

(2022) 06 NCLT CK 0002

In the National Company Law Tribunal

Case No : IA(I.B.C) 327/2021 in CP(IB)/1325/2019

Cura Healthcare Pvt Ltd

APPELLANT

Vs

Deepak Mittal

RESPONDENT

Date of Decision : 01-06-2022

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 25, 25(j), 45, 46, 46(1)(i), 46(1)(ii), 49, 49(b)(i)
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2022) 06 NCLT CK 0002

Hon'ble Judges : S. Ramathilagam, Member (J); Anil Kumar B, Member (T)

Bench : Division Bench

Advocate : B.Dhanaraj, V.V.Sivakumar

Final Decision : Dismissed

Judgement

S.Ramathilagam, Member (Judicial)

1. The above application has been preferred by Resolution Professional of Cura Healthcare Private Ltd under Section 25 & 49 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") r/w Rule 11 of NCLT Rules, 2016 seeking relief as follows;

- a) Declare that the Respondents 1 to 6 are liable under Section 49 of IBC, 2016.
- b) Restore the original position of the SBI CC Account No.6304921697 as it exist prior to the payment of advance of Rs.1.5 crores for an order with the 4th Respondent and subsequent conversion of such Advance into Equity Share Capital at the instance of the 4th Respondent during FY 2019-20.
- C) Pass such further or other orders as may be deemed fit and proper in the facts and circumstances of the case and thus render justice.

2. It was averred in the application that CIRP in respect of the Corporate Debtor has been initiated by this Tribunal on 10.12.2019 and the Applicant herein was

appointed as an Interim Resolution Professional.

3. It was further averred that in the 3rd meeting of the CoC held on 23.04.2020 the Applicant was re-appointed as Resolution Professional. Soon after the appointment, the Applicant on 16.05.2020, appointed M/s. Sarath and Associates, Chartered Accountants to carry out tile transaction audit of the Corporate Debtor for the period from 01.04.2015 to 09.12.2019. Subsequently, the transaction audit report dated 11.12.2020 was prepared by the said Chartered Accountants.

4. It was submitted by the Learned Counsel for the Applicant that in the said Transaction Audit Report, the Auditors record the following transactions as are amounting to Transactions Defrauding Creditors under Section 49 of IBC, 2016

"Corporate Debtor Share Purchase against liability of its subsidiary Adonis Medical Systems Pvt. Ltd., (AMSPL).

a) As on 31.03.2019, the source of funds for the Corporate Debtor, the Equity Share Capital brought in by the 100% holding company of the Peepul Capital Fund III LLC was Rs.168.06 Crore and SBI Secured (Cash Credit) loan of Rs.15.63 crore.

b) Further, an extract of the Special Resolution passed on 30.11.2019 at the EOGM of AMSPL revealed that the Shareholders of AMSPL gave their assent to issue and allot 23437 equity shares at a price of Ps. 640/- per Share to the Corporate Debtor, in lieu of the Advance of Rs.1,50,00,000/- received from the Corporate Debtor for an order for the supply of goods and services, which was subsequently cancelled by Corporate Debtor.

c) The Explanatory statement dated 02.11.2019 is duly signed by the 5th Respondent for the 4th Respondent.

d) A proposal to convert the Advance payment of Rs.1,50,00,000/- into equity capital of the 4th Respondent was consented by the Corporate Debtor by an e-mail as informed by the 4th Respondent.

e) Subsequently, the proposal for conversion of advance into equity shares was placed before the members of the 4th Respondent for their approval by way of a Special Resolution to allot shares in favour of Respondent.

f) The Share Valuation Certificate dated 18.03.2019 is issued by one MAPSA & Co, Chartered Accountants, Chandigarh wherein the Fair Market Valuation of Shares of AMSPL is done on basis of Discounted Flow method and the value determined is exorbitant and does not reflect the true value of shares.

g) The Form PAS-3 for Return of Allotment of Shares is noted to bear the digital signature of the 5th Respondent Mr. Arun Kaul on 21.08.2020.

h) Further, the arrangement between the Corporate Debtor and its Subsidiary AMSPL is an attempt by Respondent 1 to 3 along with Respondent 5 & 6 to

Cancel the right of the Corporate Debtor to claim the Debt of Rs.1.50 crore but to divert the funds to the 4th Respondent, especially during the pendency of the Section Application in IBA 1325/2019. Such transaction has Occurred within 2 years preceding the CIRP commencement date."

5. It was further submitted that the above-said records in the Transaction Audit report show that the funds of the Corporate Debtor have been diverted into its subsidiary, with intent to defraud creditors of the Corporate Debtor with the knowledge of both the Corporate Debtor and 4th Respondent.

6. It was further submitted that the Conversion of Advance of Rs.1.50 Crore into Equity Share Capital on 30.11.2019, is not in the ordinary course of business but intended to keep the assets of the Corporate Debtor beyond the reach of any person who makes a Claim i.e SBI. The benefit of such Transactions has not been acquired or received by the 4th to 6th Respondents in good faith. It was further submitted that the CHPL's outstanding in the SBI Secured Loan (Cash Credit) Account stands at Rs.15.63 Crore as on 09.10.2019 and is entitled to make a claim against the Corporate Debtor. The said conversion seems to prevent SBI from reaching CHPL's assets in its position as a Claimant.

7. It was further submitted that the Funds borrowed by the Corporate Debtor from SBI for Working Capital Requirements, though initially was paid to the 4th Respondent as an Advance payment for an order, which has been subsequently converted into Equity Share Capital as proposed by the 5th Respondent for the 4th Respondent and as consented to by the Directors of CHPL. Such conversion is done with intent to defraud the Creditors of the Corporate Debtor and these transactions have fit the requirement for an Application under Sec.49 IBC.

8. It was further submitted that the 1st to 3rd Respondents are Ex-Directors of the Corporate Debtor who were aware that the Corporate Debtor's Debt could not be paid when it would become due or shortly thereafter; despite which without obtaining approval from the Lender Financial Institution with a subsisting Loan Account.

9. In such circumstances, the Applicant sought to declare 1st to 6th Respondents liable under Sec.49 IBC and to restore the original position of the SBI CC Account No.6304921697 as it existed prior to payment of Advance of Rs.1.5 Crores for an Order with the 4th Respondent.

10. The Learned Counsel for the Respondent in the reply submitted that the submissions made by the Applicant regarding the valuation determined by discounted cash flow method is without any legal, logical or financial basis and the conversion of the advance of Rs.1.5 crore into equity has not resulted in any loss to anybody. Further, contended that the said investment only came from the monies invested by the shareholder, Peepul Capital Fund III LLC.

11. Having heard learned counsel for both the parties, we noticed that the relief sought by the Applicant is to declare the Respondents are liable under Section 49 and to restore the original position of the alleged transaction.

12. At this juncture, it is appropriate to refer relevant provisions of IBC, 2016

"Section 25: Duties of resolution professional:

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely,

(j) file application for avoidance of transactions in accordance with Chapter III.

Section 45: Avoidance of undervalued transactions.—

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Section 46: Relevant period for avoidable transactions.—

(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—

(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.

Section 49: Transactions defrauding creditors.—Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—

(a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or

(b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order—

(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and

(ii) protecting the interests of persons who are victims of such transactions:

13. On conjoint reading of the above provisions makes clear that Section 25(j) of IBC, 2016 confers the right to the Resolution Professional to file an application before this Adjudicating Authority for the avoidance of transactions in respect of Corporate Debtor.

14. Section 49 of IBC, 2016 clarifies that if the Adjudicating Authority is satisfied that the alleged transaction would fall under Section 45(2) of IBC, 2016 within the relevant period mentioned in Section 46(1)(i) and/or 46(1)(ii) of IBC, 2016 shall make an order under Section 49(b)(i) of IBC, 2016 i.e. which is prayed by the Applicant in the present application. Thus, it could be seen that Section 49 of IBC, 2016 cannot be invoked independently.

15. The contention of the Applicant is that the Corporate Debtor had converted Rs.1,50,00,000/- the advance given to the AMSPL into 23437 equity shares and paid exorbitant premium of Rs.630/- for the said shares, which caused significant loss to the Corporate Debtor and moved the said amount beyond the reach of the resolution process. Moreover, the Applicant had and questioned the credibility of the valuation done in Discounted Cash Flow method and the valuer who certified the exorbitant value of the said shares. It would be understood from what has been stated above is clearly not an undervalued transaction referred under Section 45(2) of IBC, 2016 and it is sine qua non to issue order under Section 49 of IBC, 2016. In view of the above, this Adjudicating Authority denies the reliefs sought in prayer (a) and (b).

16. However, we see that this application completely relied on the Transaction Audit Report of the Corporate Debtor dated 11.12.2020. As noticed from the relevant part of the said Report

the observations in the report depicts that the alleged transaction of conversion of money advanced into equity shares was made only 9 days prior to the initiation of CIRP of the Corporate Debtor. Whereas, in the explanatory statement dated 02.11.2019 it was recorded that Corporate Debtor had placed an order with AMSP and subsequently cancelled the said order. Thereafter, the special resolution passed for conversion of money advanced to shares was done on 30.11.2019.

17. Considering the facts and circumstances of this case we perceive that

only because of the alleged transaction was made 9 days before the initiation of CIRP cannot be concluded that it would not have taken place in the ordinary course of business and the transaction could not be assumed as Transaction Defrauding Creditors under Section 49 of IBC, 2016.

18. Further, the argument made by the counsel that the Discounted Cash Flow method is not applicable to Companies Act, 2013 is baseless and without any merit, liable to be rejected and there is no sufficient evidence in the Transaction Audit Report to substantiate that the alleged transaction would not have taken place in the ordinary course of business of the corporate debtor.

19. In view of the above discussions, the application stands dismissed.