

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV**

**IA No.1131 of 2022
IN
CP (IB) NO. 1147 of 2020**

An application under sections
43,45,49 & 66 of the Insolvency &
Bankruptcy Code, 2016.

Filed by,

Jayesh Sanghrajka

...Applicant

Versus

Subramanian Pandurang Shinde

...Respondent No. 1

Harshada Natesh Shinde

...Respondent No. 2

IN THE MATTER OF

LICHFL Trustee Company Limited

...Financial Creditor

Versus

Anudan Properties Private Limited

...Corporate Debtor

Order delivered on: 01.02.2024.

THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
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Coram:

Ms. Anu Jagmohan Singh
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Advocate Vidit Divya Kumat, Ld.
Counsel Present.

For the Respondent : Mr.Dharam Juman i a/w Ms.
Jenisha Gala i/b Sanjay Chaturvedi
Associates.

ORDER

1. The present Application is filed by the Applicant seeking:
 - a. Declare that the Respondents are, in terms of Section 43. Jointly and severally liable to contribute a principal amount of Rs. 23,460/- to the Applicant. Resolution Professional of the Corporate Debtor Company along with interest at the rate of 7.3% on the principal amount and the amount adjusted in the salaries of Mr. Natesh Shinde per annum from the Financial Year 18-19 onwards and direct them to do so within such period as this Hon'ble Tribunal may deem fit.;
 - b. Declare that the Respondents are, in terms of Section 45. Jointly and severally liable to contribute a principal amount of Rs. 87,98,000/- to the Applicant. Resolution Professional of the Corporate Debtor Company along with interest at the rate of 7.3% per annum from the Financial Year

- 2017-2018 onwards and direct them to do so within such period of time as this Hon'ble Tribunal may deem fit;
- c. Declare that the Respondents are, in terms of Section 45. Jointly and severally liable to contribute a principal amount of Rs. 11,00,000/- to the Applicant, Resolution Professional of the Corporate Debtor Company along with interest at the rate of 7.3% per annum from the Financial Year 2018-2019 onwards and direct them to do so within such period of time as this Hon'ble Tribunal may deem fit;
- d. Declare that the Respondents are, in terms of Section 66, Jointly and severally liable to contribute a principal amount of Rs. 39,00,000/- to the Applicant. Resolution Professional of the Corporate Debtor Company along with interest at the rate of 7.3% per annum and direct them to do so within such period of time as this Hon'ble Tribunal may deem fit;
- e. Direct that further interest at the rate of 12% per annum be payable upon the amounts mentioned in prayers (i) to (iv) from the date of the order passed in this application till the date of actual realization;
- f. Any other order that this Hon'ble Tribunal may deem fit in the facts and circumstances of this case.

Submissions of the Applicant

2. A Company Petition was filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by LICHFL Trustee Company Limited ("Financial Creditor"), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Anudan Properties Private Limited., the Corporate Debtor.

3. The Tribunal, by way of an order dated 15.03.2021, admitted the above Company Petition and appointed the Applicant, Mr. Jayesh Sanghrajka, having registration number IBBI/IPA-001/IP- P00216/2017-18/10416 as the Interim Resolution Professional. The Applicant by way of a public announcement dated 27.03.2021, invited claims and the Committee of Creditors was formed in accordance with the provisions of the Insolvency and Bankruptcy Code. On 18.04.2021 Committee of Creditors was constituted. Thereafter, the Applicant was appointed as Resolution Professional on 25.04.2021. The Applicant appointed "NHBS LLP" as the Transactional Auditor to conduct a forensic audit of the transactions of the Corporate Debtor. The Transactional Auditor was appointed by way of an appointment letter dated 03.05.2021 and submitted its report alongwith an addendum to its report for the purpose of identifying several transactions which is categorised as avoidable transactions.

SECTION 43 OF THE IBC, 2016

The Applicant submits that the Corporate Debtor has advanced an interest free loans to related parties between FY 2016-2017 and FY 2019-2020 in following manner: -

- i. A sum of Rs. 23,460/- was advanced to Mrs. Sunita Shinde for FY 2016-17.
- ii. The Corporate Debtor adjusted an amount worth Rs. 12,22,900 being salary payable to Mr. Natesh Shinde From June 2019 to March 2020 against advance paid towards room purchases and Mr. Nitesh Shinde was paid an interest free loan.

Thus, the Applicant states and submits that the non-accrual of any interest on loans to directors and their relative amounts to preferential treatment provided

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AT MUMBAI BENCH, C-IV**

IA No.1131 of 2022
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CP (IB) NO. 1147 of 2020

to these transactions by the Corporate Debtor. Also, the basis of adjustment of the Company's assets (advances paid by the company for room purchases) against salary payable to a related party is not discoverable.

SECTION 45 OF THE IBC,2016

The Applicant submits that as on 31.03.2022 the Corporate Debtor had certain outstanding loan receivables. However, there was no agreement or balance confirmation in respect of these receivables. These loans remained outstanding since 31.03.2018 and there is no interest which has been accounted for.

The Applicant states and submits that the Corporate Debtor has also written off the following interest free loans advanced to related parties which are aggregating to Rs. 11,00,000/- in the year 2020-21: -

NAME	AMOUNT (INR)	REMARKS
Loan to- Hrishikesh Vilas Patil	5,00,000	Amount Loaned before 31.03.2018
Loan to- Ranjeet Deshmukh	3,50,000	Amount Loaned before 31.03.2018
Loan to – Suhas Narayan Kulkarni	2,50,000	Amount Lent in October 2020. As per Tally Data, the amount is written off as the individual is deceased.

SECTION 66 OF THE IBC,2016

The Applicant states and submits that the Corporate Debtor had an investment in Sree Gokulam Chit & Finance Company Private Limited of Rs.

**THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV**

IA No.1131 of 2022
IN
CP (IB) NO. 1147 of 2020

39,00,000 as of 31 March 2017. Thereafter, on the 1st of April 2017, the company passed a journal entry towards disposal of this investment with the proceeds credited to Mr. Subramanya Shinde's personal account and the same was thus recorded as loan to Mr. Shinde the Managing Director of the company. The above transaction as well as outstanding loan balances in Mr. Shinde's loan account as at the year-ends were not reported in the Related Party Disclosures in the company's audited financial statements and that the outstanding amounts were adjusted against the salary paid to Mr. shinde. Details of the investment made by the Corporate Debtor company in Sree Gokulam Chit & finance Company Private Limited, between April 2016 and July 2016 via three payments are mentioned below:

DATE	BANK	AMOUNT(INR)
02.04.2016	Axis Bank A/C No. 910020001996128- 70% Rera A/c	15,00,000
18.05.2016	Axis Bank A/C No. 910020001996128	12,00,000
28.07.2016	IndusInd Bank	12,00,000

The Applicant states and submits that the abovementioned transactions of the Corporate Debtor have been carried out with intent to defraud creditors of the Corporate Debtor with a fraudulent purpose to illegally allocate the funds of the Corporate Debtor to the personal Account of Respondent No.1 and these transactions were not reported in the Related Party Disclosures in the Corporate Debtor company's audited financial statements.

Submissions of the Respondent

4. The Respondent Nos. 1 & 2 are the erstwhile Whole Time Directors of the Corporate Debtor.
5. It is submitted that the CoC (Committee of Creditor) had not authorised the filing of the present Application. Reliance in this regard is placed on the minutes of the 16th CoC meeting, which states out that NO resolution authorising the filing of the present Application was tabled and or passed by the CoC. There are no other minutes of meetings of the CoC which consider or discuss the filing of the said Application. It is thus submitted that the said Application is filed without authorisation and ought to be dismissed on this ground alone.
6. It is submitted that the applicant has alleged that the Corporate Debtor has advanced interest free loans to the related parties Smt. Sunita Shinde and Mr. Natesh Shinde between FY 2016-2017 and FY 2019-2020 and it is the applicants own case that the said loans are given to the debtors of the Corporate Debtor and not the creditor of the Corporate Debtor and hence do not attract provisions of section 43 of the Code. It has also been submitted that the applicant has neither denied nor disputed that the no salary was payable to Mr. Shinde.
7. Further, the applicant has alleged that the Corporate Debtor under section 45 of the Code had outstanding loan receivables as on 31.03.2022. The Applicants attempt to fit the transactions of the loan advanced prior to 31.03.2018 into the purview of undervalued transactions under section 45 of the Code is misconceived as they fall outside the look back period. It is also submitted that the amount is only loan and there is no transfer of ownership of assets.

8. The Respondent has also relied upon the Judgement passed by the Hon'ble Supreme Court in *Anuj Jain, IRP for Jaypee Infratech Limited Versus Axis Bank Limited and Others* wherein it has been held that:

“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”

9. Regarding investment of Rs. 39 lakhs into Sree Gokulam Chit & Finance Company Pvt. Ltd. as of 31.03.2017 which was credited to Mr. Subramanya Shinde's personal account
10. is submitted that under Section 66 of the IBC the applicant is required to prove that the business of the Corporate Debtor had been carried on with an intent to defraud the creditors or for a fraudulent purpose and that the applicant has to prove the same with clinching and irrefutable evidence. The respondent has placed reliance on judgement of co-ordinate bench *Ashish Rathi vs. Ind-Bharat Power*. It is further submitted that the said transactions are alleged to have been carried out on .01.04.2017, which is 4 years prior to commencement of CIRP, therefore it cannot be said that this was done with the prospect of avoiding CIRP.
11. It is submitted that the Application has been filed solely on the strength of a Transaction Audit Report. That the Application as filed is misconceived for the simple reason that the Minutes of the 16th CoC meeting record that *"the transaction auditor claimed that the observation in the mentioned in the transaction auditors report is procedural irregularities in conducting business and it does not have any financial impact or loss to the Company"*. In view of this position alone, the present Application is not maintainable under Sections 43, 45 and or 66 of the Code.

Findings

12. We have perused records and heard the submissions made by the parties. The bench takes note that CIRP in this case commenced on 15.03.2021.

13. Transactions Under Section 43 of IBC,2016:

The Applicant submits that the Corporate Debtor has advanced to related parties a sum of Rs. 23,460/- to Mrs. Sunita Shinde for Financial Year 2016-17 and adjusted an amount of Rs. 12,22,900/- against salary payable to Mr. Natesh Shinde.

This bench observes that, the transactions set out do not attract the provisions laid down under section 43(2) of the Code. Moreover, the applicant has also not disputed that salary was payable to Mr. Natesh Shinde. Secondly, the transactions with Smt. Shinde falls beyond the look back period i.e. is two years (to a related party as provided in section 43(4)) prior to the commencement of the insolvency date (i.e.15.03.2021). Therefore, the bench of the view that, there is no merit in the contentions of the Applicant w.r.t transactions u/s 43 of IBC.

14. Transactions under section 45 of IBC, 2016:

The bench notes that all transactions alleged to be falling within the purview of section 45 are of the period prior to 31.03.2018 except for one transaction i.e. loan to Suhas Narayan Kulkarni which was written off as the individual is deceased.

The relevant period for undervalued transactions as stated in section 46 is as follows

- (i) *such transaction was made with any person within the period of one year preceding the insolvency commencement date; or*
- (ii) *such transaction was made with a related party within the period of two years preceding the insolvency commencement date.*

Therefore, this bench is of the view that the said transactions are hit by limitation as provided under section 46 of IBC,2016. Therefore, this prayer of the applicant u/s 45 deserves to be rejected.

15. Transactions under section 66 of IBC,2016:

It is submitted that, the Corporate Debtor had an investment in Sree Gokulam Chit & Finance Company Private Limited of Rs. 39,00,000 as of 31 March 2017. On 01.04.2017 through a journal entry the amount was transferred to the account of Mr. Subramanya Shinde as loan and which was later adjusted against the salary paid to him.

In order to attract provisions of Section 66 of the IBC the applicant has to establish that the business of the CD has been carried out with intent to defraud Creditors of the CD or for any fraudulent purpose. There has therefore to be a clear finding on this account by the adjudicating authority before passing such order. This bench notes that the applicant has submitted that the amount was transferred as a loan to Mr. Shinde and later adjusted against salary paid to him. This bench also observes that nowhere in its averments the applicant has stated that salary was not payable to Mr. Subramanya Shinde. Hence, the basic premise of section 66 i.e. intent to fraud the Creditors/ fraudulent purpose is not satisfied.

THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL
AT MUMBAI BENCH, C-IV

IA No.1131 of 2022
IN
CP (IB) NO. 1147 of 2020

This bench observes that the transactions are alleged to have been carried out on 01.04.2017 which is almost 4 years prior to the commencement of the Corporate Insolvency Resolution Process and the Resolution Professional has not brought anything on record to prove that the directors of the CD had in April 2017 any reasonable prospect of avoiding the CIRP.

We rely on the Judgement of the coordinate bench in the case of *Ashish Rathi vs. Ind-Bharat Power wherein the AA held that “order to give a finding u/s 66 of the Code there must be a clinching and conclusive evidence, mere opinions or prima facie evidence is not sufficient.... The resolution professional must place evidence on record that before the Insolvency Commencement date, the directors of the company had reason to believe that the CD cannot avoid the commencement of CIRP or there was no reasonable prospect of avoiding CIRP.”*

Therefore, this bench is of the view that this transaction does not attract provisions of Section 66 of the Code.

16. This bench observes that the Resolution Professional has filed the present application without application of provisions of law. In view of observations stated *supra* IA No.1131 of 2022 in CP No. 1147/2020 is Dismissed.

Sd/-

ANU JAGMOHAN SINGH
MEMBER (TECHNICAL)
01.02.2024.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)