

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

Under Section 43, 66, 70, 71, & 72
of Insolvency & Bankruptcy Code, 2016

M.A. 1548 OF 2019

IN

T.P. (IB) 600/MB/2017

Mr. Ram Ratan Kanoongo

...Applicant/RP

Vs.

Mr. Pramod Goenka & Ors.

...Respondents

In the matter of

T.P. (IB) 600/MB/2017

D. Chagganlal & Co.

... Operational Creditor

Vs.

Say India Jewellers Pvt. Ltd.

... Corporate Debtor

Order delivered on: 03.09.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)

Hon'ble Member (Judicial)

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Appearances:

For the Applicant : Adv. Mitali Bhatt
For the Respondent No. 2 : Adv. Nausher Kohli a/w Adv. Munaf Virjee
For the Respondent No. 3 : Adv. Yash Momaya a/w Adv. Prashant Goyal

ORDER

Per: ***Prabhat Kumar, Member (Technical)***

1. The present Interlocutory Application IA 1548 of 2019 is filed in Petition CP No. 600 of 2017 by Mr. Ram Ratan Kanoongo in terms of Section 43, 66, 70, 71, & 72 read with Section 26 of the Insolvency and Bankruptcy Code, 2016 in the matter of Say India Jewellers Pvt. Ltd. seeks following relief;
 - a. Consider and allow the MA No. 1548 of 2019 in terms of Section 43, 66 read with Section 26 of IB Code, 2016
 - b. Require the person as detailed in this above, to pay such sums as stated above in respect of benefits received by them from the Corporate Debtor as the Hon'ble Tribunal may direct;
 - c. Pass appropriate directions/ orders in terms of Section 43, 67, 70, 71, 72 & 73 of the Code including for recovery/restoration of legitimate amounts due to the Corporate Debtor;
 - d. And for such other/ further order(s)/direction(s) as the facts and circumstances of the case may warrant.
2. The Insolvency Petition filed by M/s D. Chagganlal & Co. (Operational Creditor) against Say India Jewellers Private Limited (Corporate Debtor) was admitted by this Tribunal vide order dated 01 August 2017 and Mr. Akshay R.

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Shah, was appointed as the interim resolution professional ("IRP") with effect from 3 October 2017. Thereafter, Mr. Ram Ratan Kanoongo, having registration no. IBBI/IPA-001/IP- P00070/2017-18/10156, was appointed as the Resolution Professional ("RP") (now as Chairman of Monitoring Committee) in the second CoC meeting held on 20 November 2017 and was confirmed by this Tribunal vide Order dated 09 January 2018.

3. A Resolution Plan jointly submitted by Mr. Babulal Motawat and Mr. Rohit Motawat has been approved by this Hon'ble NCLT vide orders dated 29 January 2019, proposing certain modifications as listed therein and subsequently confirming the modified Resolution Plan vide order dated 07 February 2019. As per the approved Resolution Plan, the Financial Creditors have the right to all recoveries resulting out of the said Application.
4. Say India Jewellers Pvt. Ltd. has four divisions: -
 - A. Diamond Division for procurement and trading in Diamonds. This Division caters to Group Companies. It has operations at Opera House (Diamond District of Mumbai)
 - B. Jewellery Manufacturing facility in SEEPZ, Andheri
 - C. Colour Stones procurement, cutting and polishing Division catering group companies. It has Office in Jaipur.
 - D. Trading Office in SEEPZ for procurement of miscellaneous raw materials mainly Silver, Rhodium, Alloy etc. It is one of the few Trading License Holders in the entire SEEPZ. The business model followed by the Group is that the domestic procurement operations are carried out through Corporate Debtor whilst overseas operations are managed by other group companies viz. Jewel America Inc. and Barjon Jewelry Inc. being Sales, marketing and customer relationship arm.
5. The Applicant submitted that he was given to understand that the Managing Director/Promoter Mr. Pramod Goenka "Respondent No. 1" is absconding and not traceable. The shareholding pattern of the Corporate Debtor comprises 7,26,975 shares held by Respondent No. 4 constituting 96.93% shareholding.

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While Respondent Nos. 1 to 3 are also shareholders and Directors in Respondent No. 4.

6. The Corporate Debtor has been banking with Andhra Bank since 2005 and State Bank of Bikaner and Jaipur since 2008. The Respondents have been operating as many as 10 other accounts with Banks other than the consortium members (i.e. Andhra Bank and State Bank of Bikaner and Jaipur) which are operated without the knowledge of the Consortium members. The "Metal loan account with Bank of Nova Scotia" was exclusively for the purpose of purchasing metal and no other purpose; however, it has been observed that there were other financial transactions undertaken with group companies, which is a clear violation of "end use restriction" and leads to syphoning of funds from the account of the Corporate Debtor for the purpose other than for which it was disbursed. Details can be seen from the following table :

Payment to / Receipts from	(Rs. Lakhs)					
	2011-12		2012-13		2013-14	
	Receipts	Payments	Receipts	Payments	Receipts	Payments
Dynamix Chains Mfg. Pvt. Ltd. -Crs.	-	231.00	-	-	-	10.00
Yash Jewellery Pvt. Ltd.	682.61	247.70	292.75	131.05	-	256.90
TOTAL	682.61	478.70	292.75	131.05	-	266.90

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7. Potentially Bogus Sales:

- a. On perusal of the sample size of approx. Rs. 46.57 crores worth of sales, Rs. 30.71 crores are with related parties (i.e. Dania Oro Jewellery Pvt Ltd, Inter Gold India Pvt Ltd, Lily Jewellery Pvt Ltd and Yash Jewellery Pvt Ltd) which includes Rs. 10.47 crores of sales to Respondent No. 4 (i.e. Yash Jewellery Pvt Ltd). It was reported in the Forensic Audit Report that these sales amounting to Rs. 30.71 crores were not supported by any evidence/documents/delivery challans and neither shipping bills nor airway bills could be traced or were produced for inspection, the party wise details are given below :

Name of the Company	(Rs. Lakhs)		
	SEEPZ Acknowledgement not on record	Total Sample Size	Total sales
Dania Oro Jewellery Pvt. Ltd.	1,463.98	1,760.66	5,085.46
Inter Gold India Pvt Ltd.	142.81	142.81	142.81
Lily Jewellery Pvt Ltd	417.51	1,259.74	4,992.62
Yash Jewellery Pvt. Ltd	1,046.95	1,494.34	4,599.45
Total	3,071.25	4,657.55	14,820.34

- b. Hence, it can be said these are bogus sales undertaken on the behest of the Respondents 1 to 3 and the same ought to be recovered from them.

8. Provision for doubtful debts:

- a. Thereafter, on further perusal of the Tally data, an aggregate value of Rs. 30.93 crores have been shown as provision for doubtful debts, most of

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which is towards sales made to related parties with no disclosure of such provision being made in the audited financials for FY 2016-17, the party wise details are given below :

(INR)				
Particulars	Opening Balance (A)	Foreign Fluctuation (B)	Total Sales (A + B)	Provision for debts
AD Jewelry International	-	-	6,542,220	6,542,220
BRI DIAM	-	-	9,964,954	9,964,954
Divine Gems (Drs)	98,677	39,647	-	138,324
DONG FANG XIN JEWELLERY LIMITED	-	-	12,648,187	12,648,187
Elegant Jewellery (Drs)	5,583,259	2,243,308	-	7,826,567
Gems Luck HK Limited	-	15,855,694	106,347,157	122,202,851
Heera Blue (Drs)	930,506	373,870	-	1,304,376
Mercury Company (Drs)	9,322,204	3,745,584	-	13,067,788
Mohit Gems (Drs)	4,727,542	1,899,487	-	6,627,029
Nayosha Gems (Drs)	704,577	283,093	-	987,670
Technic Trade	699,309	280,977	-	980,286
Tirupati Diamonds (Drs)	1,799,395	722,982	-	2,522,377
WAI HING CO.	-	-	69,759,998	69,759,998
Wellgroom Trading Company	-	3,912,129	50,932,672	54,844,801
Total	23,766,792	29,317,124	256,195,188	309,279,104

- b. These were potentially bogus sales made to related parties merely to inflate the profit and loss account of the corporate debtor and to defraud the secured lenders.
9. The Forensic Audit shows a write-back of approx. Rs. 50.09 crores in the books of accounts with no disclosure of such write-back in the audited financials. The write back comprise of Rs. 1966.62 lakhs payable to the Group Companies and remaining payable to other parties. In other words, inflated/bogus creditors were originally created which were later written back as non-payable but were neither

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disclosed in the profit and loss account nor offered to tax as required in terms of provisions of section 41 of the Income-tax Act, 1961. This evidences that funds to the extent of Rs. 50.09 crores of the Corporate Debtor have been siphoned off for the benefit of the Respondents, which ought to be brought back into the account of the Corporate Debtor.

10. Potentially Bogus purchases subsequently, written back but not disclosed in audited financial statements:

- a. During FY 2016-17, based on the purchase information as per the Tally data, purchases aggregating to 29.42 crores were made from four parties which were subsequently written back in the accounting system with no disclosures in the audited financial statements and neither was offered to tax as required mandatorily in terms of the provisions of section 41 of Income-tax Act, 1961, the party wise details are given below :

Name of the Vendor	(Rs. Lakhs)	
	Purchases	Balances written back
Abhinandan Diamond Pvt.Ltd. (OMS)	849.89	849.89
Keshav Diamond Pvt. Ltd.	498.89	498.89
Sanmati Gems Pvt.Ltd. (OMS)	434.01	434.01
Anurodh Exports Private Limited	1,159.86	1,159.86
Total	2,942.65	2,942.65

- b. These purchase entries are neither supported by any documents, no goods receipt note, nor any confirmation about the customer's whereabouts. Refer to internal page 27 of the Forensic Audit Report (Page 46 of this application).

11. Inflated Salary expenditure:

It is observed by the Forensic Auditors that salary data have been deliberately inflated in the audited financials to the extent of Rs. 7.73 crores on the behest of the Respondents the party wise details are given below :

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				(INR)
Year / Period	Heads	Salary as per Financials	Salary as per Payroll records	Difference
2011 – 2012	Salaries, wages & bonus	66,560,591	30,131,851	36,428,740
2012 – 2013	Salaries, wages & bonus	58,543,221	27,593,843	30,949,378
2013 – 2014	Salaries, wages & bonus	24,042,660	14,122,794	9,919,866

12. Sale of fixed assets belonging to the Corporate Debtor of approx. Rs. 69.28 lakhs

The fixed assets worth Rs. 69.28 lakhs (written down value as per books) were apparently sold for merely Rs. 19.58 lakhs and the said sales proceeds have been siphoned off and not credited into the account of the Corporate Debtor. The Forensic Auditor has also observed that in case of five assets sold for Rs. 3.08 lacs, the Auditor could not trace the receipt of the funds into the tally system. Further, in majority of sale of fixed assets, the acknowledgement of purchaser for receipt of assets was not observed. The Respondents ought to be directed to bring back the money into the account of the Corporate Debtor to the extent of Rs. 69.28 lakhs.

13. Recovery of Rs. 12.06 crores being preferential transaction with Respondent No.1, needs to be vested into the Corporate Debtor.

During the period FY 2015-16 (within two years prior to initiation of CIRP), approx. Rs. 12.06 crores have been paid to Respondent No.1 out of the account of the Corporate Debtor which is preferential treatment to an unsecured lender over the secured financial creditors and triggers. provisions of section 43 and section 66 of the Code. The Corporate Debtor has payable to Respondent No. 1 under unsecured loan a sum of Rs. 2286.89 lacs at the end of Financial Year 2013-14 and the same was reduced to 968.02 lacs as on end of Financial Year 2016-17.

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14. Internal adjustments against receivables of Corporate Debtor:

Time and again, adjustment entries are passed in a way to nullify all receivables of the Corporate Debtor against the liabilities of Respondents. Respondent No. 1 stands to gain to an extent of Rs. 0.67 crores while Respondent No. 4 is a beneficiary for an amount of Rs. 25.15 crores. During the Financial Year 2012-13, Nascant Jewellery Private Limited- Creditor of Rs. 66.76 lacs has been adjusted with Respondent No. 1 loan. Similarly, in 2011-12, Yash Jewellery Pvt. Ltd. – Debtors of Rs. 160 lacs has been adjusted against Pramod Goenka – loan account. Both the respondents ought to be directed to infuse the said money into the account of the Corporate Debtor.

15. Provision of Corporate Guarantee amounting to Rs. 35.70 crores for the benefit of Respondents:

The Corporate Debtor has provided a corporate guarantee to the extent of Rs. 35.70 crores, being the claim amount received by the RP from State Bank of India for the benefit of the Respondents Lily Jewellery Pvt. Ltd. which is a misrepresentation to the existing lenders and adversely impacts the claim of the secured financial creditors, since, the said Corporate Guarantee has been created on behalf of group company i.e. Lily Jewellery Private Limited, after it has been declared as NPA on 31st December 2013 with State Bank of India and 30th September 2014 with Andhra Bank and without obtaining any NOC from existing lenders.

16. Transfer of Rs. 4.67 crores to the credit of Respondent No. 1:

The Corporate Debtor had availed a credit facility from Andhra Bank and SBBJ and had provided as a collateral security, inter alia, the plot no. AA1, Cama Industrial Estate, Goregaon (East), Mumbai. The Corporate Debtor entered into a joint development agreement with a third party during FY 2015-16 without the permission of the secured lenders and received an amount of Rs. 4.67 crores in this regard which was subsequently transferred to the credit of Respondent No.

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1. This is squarely covered under the provisions of section 43 of the Code, being preferential treatment given to the related party over the secured lenders and also hit by provisions of section 66 of the Code.
17. Respondent No. 4 is in the Corporate Insolvency Resolution Process (CIRP). Respondent No. 2 & 3 are non-execute directors and have filed their reply.
18. Respondent No. 2 submitted that the present Application is not maintainable as its barred by limitation; the office of the Resolution Plan was *functus officio* at the time of filing the Application as the Resolution Plan was approved before the filing of the Application; the Applicant has failed to demonstrate as to how Respondent No.2 is a beneficiary to the transactions which is alleged in the Application; the Applicant has failed to place on record any such evidence which will explain a direct relationship between Respondent No.2 and the said purported transactions; he was never involved in the decision making or daily affairs of the Corporate Debtor; and he was not involved with the Corporate Debtor after 2002.
19. Respondent No. 3 submitted that An erstwhile RP or a member of the monitoring committee has no power to file or prosecute an application under Sections 43 or 66; Section 66 can only be invoked “*during the corporate insolvency resolution process or a liquidation process*”; The Application is moved by the Applicant with gross and unexplained delay, and is therefore barred; In multiple places, the Applicant, in terms, admits that he only has a “*reason to believe*”, or that “*potentially*” offending acts have been committed; it was Respondent No.1 who was in charge of all the decision making and running the affairs of the Corporate Debtor and Respondent No.3 had a very limited role in the Corporate Debtor and used to simply execute the decisions of Respondent No.1; and Respondent No.3 was never the beneficiary of any transactions of the Corporate Debtor.
20. Heard the Learned Counsel and perused the material on record.
21. The Respondent No. 2 and 3 have raised the ground of limitation stating that the application has been filed beyond 135 days from commencement of CIRP.

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However, the time lines under IBC have been held to be directory in nature in *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta*, [2019] [ibclaw.in 07 SC](#). The division Bench of Hon'ble Delhi High Court in the case of *Tata Steel BSL Ltd. Vs. Venus Recruiter Pvt. Ltd. & Ors.* (2023) [ibclaw.in 09 HC](#) have held that “*However, it is our understanding that the timelines under Regulation 35A are directory and not mandatory in nature.*” hence we do not find any merit in this ground.

22. The application has been contested on the ground that the Applicant Resolution Professional ceases to have any authority after approval of Resolution Plan in case of Corporate Debtor finally on 7.2.2019 to file an application for avoidance of transactions under the IBC. Admittedly, this application has been filed by the Applicant Resolution Applicant after approval of Resolution Plan, which is evident from the fact of approval of Resolution Plan even stated at I.6 of the Application. On perusal of the application and documents annexed thereto, we find this Application has been signed on 18.4.2019 by the Applicant in his capacity as Resolution Professional, whereas the applicant ceases to be Resolution professional on 7.2.2019 and the office of Resolution Professional is rendered *functus officio*. We further find that the Applicant has not made any averment as to when he received the Report of Forensic Auditor; why he could not file the application before the filing of an application before this Tribunal seeking approval of the Resolution Plan; whether the Report of Forensic Auditor was considered by CoC or even placed before CoC. There is no averment that the applicant received the information late or there was non co-operation from the erstwhile Management which delayed the filing of present application. No minutes of CoC meeting, if any, held for discussion of the avoidance transaction, is placed on record. The Forensic Auditor's report is undated, hence this Tribunal is not in a position even to make out what could have led the Applicant to file present application after approval of Resolution Plan.
23. The Hon'ble Delhi High Court in case of *Tata BSL Limited vs. Venus Recruiters Private Limited* (Supra) had held that the Resolution Professional can prosecute

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further the avoidance applications filed prior to approval of Resolution Plan. It said so in following words -

83. The Ld. Single Judge has heavily relied upon the role of the RP in the context of the CIRP to hold that the RP becomes functus officio upon the conclusion of the CIRP. The role of the RP vis-à-vis the resolution process ends, and rightly so, with the successful resolution of the corporate debtor. However, the Scheme of IBC makes it is clear that avoidance applications and CIRP are a separate set of proceedings. The avoidance of a transaction requires discovery of dubious transactions which are complex in nature and adjudication of these by the adjudicating authority takes time and the resolution process need not await the outcome of the exercise. Therefore, a distinction can be drawn between the role of the RP vis-à-vis CIRP on one hand and avoidance applications on the other.

84. Accordingly, reliance placed upon sections applicable in the context of CIRP cannot be extended to the RP for the purposes of pursuing avoidance applications. The RP, before passing of the approval order, filed an application for avoidance of certain transactions, discharging the statutory burden laid out under Section 25(2) (j) of the IBC.

24. Section 25(2)(j) of the Code mandates the Resolution professional to file application for avoidance of transactions in accordance with Chapter III, if any. The Resolution Professional becomes functus officio after the approval of plan and he ceases to have authority to file any fresh application under the Code, except to prosecute the applications already pending before this Tribunal prior to approval of the Resolution Plan or before appellate authorities in relation to such pending application before this Tribunal or pending thereat at the time of approval of Resolution Plan.

25. Accordingly, we are of considered opinion that the present application is not maintainable as having been filed without any authority vested in the Resolution Professional after the approval of Resolution Plan.

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26. We find that the Resolution Professional has referred to various observation of Forensic Auditor to make out a case against the Respondent No. 1 to 3 alleging bogus sales & purchases, inflated salary expenses, siphoning of funds by sale of fixed assets, transfer to related persons and preferential payments. Accordingly, we consider it appropriate to direct IBBI to look into these aspect and initiate appropriate proceedings against Respondent No. 1 to 3 in terms of Section 70, 71 and 73 of the Code. The IBBI may also look into the conduct of the Applicant Resolution Professional in failure to file appropriate application prior to approval of Resolution Plan. Registry is directed to send a copy of this Order to IBBI for necessary action at their end.

27. In view of the foregoing, the **MA 1548 of 2019 is dismissed** and disposed of accordingly.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)
/Neeraj/

Sd/-
JUSTICE VIRENDRASINGH BISHT
MEMBER (JUDICIAL)