(2022) 02 NCLT CK 0081

In the National Company Law Tribunal

Case No : I.A. (IB) NO. 898/KB/2020 in C.P. (IB) No. 263/KB/2018

Niraj Agrwal APPELLANT

Vs

Amrit Fresh Pvt. Ltd RESPONDENT

Date of Decision : 23-02-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(24), 7, 13, 15, 30, 43, 43(2), 45, 53, 66

Citation : (2022) 02 NCLT CK 0081

Hon'ble Judges : Rajasekhar V.K., Member J;Balraj Joshi, Member, T

Bench : Division Bench

Advocate : Raj Singhania, Niraj Agarwal, Nirmalya Dasgupta, Aryaa Chatterjee

Final Decision : Disposed Of

Judgement

Rajasekhar V.K., Member (Judicial)

1. This Court convened through video conferencing today.

2. The present I.A. has been filed by the Resolution Professional of Amrit Fresh Pvt. Ltd. under section 43 of the Insolvency and Bankruptcy Code ("Code").

3. This Adjudicating Authority vide order dated 10 July, 2019 admitted Amrit Fresh Private Limited ("Corporate Debtor") under Corporate Insolvency Resolution Process ("CIRP") on a Petition filed under section 7 of the Code by Bank of India, registered as C.P. (IB) No. 263/KB/2018.

4. Mr. Niraj Agarwal was appointed as the Interim Resolution Professional and was appointed as the Resolution Professional in the first CoC meeting held on 08 August, 2019, with 100% voting share and the appointment was approved by this Adjudicating Authority vide order dated 13 August, 2019.

5. The Applicant in compliance of Section 13 and section 15 of the Code made public announcement in Form A on 12 July, 2019.

Submissions of the learned Authorised Representative appearing on behalf of the Applicant.

6. There was a delay on the part of the erstwhile promoters to hand over the books of accounts and other relevant documents to the Resolution Professional. However, upon instructions from the Applicant, the directors Mr. Harish Bagla and Mrs. Archana Bagla tried to assist in this Resolution Professional through some of the employees working in the group companies to get access to the required documents. Due to non-availability of books of accounts on time, the Resolution Professional was not able to form an opinion and determination on preferential and other transactions within the prescribed 75/115 days of commencement of CIRP.

7. The Applicant was of the firm opinion that the Corporate Debtor has given preference in some financial transactions to some creditors during the two years preceding the CIRP commencement date. The Applicant. Appointed ALP & Associates on 21 February 2020 to conduct Transaction Audit of the books of accounts of the Corporate Debtor under the provisions of the Code.

8. The Covid-19 pandemic led to severe disruption in normal life and the Central Government declared a nationwide lockdown from 24.03.2020.

9. The Auditor submitted his Transaction Audit Report vide letter dated 26 June, 2020, wherein the Auditor reported certain preferential transactions. The transaction audit report was discussed at the 9th CoC meeting held on 03 July, 2020 and on the instruction of the CoC, the Applicant has filed the present I.A.

10. That the Applicant based on the analysis by the Transaction Audit Report has come across two preferential transactions which fell under the ambit of section 43 of the Code.

11. A payment of Rs.13.40Lakh was made to the Respondent No. 4 who is a related party of the Corporate Debtor. The corporate Debtor and the Respondent No. 4 are owned by the same persons.

12. From the Report of the submitted by the Transaction Auditor, it was observed tha t the Corporate Debtor had also made payment of Rs.2.50Lakh to Respondent No. 5 who is a related party of the Corporate Debtor.

13. The Respondent No. 1 and Respondents No. 4 and 5 are promoted by Harish Bagla and Archana Bagla, the Respondents No. 2 and 3 respectively.

14. The management of the Corporate Debtor have acknowledged the facts that the payments were made to related parties and their relationship falls under the meaning of section 5(24) of the Code.

15. Notice was served on the Respondents. Respondents No. 2 and 3 have entered appearance and have filed their reply. The I.A. was heard ex-parte against Respondents No. 1, 4 and 5.

Submission for the learned Counsel appearing on behalf of the Respondents No. 2 and 3

16. The Learned Counsel submitted that the Respondents No. 2 and 3 were the erstwhile Directors of the Corporate Debtor.

17. The present I.A. is not maintainable and has been filed by the Resolution Professional in abuse of the process of law.

18. The I.A. is barred by limitation as the timeline prescribed under regulation 35A of the CIRP Regulations have not been followed.

19. A Resolution plan had been submitted before this Adjudicating Authority which has been approved on 24 December, 2020 and by virtue of the said order the Applicant has ceased to be a Resolution Professional, hence, the application is ex facie not maintainable on such ground.

20. The Resolution Professional did not form an opinion or determination within the stipulated timeline. Nor was the I.A. filed within 135 days from the commencement of CIRP.

21. The whole purpose of an avoidance application is to see that the benefit of any orders passed would enure to the Corporate Debtor prior to approval of the Plan by the CoC and the Adjudicating Authority. The specific timelines under regulation 35A of the CIRP Regulations are provided so that the Resolution Professional includes all the details in the Resolution Plan submitted under section 30 of the Code.

22.The learned Counsel placed reliance on Venus Recruiters Private Limited vs Union of India & Ors. 2020 SCC OnLine Del 1479 dated 26 November, 2020 (paragraphs 71-73 and 77-80), Suraj Fabric Industries Limited v. Santosh Choraria (Paragraphs 20-28) and ATO (I) Ltd. v. Gandhamardhan Sponge Industries Ltd. (Paragraphs 23-28).

22. The Forensic Audit Report is ex-facie speculative, vague and the Resolution Professional has also failed to make out a case or to establish any ground for passing any order as prayed for in the application. None of the ingredients of sections 43, 45 or 66 of the Code are satisfied or met.

Analysis and Findings

24. We have heard the learned Authorised Representative on behalf of the Applicant and the learned Counsel for the Respondents No. 2 and 3 and perused the records.

25. There are certain discrepancies in the cause title of the I.A., the Corporate Debtor has been arrayed as Respondent No. 1, once, the Resolution Professional is appointed to represent the Corporate Debtor. The Respondent No. 1 is represented by the Applicant himself hence, the name of the Corporate Debtor is dropped from the array of Respondents. Further, the Respondents No. 2 and 3

have filed the affidavit in reply as Respondents No. 1 and 2, we are considering the same as affidavit-in-reply filed by the Respondents No. 2 and 3.

26. Before going into the merits of the alleged transactions, let us first decide whether the present I.A. is maintainable.

27. It is imperative to consider whether the RP has adhered to section 43 of the Code read with regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for the Corporate Persons) Regulations, 2016 (CIRP Regulations).

28. As per the said regulation, the RP has to form an opinion whether the Corporate Debtor has been subjected to preferential transaction on or before seventy-fifth day of the CIRP commencement date. Thereafter, on or before one hundred and fifteenth day of the CIRP commencement date, the RP shall make a determination that the Corporate Debtor has been subjected to preferential transaction. Upon making such determination the RP shall make an application before the Adjudicating Authority on or before one hundred and thirty-fifth day of the CIRP commencement date

29. During the hearing, the learned Authorised Representative on behalf of the Applicant had submitted that the Applicant had formed an opinion on 29 November, 2019 and had determined the preferential transactions on 26 June, 2020 but the same has not been mentioned in the I.A.

30. The present I.A. has not been filed within the stipulated timeframe as prescribed in the CIRP Regulations but the delay can be condoned in view of the lockdown imposed due to the Covid-19 pandemic.

31. Be that as it may, the Resolution Professional has failed to form an opinion and determine the nature of the nature of transaction. The Applicant has heavily relied on the report filed by the Transaction Auditor in the Application and has only placed the extracted portion of the report of the Transaction Auditor.

32. On perusal of the Final Progress Report filed by the Applicant, the Applicant has stated that the present application was filed on 01 August, 2020 whereas the application for approval of Resolution Plan was filed on 03 August 2020.

33. The Hon'ble Supreme Court, in its judgment dated 26.02.2020 in Anuj Jain, IRP of Jaypee Infratech Ltd v. Axis Bank Ltd, (2020) 8 SCC 401 : 2020 SCC OnLine SC 237 at page 486 laid down the detailed approach that a resolution professional was expected to take in the matter of avoidance transactions. This is worth its weight in gold, and is extracted below for handy reference:

“Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

(1) In the first place, the resolution professional shall have to take two major but

distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of "related party" in terms of Section 5(24) of the Code and another of the remaining persons.

(2) In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two subsets : One concerning related party/parties and other concerning unrelated party/parties with each subset requiring different analysis. The subset concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

(3) Having thus obtained two subsets of transactions to scan, the steps thereafter would be to examine every transaction in each of these subsets to find : (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.

(4) In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of Section 43.

(5) In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section(2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of Section 43.

(6) In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of clauses (a) and (b) of sub-section (3) of Section 43.

(7) After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the adjudicating authority for necessary order(s) in relation to the transaction(s) that had passed through all the positive tests of

sub-section (4) and sub-section (2) as also negative test of sub-section (3).”

34. It is also pertinent to note that the Resolution Plan for Amrit Fresh Private Limited was approved on 24 December, 2020 by this Adjudicating Authority. The Corporate Debtor has been handed over to a new Management and the office of the Resolution Professional becomes functus officio.

35. The Hon’ble High Court of Delhi in Venus Recruiters Private Limited vs. Union of India and Ors. 2020 SC OnLine Del 1479 dated 26 November 2020 held that once a Resolution Plan is approved, the Resolution Professional cannot carry the hat of “Former Resolution Professional” and pursue an avoidance application in respect of preferential transactions after the change of hands in the management of the Corporate Debtor. Hence, the application for preferential transactions cannot be pursued by the erstwhile Resolution Professional nor can the new Management of the Corporate Debtor pursue the application.

36. In view of the above circumstances, the present I.A. is not maintainable and hence dismiss the present application. I.A.(IB) No. 898/KB/2020 shall stand dismissed.

37. Needless to say, the findings mentioned herein, and the result of this IA, shall not bind or dissuade the Financial Creditor or the Corporate Debtor from taking any steps under any other law before the appropriate judicial forum, if the same is found applicable. The findings mentioned herein are only in the context of the present application filed under the provisions of the Insolvency & Bankruptcy Code, 2016

38. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their learned Counsel and Authorised Representative for information and for taking necessary steps.

39. Certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

