NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.483 of 2022

[Arising out of order dated 02.03.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Cuttack Bench in T.P. No.198/CTB/2019 arising out of CP(IB) No.4686/CTB/2019.]

IN THE MATTER OF:

Jagdish Kumar Parulkar,
Resolution Professional
of M/s Tayal Foods Limited
R/o B-56, Wallfort City,
Bhatagaon, Ring Road-1, Raipur ...Appellant

Versus

Vinod Agarwal
Ex-Director, M/s Tayal Food Private Limited
Villa -206, Sapphire Green, Ama Seoni,
Near Vidhansabha, Raipur-492001 ...Respondent No.1

Meena Agarwal
Ex-Director, M/s Tayal Food Private Limited
Villa -206, Sapphire Green, Ama Seoni,
Near Vidhansabha, Raipur-492001 ...Respondent No.2

Abhishek Agarwal
Ex-Director, M/s Tayal Food Private Limited
Villa -206, Sapphire Green, Ama Seoni,
Near Vidhansabha, Raipur-492001 ...Respondent No.3

Jaipal Consultancy Pvt. Ltd.
Through Directors,
Vinod Agarwal and Meena Agarwal
C/o Tayal Food Private Limited,
Village. Sirri, Kharora,
Raipur CT 493225 IN ...Respondent No.4

Avnish Tayal
Villa -206, Sapphire Green, Ama Seoni,
Near Vidhansabha, Raipur-492001 ...Respondent No.5

Shree Om Ricetech Private Limited
Through Directors
Village. Sirri, Kharora, Raipur CT 493225 IN ...Respondent No.6

Present:

For Appellant: **Mr. Aishvary Vikram, Advocate.**

For Respondents: **Mr. Abhinav Shrivastava and Ms. Ritu Reniwal, Advocates.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 02.03.2022 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) in T.P. No.198/CTB/2019 arising out of CP(IB) No.4686/CTB/2019. By the Impugned Order, the Adjudicating Authority dismissed the application filed by the Resolution Professional (present Appellant) under Sections 43 and 66 of the IBC seeking avoidance of certain preferential and fraudulent transactions carried out by the suspended directors of the Corporate Debtor. Aggrieved by this impugned order the present appeal has been preferred.

2. Put briefly, the factual matrix of the present case, necessary to be noticed for deciding the appeal are as follows:

- Tayal Foods Ltd/Corporate Debtor was admitted into Corporate Insolvency Resolution Process ("**CIRP**" in short) on 03.10.2019. The Appellant was initially appointed as Interim Resolution Professional and later confirmed as Resolution Professional on 20.12.2019 with the approval of Committee of Creditors ("**CoC**" in short).
- Towards conduct of the CIRP process, the Resolution Professional sought documents and information pertaining to the Corporate Debtor from the suspended management. Since the documents were allegedly not provided by the suspended management of the Corporate Debtor, the Resolution Professional filed an application vide I.A. No. 156/CTB/2019 before the Adjudicating Authority under Section 19(2) of the IBC on 15.11.2019.
- On perusal of Balance Sheet documents of the Corporate Debtor which the Resolution Professional had obtained from the Financial Creditors, the Resolution Professional opined that some suspicious transactions had been undertaken by the suspended management which needed auditing and for this purpose appointed a Transaction Auditor ("**TA**" in short) on 23.11.2019.
- The TA after auditing the documents available with it prepared the draft Transaction Audit Report ("**TAR**" in short) wherein it had noticed that certain transactions fell under Sections 43 and 66 of the IBC and

submitted it on 27.08.2020 to the Resolution Professional. The draft TAR was sent by the Resolution Professional to the suspended management by email on 11.09.2020 for comments. Thereafter the TA finalized the TAR which was received by Resolution Professional on 19.09.2020. This was sent by email to suspended management by the Resolution Professional on 29.09.2020 for comments.

- The Resolution Professional on receipt of a Resolution Plan, as approved by the CoC, he filed an application vide I.A. No.338/CTB/2020 on 26.11.2020 before the Adjudicating Authority under Section 30(2) for approval of the Resolution Plan. This application was followed later by another application filed under Sections 43 and 66 of the IBC vide I.A. No.66/CTB/2021 on 26.07.2021.
- The Adjudicating Authority dismissed the application filed by the Resolution Professional under Sections 43 and 66 of the IBC Code. Aggrieved by the Impugned Order, this appeal has been preferred by the Resolution Professional /Appellant.

3. The Learned Counsel of the Appellant making his submission stated that the Appellant on having been appointed as the Resolution Professional, found after perusal of the Balance sheet of the Corporate Debtor, that no funds were available with the Corporate Debtor though the Balance Sheet of the Corporate Debtor had recorded a profit of Rs.10,57,504/- in FY 2016-17. It was contended that serious endeavours were made by the Resolution Professional for obtaining documents from the ex-management but on having

failed to obtain them, went ahead and filed a Section 19 application of non-cooperation against the suspended management. On analysis of the available records, having come to the opinion that some suspicious transactions had been undertaken by the suspended management which needed auditing, the Resolution Professional appointed a TA. To conduct the exercise of transaction audit, the TA sought documents from the suspended management of the Corporate Debtor. However, as no documents were provided by the suspended management despite repeated reminders, the TA proceeded ahead on the basis of documents provided by members of CoC which included the financial statement, bank statement and stock audit report. Having audited the documents, the TA had arrived at the conclusion that certain transactions fell in the category of Sections 43 and 66 of the IBC and included it in his draft TAR. The draft TAR was sent by the Appellant to the suspended management by email on 11.09.2020 for their comments. But it did not elicit any response. Thereafter the TA finalized the Transaction Report which the Resolution Professional sent by email to the suspended management on 29.09.2020 for comments which also remained un-responded. In the interim, since the CoC had approved the Resolution Plan, the Resolution Professional had already moved a Section 30 application before the Adjudicating Authority.

4. Elaborating further that in the absence of clarifications from the suspended management of the Corporate Debtor, the Resolution Professional after considering the TAR determined that certain preferential transactions falling in the category of Section 43 of the IBC and certain fraudulent

transactions attracting Section 66 of the IBC had taken place and an application was filed before the Adjudicating Authority on 07.01.2021 which was later refiled after removing defects on 26.07.2021. The Learned Counsel for the Appellant stated that a summary of these transactions have been placed in a tabular chart at page 17 of the Appeal Paper Book ("**APB**" in short)as under:

Party name/Respondent	Relevant date of transaction	Relation with CD	Amount (in Rs)
Vinod Agarwal R-1	21.03.2018	Director	1,50,000
Meena Agarwal R-2	17.01.2018	Director & wife of R-1	3,00,000
AbhishekAgarwalR-3	04.10.2017	Director & son of R-1 & R-2	65,000
Jaipal Consultancy Pvt. Ltd. R-4	Dec17–Feb18	Vinod Agarwal & Meena Agarwal are the Directors	1,11,60,000
Shree Om Ricetech Private Limited R-6		Vinod Agrawal's father is the Director of the present company	10,00,000
Total			1,26,75,000

5. Elucidating on the suspicious transactions, it was stated that a sum of Rs.1,50,000/- was transferred by the Corporate Debtor to Shri Vinod Aggarwal/R No. 1 for repayment of mortgage loan which was taken by his father from Union Bank of India. As this transfer was for meeting personal needs, it was contended that the Adjudicating Authority has wrongly held that this payment was made in the ordinary course of business Moreover, Rs.3 lakh was transferred by the Corporate Debtor to Meena Agarwal/Respondent No. 2 for her emergent medical needs on 17.01.2018 while the treatment

happened a year later. Submitting that these expenses cannot be viewed as expenditure to meet emergent medical needs it was contended that the Adjudicating Authority had overlooking these facts erroneously held that this was not a preferential transaction. The third preferential transaction pointed out was transfer of Rs.65,000/- by the Corporate Debtor to Abhishek Aggarwal/Respondent No.3 on 04.10.2017. The Adjudicating Authority having treated this expenditure as one for reimbursement of business tour expenses, the Learned Counsel for the Appellant challenged this finding on the ground that there are no documents substantiating the expenditure and with the Corporate Debtor having turned into NPA on 13.03.2018, this expenditure for promotion or expansion of business is not justifiable. The fourth transaction relates to transfer of Rs. 1,11,60,000/- from December 2017 to February 2018 to Jaipal Consultancy Pvt. Ltd./Respondent No. 4. It has been submitted that this company was incorporated on 10.10.2017 with Respondents No.1 and 2 as Directors for the purpose of siphoning funds from the bank account of the Corporate Debtor. It has been submitted that the above preferential transactions meet all the ingredients of Section 43 of there being an antecedent debt; preference having been shown to related parties; and transactions not being in the ordinary course of business which has been missed out by the Adjudicating Authority.

6. It is further submitted that the suspended directors had entered into fraudulent sale of stocks with fictitious debtors and misrepresented the stock statement which attracts Section 66 of IBC. The TA after reviewing the

Balance sheet and Stock statements found that on 27.03.2017, the total stock was Rs. 10.21 cr and debtors were Rs. 48.11 lakhs. Subsequent stock statement dated 26.05.2017 showed that the total stock was Rs.2.59 cr and debtors became 7.52 cr. Thus, the suspended management had sold stock worth Rs.6 cr in 2 months from 01.04.2017 to 26.05.2017 during which period there was an increase of debtors by Rs.5 cr. It was contended that stocks were sold by the suspended directors outside the books of accounts and the sale proceeds were not routed through the Corporate Debtor's accounts. The Appellant/Resolution Professional has therefore claimed that the Corporate Debtor has submitted that this amounted to be fictitious sale of stocks being booked by the suspended director while the actual stock was sold off and the amounts received from such transactions were siphoned off by the suspended management in some other account of the suspended directors. Alternatively the stock statement was inflated to mislead the lenders to obtain their sanction. Challenging the impugned order, it is submitted that the Adjudicating Authority had overlooked this fraudulent manipulation of the stock statement by relying on selective reading of a bank inspection report.

7. The Learned Counsel for the Respondent refuting the above submissions raised the issue of the maintainability of the application on the ground that the Resolution Professional had failed to adhere to the timelines prescribed by the Regulation 35-A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulation**" in short). As per this

Regulation, the Resolution Professional is required to form his opinion on or before the 75th day of the Insolvency Commencement Date ("**ICD**" in short) which was not done. It was added that the Regulations further lay down the requirement to make a determination by the Resolution Professional that the Corporate Debtor had been subjected to transactions covered by Sections 43 and 66 on or before 115th day of ICD which was also not done. Thus, the Resolution Professional had got the matter listed without formation of opinion and determination which is not in consonance with the IBC.

8. Further submission was made that the Resolution Professional was required to submit the application on or before 135th day of the ICD but had filed the application on 26.07.2021 which was on the 437th day from ICD. It was, therefore, pointed out that this delay of nearly 17 months is violation of Regulation 35-A thereby rendering the application non-maintainable. Further it was argued that the excuse made by the Appellant of non-cooperation by the suspended management is based on flimsy grounds since the Respondents had handed over the factory to the Resolution Professional in 15.10.2019 along with all documents lying at the premises. It was thus submitted that the Adjudicating Authority had rightly dismissed the application filed by the Appellant under Sections 43 and 66 of the IBC Code on the grounds that there was delay on the part of the Resolution Professional in filing the application in breach of timelines specified and that no opinion has been formed and no determination made by the Appellant as required under Regulation 35-A.

9. The Learned Counsel for the Respondents further denied that the ground raised by the Resolution Professional of lack of cooperation from the erstwhile management of the Corporate Debtor which had led to the filing of Section 19(2) application by the Resolution Professional was not based on facts. It was stated that the Resolution Professional had asked for documents after filing the Section 19 application. Further, making the assertion that the Resolution Professional did not follow up the Section 19(2) application before the Adjudicating Authority in a diligent manner it was mentioned that the application which was first heard on 19.12.2019 was disposed of on 11.08.2021 and that too without any effective directions from the Adjudicating Authority for extending cooperation. It has been further contended that if it is a fact that the Appellant faced total non-cooperation from the Respondents, it then raises a question both on the authenticity of the audit conducted by the TA as well as on the reliance placed upon the TAR by the Resolution Professional.

10. The Learned Counsel for the Respondents in the context of the transactions in question submitted that the sum of Rs.1,50,000/- paid to Vinod Agarwal, Respondent No.1 was for repayment of mortgage loan taken by his father from Union Bank of India for which guarantee had been given by Respondent No.1 and therefore was a transaction in the ordinary course of business. It was also added that Respondent No.1 had given an unsecured loan of Rs.50 lakhs to the Corporate Debtor. Secondly, the payment of Rs.3

lakhs made to Meena Agarwal was made by the Corporate Debtor as interest in consideration of unsecured loan granted by Respondent No.2 to meet emergency medical need for which medical reports had also been submitted. It was therefore not preferential in nature. As regards, the payment of Rs.65,000/- to Respondent No.3 it was submitted that this was reimbursement of expense incurred on hotel bookings and travellings which were carried out in the usual course of business promotion. It was mentioned that the Adjudicating Authority had also noted that the Appellant had not pressed for any decision on the transactions with respect to Respondents No.4 and 5 before the Adjudicating Authority. It was further denied that there was any manipulation in the stock statement. The stock price which was over-inflated on 27.03.2017 due to price fluctuation got reduced on 31.03.2017 since the balance sheet requires recording of either cost price or market price whichever is less. Further, the stock statement showed reduction on 26.05.2017 since sales were made on credit basis and there was corresponding increase in the debtor amount. It was also pointed out that the TAR cannot be relied upon since there is no definite conclusion made to establish whether the transactions have taken place in the ordinary course of business or otherwise.

11. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records carefully.

12. The principal issues before us for consideration are as delineated under: -

(i) Whether the application filed by the Resolution Professional with regard to transactions under Sections 43 and 66 is rendered non-maintainable on grounds of non-compliance to Regulation 35-A if it is not filed on or before 135th day of ICD and if formation of opinion and making a determination on such transactions does not take place on or before the 75th day and 115th day of ICD respectively and whether these periods stipulated by the said Regulation is mandatory or directory.

(ii) Whether the transactions conducted by the Respondents which find mention in the application of the Resolution Professional were not in the ordinary course of business and thus fell in the category of preferential transactions and fraudulent trading in terms of Sections 43 and 66 of the IBC.

Question No.(i)

13. To answer this question, it would be in order to first glance through the provisions contained in Regulation 35-A which is as reproduced below:

Regulation 35-A of CIRP Regulations:

35-A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the

corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

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

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.

14. For a better appreciation of the issue under consideration, we need to notice the important CIRP milestones involved and their time-lines in the backdrop of the present case. It is noticed that CIRP commenced on 03.10.2019. The CIRP termination date after extension of 90 days was 29.06.2020. The application under Section 43 and 66 was filed by the Resolution Professional on 26.07.2021 which as per Regulations should have been filed on or before 14.02.2020 being the 135th day counted from 03.10.2019. As against the due date of filing application under Section 43 and 66 falling on 14.02.2020, the application was actually filed on 26.07.2021 which is after 17 months from due date. There is also a gap of nearly 8 months between filing the application of approval of Resolution Plan and filing of application under Sections 43 and 66. There is also a clear delay beyond 135

days from the ICD in filing the Section 43 and 66 application which is un-disputed.

15. We now come down to have a look at the timelines laid down by the Regulation 35-A in respect of formation of opinion and determination of transactions covered under Sections 43 and 66 of IBC in the background the facts of this case. The formation of opinion was to be completed by 16.12.2019 being the 75th day of ICD. The determination of opinion was to be completed by 25.01.2021 being the 115th day of ICD. The Respondents have claimed that the Appellant had failed to follow the time period prescribed under Regulation 35-A to form an opinion on or before the 75th day of ICD and thereafter to make a determination on or before 115th day of ICD. The Learned Counsel for the Respondent contended that the vital essence of Regulation 35-A to form an opinion and determination being missing, this amounted to violation of Regulation 35-A. We find that the Adjudicating Authority in the impugned order has also held that it is not convinced with the submissions of Resolution Professional on not adhering to specified timelines.

16. Challenging the impugned order, the Learned Counsel for the Appellant contended that the timelines prescribed under Regulation 35-A are not mandatory but directory in nature. In support of their contention reliance has been placed on the judgment of this Tribunal in ***Aditya Kumar Tibrewal v. Om Prakash Pandey, 2022 SCC Online NCLAT 142.*** We find that this Tribunal in the above matter has deliberated at length on whether the time-

period prescribed in Regulation 35-A is mandatory or directory. This Tribunal has held therein that the rules of statutory interpretation for finding out true nature of statutory provisions, whether the mandatory or directory, are well settled, and in doing so, relied on the observations of the Hon'ble Supreme Court in **'State of Uttar Pradesh Vs. Manbodhan Lal Shrivastava'** AIR 1957 SC 912 as under:-

> "*…Hence, the use of the word 'shall' in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provision will not render the proceeding invalid. In that connection, the following quotation from Crawford on 'Statutory Construction'.art.261 at p. 516, is pertinent:*
>
> > *"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provisions but also by considering its nature, its design, and the*

consequences which would follow from construing it the one way or the other……"

Going further, this Tribunal in the same judgment also relied on the observations of the Hon'ble Apex Court in (2016) 11 SCC 31 in "**Lalaram Vs. Jaipur Development Authority"** as below:

"106. As noticed hereinabove, it is affirmatively acknowledged as well that where provisions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of these have the potential of resulting in serious general inconvenience or injustice to persons who have no control over those entrusted with duty and at the same time would not promote the main object of the legislature, such prescriptions are generally understood as mere instructions of the guidance of those on which the duty is imposed and are regarded as directory. It has been the practice to hold such provisions to be directory only, neglect of those, though punishable, should not, however, affect the validity of the acts done. At the same time where however, a power or authority is conferred with a direction that certain regulation or formality shall be complied with, it would neither be unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right of authority."

The Tribunal has therefore held that timeline prescribed in Regulation 35-A of CIRP is directory and not mandatory and has held as follows: -

> *"11. viii …….. One of the objective of the Code is to maximize the assets of the Corporate Debtor. In event the actions taken by the Resolution Professional after the timeline prescribed in Regulation 35A of the CIRP regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of the Resolution Process, reach of the Court and shall cause great inconvenience and injustice to Corporate Debtor. Hence, we are of the view that timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the Resolution Professional beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be non-est or void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations. There may be genuine and valid reasons for Resolution Professional not to file application for avoiding the transactions within time prescribed which are question relating to each case and has to be examined on case to case basis and if there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit.***"***

17. We may now proceed to examine the facts of the present case in the light of the relevant statutory provisions, related regulations and the judgment of this Tribunal in ***Aditya Tibrewal (supra)***. It is the Respondent's

case that the present appeal is not maintainable since the Resolution Professional was required to submit the application under Section 43 and 66 of IBC before the Adjudicating Authority on or before 135th day of the ICD but the same was filed on 26.07.2021 after a delay of nearly 17 months and that this was a clear violation of Regulation 35-A. The Learned Counsel for the Appellant has also admitted the delay in filing of the application under Section 43 and 66 of IBC but justified the delay on the ground of non-cooperation by the suspended management of the Corporate Debtor in furnishing information and requisite documents. The Respondents have, however, contended that the Corporate Debtor having handed over the factory along with the documents to the Appellant on 15.10.2019, there was no further information in their possession. However, we do not find on record any proof or list of documents handed over by the suspended management to the Resolution Professional. Hence, by merely claiming that the factory premises was handed over we are not sufficiently convinced that all the requisite documents had been handed over.

18. Furthermore, from material on record, we find that inspite of sustained efforts, the Resolution Professional remained unsuccessful in obtaining documents from the ex-management. We also find that a spate of Emails were sent seeking information from the suspended management on 09.10.2019, 11.10.2019, 14.10.2019, 15.10.2019, 16.10.2019, 21.10.2019, 22.10.2019, 23.10.2019, 25.10.2019, 28.10.2019, 29.10.2019 and 31.10.2019 by the Resolution Professional as placed at pages 58-66 of APB. The series of

reminder emails scrupulously sent by the Appellant/Resolution Professional to the Respondents to furnish information before the filing of Section 19(2) application has also been placed by way of an additional affidavit (page 37-67). These repeated reminders, to our mind, substantiates the contention of the Appellant that cooperation was not forthcoming from the ex-management.

19. It has also been submitted that on account of non-cooperation in furnishing of information by the suspended management, the Resolution Professional was compelled to file a Section 19 application on 15.11.2019 before the Adjudicating Authority. We also note that the reminder emails mentioned in the immediately preceding paragraph seeking information/documents also formed part of record before the Adjudicating Authority in the Section 19 application. Further, the Learned Counsel for the Appellant submitted that delay was also on account of delayed receipt of TAR. The TA's work was hindered due to outbreak of COVID-19 and consequential lockdown. Since the scourge of the Covid-19 pandemic was raging during this period, this explanation is not unfounded. Cumulatively seen, we are therefore satisfied that the reasons for delay in submission of application under Sections 43 and 66 of IBC as put forth by the Appellant have sufficient force in them and cannot be blamed of wilful laxity or leniency.

20. Regulation 35-A requires a Resolution Professional to form an "opinion" if the corporate debtor has been subjected to an avoidance transaction. Such opinion is to be followed by a "determination" by the Resolution Professional

qua such avoidance transaction. The idea behind the Resolution Professional to form an opinion and make a determination reflects that the Resolution Professional has to apply his mind to the suspicious avoidance transactions. In case the Resolution Professional determines that the corporate debtor is subject to the aforesaid transaction then it shall make an application to the Adjudicating Authority.

21. We now come to the Respondents claim that the Appellant had crossed the time-period prescribed under Regulation 35-A to form an opinion on or before the 75th day of ICD and to make a determination on or before 115th day of ICD. This was rebutted by the Learned Counsel for the Appellant and submitted that the Resolution Professional had formed an opinion of suspicious transactions on 23.11.2019 which was much before the 75th day of CIRP as it was this opinion which had triggered the appointment of TA to conduct an investigation and audit of the Corporate Debtor to examine suspicious transactions. We are inclined to agree to this standpoint since holding any opinion carries with it an element of belief and in the present case the decision taken by the Resolution Professional to appoint the TA is a clear expression of the belief that some suspicious transactions had taken place. The TA has also acknowledged while submitting the TAR that the Resolution Professional while engaging the TA on 23.11.2019 had clearly laid down the scope and procedure to be followed for the audit as placed at page 133 of APB. This validates the contention of the Appellant that it had formed an opinion

well in time on the need for audit and defined the contours of audit in respect of transactions attracting Sections 43 and 66 of IBC.

22. Coming to the determination aspect, it is commonsensical axiom that the time taken by a Resolution Professional to determine an avoidance transaction is dependent on a multitude of factors, including availability of information, co-operation from the erstwhile directors of the Corporate Debtor, cooperation from parties to the avoidance transactions, analysis by the transaction auditor, etc. Such factors often being outside the control of the Resolution Professional, there is therefore a distinct possibility of delay in making a determination, beyond the timelines specified in the CIRP Regulations. While admitting some delay in determination of opinion by the Resolution Professional in the present case, it was submitted that this was on account of delay in submission of report by the TA and for this delay the fault was attributable to the suspended management as documents were not provided by them to the TA despite repeated reminders. We also note that the draft TAR prepared by the TA was sent by the Appellant to the suspended management by email on 11.09.2020 for comments. But it did not elicit any response. Even the final TAR which was sent by email to suspended management on 29.09.2020 for comments remained un-responded. We therefore have no hesitation in pointing out that the suspended management of the Corporate Debtor by not parting with information on time and refusing to comment on the final TAR has also been a critical and contributory factor

in causing delay in the determination of the opinion and to that extent cannot be absolved of blameworthy conduct.

23. We are also not inclined to agree with the finding of the Adjudicating Authority that there was no effort made for determination of independent opinion by the Resolution Professional. The Resolution Professional was already having preliminary information about suspicious transactions based on whatever documents were available in the public domain; as available with the CoC and with the Corporate Debtor which expectedly would have aided the process of reasoning. This preliminary information coupled with professional inputs of the TAR which having been prepared by an expert agency was sufficient for the Resolution Professional in determining the facts surrounding each transaction and in making out whether the ingredients of Sections 43 and 66 were applicable to such transactions before filing an application before the Adjudicating Authority.

24. We are of the considered opinion that CIRP Regulations 35-A is not mandatory and the requirement for approaching the Adjudicating Authority for appropriate relief on or before 135th day of the ICD is only directory. Moreover, since Regulation 35-A must be read along with the statutory construct of IBC which by itself does not prescribe any time period for determination of opinion. Hence merely on account of delay in determination of opinion cannot by itself become a ground for non-maintainability of the petition. Keeping in view the facts of this case and for reasons discussed

above we hold that there were sufficient and genuine reasons for the delay justifying consideration of the application under Sections 43 and 66 by the Adjudicating Authority even though it was filed beyond 135th day of ICD.

Question No. (ii)

25. This now brings us to the second question as to whether in the present case the transactions conducted by the erstwhile management of the Corporate Debtor contain the ingredients as specified in Sections 43 and 66 of IBC or whether these transactions were conducted in the ordinary course of business.

26. At this stage it may be useful to reproduce the statutory provision contained in Sections 43 and 66 of IBC as under:

Section 43

"43. (1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

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

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

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

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

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

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

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

(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

Section 66

Fraudulent trading or wrongful trading-

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the

corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

27. Next, we take note of the findings returned by the Adjudicating Authority in this regard which is as extracted hereunder:

> *"……this Tribunal is not convinced with the submissions of RP on not adhering to specified timelines or bringing in sufficient reasons that transactions referred therein are convincingly fraudulent or preferential. Such, transactions have been sufficiently explained by the respondents and prima facie, it cannot be inferred that the alleged transactions have the ingredients as specified in Section 43 and 66 of the Code."*

28. The Learned Counsel for the Appellant has challenged the impugned order on the grounds that the Adjudicating Authority has not appreciated the facts surrounding the transactions and mindlessly reproduced verbatim from the written submissions filed by the Respondents. The large scale verbatim cut and paste practice which has been carried out by the Adjudicating Authority have been extracted in details at pages 1-30 of Rejoinder filed by the Appellant. Prima-facie, this allegation of replication appears to be well founded.

29. Additionally, it has been adverted that the Adjudicating Authority failed to put to test the set of suspicious transactions in the light of settled law as laid down by the Hon'ble Supreme Court in ***Anuj Jain v. Axis Bank Limited (2020) 8 SCC 401*** wherein the guiding principles for determining

preferential transactions and ordinary course of business have been interpreted. Before going into analysis of the facts of the transactions in question, we may focus on the preposition of law as laid down in the Anup Jain (supra) judgment. The relevant extracts are as excerpted below:

> *21.1…….. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section(2) of Section 43, the transaction, of transfer or property or an interest thereof of the corporate debtor, ought to be for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.*
>
> *21.2. However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of Section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways: (a) if the preference is given to a related party (other than*

an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date…..

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21.4. Sub-section (3) of Section 43 specifically excludes some of the transfers from the ambit of sub-section (2). Such exclusion is provided to: (a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee; (b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value……

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"28.6.1…….It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. As regards the meaning and essence of the expression "ordinary course of business", reference made by the appellants to the decision of the High Court of Australia in Downs Distributing Co., could be usefully recounted as under:

> *"As was pointed out in Burns v. McFarlane the issues in sub-section 2(b) of Section 95 of the Bankruptcy Act, 1924-1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does*

not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor". It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speak of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

30. Analysing the transactions in question, at the very outset we notice that CIRP had commenced on 03.10.2019 and therefore the relevant look back period would be two years for the related parties i.e. 03.10.2017 to 03.10.2019. We notice that a sum of Rs.1,50,000/- was transferred by the Corporate Debtor to Shri Vinod Agarwal /Respondent No. 1, who was an erstwhile Director of the Corporate Debtor for repayment of mortgage loan

which was taken by his father from Union Bank of India. In this case, the transaction had happened on account of loan taken by the father of Respondent No.1 and therefore repayment should have been done from the personal account of Respondent No.1. Since no profit motive for the business of the Corporate Debtor can be found in this transaction nor was the transaction related to the normal flow of business of the Corporate Debtor, the Adjudicating Authority has erroneously held the said transaction to be in the ordinary course of business. Moreover, this transfer was for meeting personal needs and thus fell outside the scope of day to day operations and therefore not in the normal course of business. This related party transaction took place on 21.03.2018 and hence was within the look back period.

31. The second transaction in question is a sum of Rs.3 lakh transferred by the Corporate Debtor to Meena Agarwal/Respondent No. 2, an erstwhile Director of the Corporate Director purportedly for her emergent medical needs on 17.01.2018 which happens to be within the look back period. However, the medical records filed by the Respondents without accompanying bills pertain to a period between 01.04.2019 to 03.04.2019 which is nearly one year after the date of transfer of funds and hence the expenditure cannot be viewed as expenditure to meet emergent medical needs. In any case, medical expenses should have been cleared from the personal account of Respondent No.2 not being an expense incurred in the ordinary course of business of the Corporate Debtor. The reason for medical emergency seems to be an afterthought to justify the transaction since the amount was withdrawn on 17.01.2018 while

Meena Aggarwal was admitted in the hospital on 01.04.2019, which was more than a year later. Similarly, in this transaction too, no profit motive for the business of the Corporate Debtor can be found nor was the transaction related to the normal flow of business of the Corporate Debtor. We, therefore hold that the Adjudicating Authority had erred in overlooking these aspects in concluding that this was not a preferential transaction.

32. The third transaction within the relevant look back period relates to the transfer of Rs.65,000/- by the Corporate Debtor to Abhishek Aggarwal, a family member of erstwhile director on 04.10.2017 has been treated by the Adjudicating Authority as one for reimbursement of business tour expenses and hence not preferential. This has been challenged by the Appellant on the ground that there are no documents substantiating the expenditure. Moreover, the transaction was carried out when the account of the Corporate Debtor was in stress and hence to say that this expenditure was for promotion or expansion of business is not justifiable.

33. The object and purpose of Section 43 of IBC is to find out and nullify the preferential transactions undertaken by the parties at relevant time to withdraw money from a distressed corporate debtor when it is on the verge of commencement of CIRP. The analysis made of the above set of transactions seem to clearly have the effect of putting the erstwhile directors of the Corporate Debtor in a more beneficial position than it would have been placed in the event of distribution of asset of the Corporate Debtor under Section 53

of the Code and cannot be said to have been covered under the exception of ordinary course of business or financial affairs of the Corporate Debtor as carved out under Section 43(3) of the Code.

34. The fourth transaction found suspicious by the TA and the Resolution Professional relates to transfer of Rs. 1,11,60,000/- to Jaipal Consultancy Pvt. Ltd./Respondent No.4. It is pertinent to note that both Respondents No.1 and 2 were Directors in the said Jaipal Consultancy Private Limited. These transactions were made from December 2017 to February 2018 which squarely fall in the lookback period. It has been submitted by the Learned Counsel for the Appellant that this company was incorporated on 10.10.2017 for the purpose of siphoning funds from the bank account of the Corporate Debtor. It has been submitted that the TA found that Respondent No.4 does not exist on the GST portal and did not complete annual filing with the Registrar of Companies. The TA has noted that there is no explanation available on record as to the purpose and nature of these payments. No records were submitted to establish regular or repetitive business transactions with these parties in the past. There is not much to show either by the Respondents that the above transactions were part of an undistinguished and undisputed common flow of business. What is more intriguing is that the Adjudicating authority in the impugned order has not even commented on this transaction having erroneously noted that the Appellant has not pressed allegation against Respondent No.4. This gross error seems to have occurred because the Adjudicating Authority had simply

copied the submissions made by the present Respondents without applying own judicial mind. In this regard, we note that the Learned Counsel for the Appellant asserted that such practice of copy and paste has been castigated by the Hon'ble Supreme Court and placed reliance in the judgement delivered in the matter of ***UPSC v. Bibhu Prasad Sarangi (2021) 4 SCC 516.***

35. The last set of suspicious transactions is that of the suspended directors having entered into fraudulent sale of stocks with fictitious debtors. The TA after reviewing the stock statements found that on 27.03.2017 the total stock was Rs. 10.21 cr and debtors were Rs. 48.11 lakhs. The position changed on 26.05.2017 when total stock came down to Rs.2.59 cr and debtors rose to Rs.7.52 cr. Thus, it can be inferred that the suspended management had sold stock worth Rs.6 cr in 2 months and during this period there was an increase of debtors by Rs.5 cr. The Learned Counsel for the Appellant stated that the Resolution Professional sent demand letters to the debtors whose names appeared in the stock statement of 26.05.2017 but the debtors responded that no amount is pending to the Corporate Debtor. It has therefore been contended by the Appellant that stocks were sold by the suspended directors outside the books of accounts and the sale proceeds were not routed through the Corporate Debtor's account. The Resolution Professional has therefore claimed that this clever manoeuvring of sales and purchase transactions amounted to be fictitious and fraudulent sale of stocks being booked by the suspended director and that the actual stocks were sold off and the amounts received from such transactions were siphoned off by the

suspended management in some other account of the suspended directors. The Adjudicating Authority without much analysis has simply noted that the Respondent has opined that the Resolution Professional has misrepresented the stock statement and that even the creditor Bank has relied on the genuineness of these transactions based on CA certificate which had verified the stock and book debts. However, we feel that the Adjudicating Authority has not taken the full picture into account since the Bank inspection note of 18.09.2017 placed at page 230 of APB clearly records that the Respondent No.1 had admitted that negligible sales was being reflected in the Corporate Debtors account since the sales proceeds were being parked in the account of a separate firm. Prima-facie, we are of the view that there is sufficient and adequate reason to subscribe to the contention of the Appellant that the Respondents had wrongfully diverted funds of the Corporate Debtor which in turn had aggravated the financial health of the Corporate Debtor and tantamount to fraudulent trade practice.

36. In result, answering the second question we are of the considered view that the Resolution Professional after having appraised the TAR, did effectively make out a detailed and specific case substantiating how the Respondents carried out certain transactions which squarely answer the description of preferential and fraudulent transaction under Sections 43 and 66 of IBC. However, the Adjudicating Authority has erroneously disregarded the same without placing on record cogent and sufficient reasons.

37. In view of the foregoing discussions, we are of the considered view that the Adjudicating Authority has erroneously dismissed the application filed by the Resolution Professional under Sections 43 and 66 of the IBC. We, therefore, set aside the impugned order. Being satisfied that the Appellant has successfully established that the Respondents had indulged in transactions which squarely attract Sections 43 and 66 of the IBC, we direct the Respondents to pay back the sums received by them from the Corporate Debtor and also reverse the sums siphoned off from the Corporate Debtor on account of the aforesaid transactions through the Resolution Professional. Further all adverse observations made on the conduct of Resolution Professional is expunged. The appeal is allowed with the above observations. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 16.02.2023

PKM