
(2021) 03 NCLT CK 0025

In the National Company Law Appellate Tribunal

Case No : Interlocutory Appeal No. 2277 Of 2020 In (IB)-241/(ND) Of 2019

Tarun Batra

APPELLANT

Vs

Ram Bhaj Jain & Ors.

RESPONDENT

Date of Decision : 24-03-2021

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 9, 45(2), 49, 66, 66(1)

Citation : (2021) 03 NCLT CK 0025

Hon'ble Judges : Dr. Deepti Mukesh, J; Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Subhash Chandra, Sumesh Dhawan, VatsalaKak, Rajeev Gupta, Sangram Patnaik, Swayansidha Patnaik, Aditi Mishra

Final Decision : Disposed Of

Judgement

1. This is an order being passed in IA.2277/ND/2020. The application has been filed by the Resolution Professional under Section 49 and Section 66 of the Code, seeking following prayers:

- a. Declare the transaction of Plant and Machinery of the Corporate Debtor to Respondent No.3 as fraudulent;
- b. Issue necessary directions for cancellation of the transaction of sale of Plant and Machinery of Corporate Debtor to Respondent No.3;
- c. Pass any other Order as the Hon`ble Adjudicating Authority deems fit.

2. The brief facts of the case are that an application by M/S BHUPINDRA AGRO PVT. LTD. (herein the Operational Creditor) under Section 9 of IBC, 2016 was filed on 25.01.2019 against the Corporate Debtor and vide order dated 4.12.2019, the Corporate Insolvency Resolution Process was initiated against the Corporate Debtor and Mr Vikas Garg was appointed as an Interim Resolution Professional. In the first meeting of committee of creditors held on 15.01.2020, the members of the CoC resolved to to replace the IRP and appoint Mr. Tarun

Batra as the Resolution Professional for the Corporate Debtor. The Adjudicating Authority vide its order dated 24.01.2020 confirmed the appointment of Mr. Tarun Batra as RP. Thereafter, the Committee of Creditors in its second meeting held on 14-02-2020, resolved to appoint A.K.G. Associates for carrying out transaction audit for the period from 01.04.2017 to 04.12.2019 i.e. two preceding years from the commencement of the CR process.

3. The Final report of the transaction audit was presented in the 3rd meeting of the CoC held on 15.05.2020. The final report dated 15.05.2020 has reported a large number of irregularities in conduct and management of business affairs of the Corporate Debtor, including transactions which qualify as preferential transactions and transactions defrauding the creditors under Section 66 of the code. The observations made by A.K.G & Associates (Transaction Auditor) on behalf of the Resolution Professional, in the final report dated 15.05.2020 with respect to the present application made under Section 49 and Section 66 of the code are reproduced as:

Pg. 079 Para 2.2 SALE OF PLANT AND MACHINERY TO RADICO TRADING CO.

Para 2.2.1 The corporate debtor has transferred almost all the fixed assets Just before the initiation of CIRP by the way of books entries, no physical transfer of such assets has been taken place. Further the said transfer/transaction has been. done without the prior approval of the financial creditor i.e. Punjab National bank.

Para 2.2.2 It was observed that the CD has received an unsecured loan of Rs. 4.80 core before 01.04.2017 and made payment of Rs. 4.09 core against the said unsecured loan during the period under audit.

Para 2.2.3 Further, during the FY 2018-19 the CD has sold/transferred Its plant and machinery to Radico Trading Co having the book value of Rs. 1.56 core for Rs. 20.80 lakh by making loss on sale of plant and machinery. No details of assets sold/transfer or valuation report of such assets is available on record. Its seems that Its mere a books entry to exclude such assets from the reach of secured creditors.

Pg. 082. Para 3. TRANSACTION WHICH MAY BE COVERED UNDER SECTION 66 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Para 3.1 As per our review and to the best of our knowledge, during the period under audit there have been no transaction as laid down in Section 49.

Pg. 084 Para 5. TRANSACTION WHICH MAY BE COVERED UNDER SECTION 66 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

Pg. 095 Para 5.5 Sale of Plant And Machinery to Radico Trading Co.

Para 5.5.1 As stated earlier In Point No. 2.2 above, The corporate debtors has trans-ferred its fixed assets just before the initiation of CIRP by the way of books entries, no physical transfer of such assets has been taken place. Further the said transfer/transaction has been done without the prior approval of the

financial creditor i.e. Punjab National bank.

4. As per the averments made in the application, the Respondent no. 3 that is M/ S RADICO TRADING LIMITED is a related entity of the suspended directors of the Corporate Debtor. The Respondent No.3 is a Corporate Guarantor for the loan taken by the Corporate Debtor from Punjab National Bank and the land and building of the Respondent No. 3 is mortgaged in the loan account of the Corporate Debtor against as Corporate Guarantee.

5. The issue raised in the final transaction audit report is that the suspended directors have transferred plant and machinery of the Corporate Debtor on 03.05.2019 for Rs 7,55,200/- and on 08.05.2019 for Rs. 14,40,600/- to Respondent No. 3 by way of book entries. The gross and net value of Plant and Machinery in the books of account as on 31.03.2019 was Rs. 4,23,92,728/- and Rs. 1,56,49,484. The said Plant and Machinery is under physical possession of the Corporate Debtor only and the Resolution Professional has the safe custody and control over it. It is stated that entries in Books of accounts of Corporate Debtor have been passed in lieu of the transfer of Plant and Machinery, with the malafide intention to defraud the Creditors of the Corporate Debtor and also to mislead the Prospective Resolution Applicants and to keep these assets of the Corporate Debtor beyond the reach of creditors. It is stated that the alleged transfer of assets of the Corporate Debtor has been shown to be done by the suspended Directors when the Section 9 application was pending adjudication before the Adjudicating Authority.

6. It is further submitted by the applicant that no agreement has been entered between the Corporate Debtor or Respondent No. 3 showing transfer of Plant and Machinery. The Applicant vide his email dated 21.02.2020 and 28.02.2020 had sent a questionnaire to Respondent No.1 and Respondent No.2 (herein the suspended Director/Promoter and Additional Director of the Corporate Debtor) inquiring about any Agreement executed between the Respondent No.,3 (Radico Trading Co.) and the Corporate Debtor however, there was no response.

7. The Respondent No.1, Respondent No. 2 and Respondent No. 3 filed their replies and stated that Respondent No.3 is not a related entity of the suspended directors. There is no common director and no common shareholding between the two companies. It is submitted by the Respondent no.1 and no.2 that no Corporate Guarantee has been invoked against the Respondent No.3. That an amount of Rs 5.24 Crore were arranged by Respondent No. 3 that is M/S Radico Trading Limited who sold 76 Kanal and 17 Marla for a consideration of Rs. 4,54,00,000/- out of which Rs. 4,51,46,000/- was deposited by M/S Radico Trading Limited in PNB Bank directly during 08.11.2016 to 02.03.2017 in the account of the Corporate Debtor, which was accounted in the books of the Corporate Debtor Company through book entry. The PNB bank gave the NOC to the Tehsildar Panipat for the said sale. The Corporate Guarantee of the Respondent No.3 has ceased after paying the consideration by obtaining the NOC's and selling the land of Respondent No. 3. It is further submitted that

there were continuous transaction between the Corporate Debtor Company and Respondent No. 3 and all the transactions were carried out in the ordinary course of business.

8. The Plant and Machinery is sold at the best market price after taking various quotations from independent buyers and was sold during the ordinary course of business for Rs. 7,55,200/- (including GST) vide bill no. 407 dated 03.05.2019 and Rs.14,40,600/- (including GST) bill no. 408 dated 08.05.2019. It has been submitted by Respondent No. 2 and Respondent no.3 that the amount of Rs.7,55,200/- and Rs. 14,40,600/- is not adjusted to the account of Respondent no.3 by way of journal entry and that an actual amount has been received from the Respondent No. 3. The details of the quotation received and the bills raised have been annexed and placed on record. It is submitted by the Respondents that Machinery purchased by the Respondent no 3 is bonafide and for a valuable consideration and the possession of the machinery is with Respondent no 3 and is using the machinery for processing the Paddy of Haryana State Warehousing Corporation.

9. The Arguments were heard in the present application. In order to deal with issue in hand we would like to analyse Section 49 and 66 of the Code. Section 49 of the Code deals with the undervalued transaction entered into with the purpose of defrauding and affecting the interest of the creditors. The important element required for attracting Section 49 Section is that there should be a deliberate act on the part of corporate debtor to enter into an under value transaction. Section 49 states that :

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:

Provided that an order under this section-

(a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in

good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

10. Further the provision of Section 66 deals with fraudulent trading or wrongful trading, therefore, "intent to defraud the creditors" is essential as it is imperative to prove that the business is conducted or a transaction has been made in a fraudulent manner in order to intentionally defraud the creditors of the Corporate Debtor. The provision applies when the person knowingly carries out the fraudulent activity. Section 66(1) states that :

" (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.

11. As per the Final Audit Report dated 15.05.2020 the book value of the Machinery is Rs. 1.56 Cr. However, on perusal of the documents placed on record by the Respondent no. 3 it has been observed that the Machinery has been purchased by the Respondent No. 3 vide bill no. 407 dated 03.05.2019 for an amount of Rs. 7,55,200/- and bill no. 408 dated 08.05.019 for an amount of Rs. 14,40,600/- (Inclusive of GST). The Final Audit Report states that during the period under audit there have been no transaction as laid down in Section 49 and with respect to Section 66 of the code, the observations made only rely on the fact that the Corporate Debtor has trans-ferred its fixed assets just before the initiation of CIRP by the way of books entries. However, on scrutinizing the details of all the documents placed on record, we are of the view that the Directors of the Corporate Debtor were well aware of the fact that an application has been filed on 25.01. 2019 and the same is pending for initiation CIR process against the Corporate Debtor, therefore the Directors of the Corporate Debtor deliberately entered into an undervalued transaction. These facts support that there was an intention to defraud the creditors by keeping these assets of the Corporate Debtor beyond the reach of the Creditors or any such person who is entitled to make a claim against the Corporate Debtor.

12. In our view, these transactions are covered under the provisions of the Section 49 and 66 of the Code. Therefore, we allow this I.A. No. 2277/2020 in Company Petition No. (IB)-241/(ND)/2019 and declare the sale of plant and machinery of the Corporate Debtor to the Respondent no. 3 as cancelled. As a consequence to the cancellation of the said transaction, it is hereby directed that the possession of the Plant and Machinery be handed over to the Resolution Professional and the Resolution Professional shall take all the steps to safeguard the same in the interest of the Creditors. Since the suspended Director/promoter and Additional Director of the Corporate Debtor ie. Respondent no. 1 and Respondent No.2 knowingly carried on with the fraudulent transactions, therefore

they are held liable to bear the liability of the Corporate Debtor Company, and it is further directed to the Respondent No. 1 and Respondent No. 2, to compensate and refund back the amount so raised on the sale of Plant and Machinery to the purchaser Respondent No.3.

13. The Application is allowed and disposed of in terms of above orders.

14. Copy of this order be sent to the parties.