

**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI**

**ORDER SHEET OF THE HEARING ON 16<sup>th</sup> MAY, 2024, 10:30 A.M.**

**IA (IBC)/73/GB/2022  
In CP (IB)/20/GB/2021**

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao  
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

In the Matter of	Sapna Singhal, RA Vs Naresh Kumar Harlalka & Four Others.
Under Section	U/s 49 of IBC, 2016

For Petitioner (s) : Ms. A. Khaitan, CA

For Respondent (s) : Mr. M. Sharma, Adv. R1, 2 & 3

**ORDER**

Order pronounced in the open court *vide* separate sheets.

Sd/-  
**Satya Ranjan Prasad**  
Member (Technical)

Sd/-  
**H.V. Subba Rao**  
Member (Judicial)

**NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI**

**IA (IBC)/73/GB/2022  
In CP (IB)/20/GB/2021**

***In the matter of:***

An Application under Section 49 of the Insolvency and Bankruptcy Code, 2016;

-And-

***In the matter of:***

An Application under Rule 11 of the NCLT Rules, 2016;

-And-

***In the matter of:***

**Ms. Sapna Singhal**, Successful Resolution Applicant for Byrnihat Coal Private Limited (Corporate Debtor) having address 610A, Sambhu Nagar, Baghpar Road, Meerut City, Uttar Pradesh – 250002 [**Initially filed by:** Mr. Purshotam Gaggar, Resolution Professional for Byrnihat Coal Private Limited (Corporate Debtor)];

**.... Applicant**

-Versus-

**Naresh Kumar Harlalka**, erstwhile Director of the Corporate Debtor having address R.K. Bose Road, Near Chowk Bazar Dhubri, Assam 783301;

**...Respondent No. 1**

-And-

**Mr. Rohit B. Marak**, erstwhile Director of the Corporate Debtor having address, 57 Ampher (Mylliem Syiemship), Ampher, Ribhoi, Meghalaya 793101;

**...Respondent No. 2**

-And-

**JSB Properties Pvt. Ltd.** having address House No. 31, 1<sup>st</sup> Floor, F.A. Road, Kumarpara, Guwahati, Assam- 781009;

**...Respondent No. 3**

-And-

**Ajay Anya Kumar (HUF)** having address Flat No. 101, Prime Apartment, Amarawati Path, GS Road, Christian Basti, Guwahati, Assam-781005;

**...Respondent No. 4**

-And-

NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI

IA (IBC)/73/GB/2022 in  
CP (IB)/20/GB/2021

---

**Mahalaxmi Foundation (Through its Trustees)** having office address at 56<sup>th</sup> Floor, Cube Building, G.S. Road, Christian Basti, Guwahati, Assam -781005.

...Respondent No. 5

***Coram:***

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

***Appearances (through video conferencing):***

For Petitioner : Ms. A. Khaitan, CA

For Respondent : Mr. M. Sharma, Adv.

**Order reserved on: 13.05.2024**  
**Order pronounced on: 16.05.2024**

**ORDER**

1. The instant Interlocutory Application i.e. **IA (IBC)/73/GB/2022** has been filed under Section 49 of the Insolvency and Bankruptcy Code, 2016, praying for the following reliefs:
  - i) *Pass an order declaring that the transactions as stated in the present Application are undervalued in terms of Section 49 of the Insolvency and Bankruptcy Code, 2016; and*
  - ii) *Pass an order thereby directing Respondent No. 3, to transfer a sum of Rs. 38.60 Lakh to the Corporate Debtor; and*
  - iii) *Pass an order thereby directing Respondent No. 4/ Ajay Anayya Kumar (HUF) to transfer 30,000 shares of Kamrup Warehousing Pvt. Ltd. to the Corporate Debtor;*
  - iv) *Pass an order thereby directing Respondent No. 5/ Mahalaxmi Foundation to transfer 80,000 shares of Mahalaxmi Continental Ltd. to the Corporate Debtor.*
2. The reasons mentioned in the above Application are as follows:
  - 2.1 Mr. Akhil Ahuja was appointed as Interim Resolution Professional by this Tribunal *vide* order dated 01.04.2022 by allowing CP (IB) No.20/GB/2021-

*Byrnihat Coal Private Limited v. Sharma & Sons Corporation & Ors.* and thereby initiating CIRP against the Corporate Debtor / Byrnihat Coal Private Limited ('BCPL'), a private limited company and a registered MSME having its registered office at House No. 3/1, Rajdeep Complex, F.A. Road, Kumarpara, Guwahati-781009, Assam and engaged in the business of trading of coal and LAMC.

- 2.2 In the 2nd Meeting of the Committee of Creditors (hereinafter referred to as "CoC") dated 06.05.2022, it was resolved to replace Mr. Akhil Ahuja and appoint Mr. Purshotam Gaggar, the Applicant herein, as the Resolution Professional (RP) of the Corporate Debtor. This Tribunal *vide* order dated 21.06.2022, allowed the Application bearing IA(IBC)No.36/GB/2022 in C.P.(IB)/20/GB/2021, for the appointment of Mr. Purshotam Gaggar as RP of Corporate Debtor.
- 2.3 Applicant after perusal of the limited documents of the Corporate Debtor formed an opinion that certain transactions of the Corporate Debtor were within the purview of avoidable transactions. Thereafter, the Applicant in pursuance of his duties as the Resolution Professional appointed a Transaction Auditor to carry out investigation into the affairs of the Corporate Debtor. The Applicant was provided with the transaction audit report dated 02.09.2022, wherefrom it is clear that several transactions have been carried which amount to transactions entered into with the intention of defrauding creditors as stipulated under Section 49 of the Insolvency and Bankruptcy Code, 2016.
- 2.4 The Transaction Auditor carried out the audit of the Corporate Debtor on the basis of the information and documents as was made available and on the basis of the same raised certain observations with respect to numerous transactions and activities carried out by the suspended Board of Directors and requested that the same be replied to, however, Transaction Auditor did not receive appropriate response with respect to the same.
- 2.5 The Applicant was provided with the final Transaction Audit Report on 02.09.2022. Upon perusal of the Transaction Audit Report so submitted, it

was ascertained that the Corporate Debtor had entered in to certain undervalued transactions with the intent to defraud its creditors and as such transactions are required to be reversed in order to protect the interests of the creditors. Applicant thereafter, *vide* letter dated 02.09.2022, sought clarification from the Suspended Board of Directors with respect to the findings and observations stated therein.

2.6 The said Respondent No. 1 submitted a reply to the findings and observations of the Transaction Auditor *vide* letters dated 10.09.2022 and 12.09.2022. It is noted that while some of the transactions as highlighted by the Transaction Auditor were duly addressed by the said replies received, however, the Applicant has determined that certain transactions as highlighted by the Transaction Auditor are required to be avoided as no cogent explanation has been provided by the suspended Board of Directors for the same. Despite explanations sought by the Transaction Auditor as well as by the Applicant herein, the Respondents have not been able to provide cogent justifications for such transactions.

2.7 Instances of transactions as defined under Section 49 of the IBC, 2016 are as follows:

2.7.1 **Advance to JSB Properties Pvt. Ltd. / Respondent No. 3** – CD had advanced a sum of Rs. 47.00 Lakh (Rs. 15.00 lakh on 19.03.2019 and Rs. 32.00 lakh on 25.03.2019) and got back Rs. 8.40 lakh on 29.03.2019, resulting into net advance of Rs. 38.60 lakh to JSB Properties Pvt. Ltd., a related party of the CD and its shareholder to the extent of 19.52%, without any documentation providing the reason for such an advance or the terms for grant of such an advance or repayment terms and without charging any interest whatsoever. Further, no interest has been charged by the CD for such an advance. The CD had not given such an advance in its ordinary course of business either and as such the said transaction is an undervalued transaction. Furthermore, the said transaction has been carried for the sole purpose of keeping such a sum of money beyond the reach of its

creditors. Upon specific queries raised by the Transaction Auditor as well as the Applicant for such advance being given, the Respondent No. 1 herein stated that such an advance was given to the Respondent No. 3, as the Respondent No.3 herein had given a corporate guarantee for the loan advanced to the CD and as such the CD in return for a such guarantee provided the advance to the Respondent No. 3. It was further informed by the Respondent No. 1 that the Respondent No. 3 refused to make repayment till the Corporate Guarantee executed by them was released. It is evident that the Respondent No. 3 had arm twisted the CD into providing them such an advance with no set terms and conditions and with no provision for interest whatsoever. Furthermore, Respondent No. 3 being a related party as well as a shareholder tried to keep the said amount away from the assets of the CD so that the same is not available to the creditors of the CD.

- 2.7.2 Sale of shares to M/s Ajay Ananya Kumar (HUF)/Respondent No.4** - On verification of books of accounts and on review of Financial Statements of CD it was revealed that, in the month of April, 2010, the CD had purchased shares of Kamrup Warehousing Pvt. Ltd. for a sum of Rs. 15,00,000/- (Rupees Fifteen Lakh Only). However, in the year 2015-16, the said shares were sold for a meagre sum of Rs. 1,50,000/- (Rupees One Lakh Fifty Thousand Only) to M/s Ajay Anayya Kumar (HUF), Respondent No. 4 herein. From the above it is clear that the CD had sold the said shares at a loss of Rs. 13.50 Lakh. Upon specific queries raised by the Transaction Auditor as well as the Applicant for selling the shares at 1/10th rate to Respondent No. 4, Respondent No. 1 stated that the CD sold the shares to meet its business needs. However, as the CD was unable to find a purchaser, the same were sold to M/s Ajay Anayya Kumar (HUF) at a loss of Rs. 13.50 Lakh. The said transaction is an undervalued transaction. Furthermore, the said transaction has been carried for the sole purpose of keeping the assets of the Corporate Debtor beyond the reach of its creditors.

**2.7.3 Donation of shares to Mahalaxmi Foundation/ Respondent No. 5-**

CD had made a huge investment of Rs. 3.05 Crore for purchasing 3,05,000 (Three Lakh and Five Thousand) shares of Mahalaxmi Continental Limited. As mentioned in the audit report, during the audit it was revealed that the CD is holding only 2,25,000 (Two Lakh and Twenty-Five Thousand) shares of Mahalaxmi Continental Ltd. Upon further enquiry it was revealed that as per annual report of FY 2015-16, the CD was holding 3,05,000 (Three Lakh and Five Thousand), however, the same were reduced to 2,25,000 (Two Lakh and Twenty-Five Thousand), during FY 2016. Upon enquiry for the suspended board it was revealed that on 09.09.2016 the CD had donated 80,000 (Eighty Thousand shares) amounting to Rs. 80 Lakh to one Mahalaxmi Foundation (Respondent No. 5) gift deed dated 09.09.2016. Moreover, no cogent reason was provided by the suspended board for making such a huge donation. The Corporate Debtor has not given such gift in its ordinary course of business either and as such the said transaction is an undervalued transaction. Furthermore, the said transaction has been carried for the sole purpose of keeping the said shares beyond the reach of its creditors.

2.8 It appears that the aforesaid transactions are transactions carried out for keeping the assets of the CD beyond the reach of the creditors, and to ensure that such amount lying in the bank account of CD is unavailable to its creditors with the clear intent of defrauding its creditors. Hence, the present Application is filed to reverse the effect of such transactions and seek orders in respect of the Respondents to pay such sums in respect of benefits received by Respondents to the Applicants.

3. The Respondent Nos. 1, 2 and 3 in their reply dated 06.02.2023 submit that:

3.1 The present Application of the Applicant is not maintainable for want of limitation as the Application is filed beyond the prescribed period *i.e.*, 135 days as mentioned in Regulation 35A of Insolvency (Resolution Process for Corporate Persons) Regulations, 2016. The use of expressions "*shall form and*

*opinion*”, “*shall make a determination*” and “*shall apply to the Adjudicating Authority*” in the said Regulation 35 of the CIRP Regulations, 2016 shows mandate of the same.

- 3.2 The Respondents also submit that there is want of infirmity as there was no proper resolution of the CoC for appointment of Transaction Auditor and deciding their fees. The RP did not apprise the members of the CoC regarding the appointment of any Transaction Auditor.
- 3.3 The opinion so formed by the RP that several transactions carried out, are fraudulent in nature and that the business of the CD was carried out to defraud the creditors is based solely on the report dated 02.09.2022 of the Transaction Auditor. The Transaction Auditor has not concluded that all the transactions referred in the Application are fraudulent in nature. Moreover, the Report clearly mentions that the RP needs to take legal opinion to determine criminality of the Promoter/Company and accordingly, take directions from Adjudicating Authorities. The auditor has based its entire report on logical assumptions and has not conducted its own verification. The Transaction Auditor did not check the actual records and details of the transactions with the other party and has only relied on data provided to them and the conclusion of the audit was made when there was no service staff available in the CD Office which shows mala fide intent on the part of Transaction Auditor.
- 3.4 Only allegations has been made by the Applicants in respect of the amount which is due and payable by the Respondents and no documentary proof has been filed in support of the same, to show that the business of the CD was carried out by the Respondents with a dishonest intention and to defraud the creditors.
- 3.5 Specific reply with regards to the instances of transactions as mentioned in the Application are as follows:
- 3.5.1 **Advance to JSB Properties Pvt. Ltd. / Respondent No. 3-** The JSB Properties Pvt. Ltd. has given its Corporate Guarantee against loan taken by the CD (Byrnihat Coal Private Limited) from Punjab



National Bank. When they were in some urgent requirement of fund, they requested us to help them out and based on their Corporate Guarantee to the Bank, the Respondent No.1 had provided funds to them. Later, the Respondent No. 1 requested JSB Properties Pvt. Ltd. /Respondent No.3 to refund them back the advance amount, JSB Properties Pvt. Ltd. / Respondent No.3 suggested the Respondent No.1 to get their corporate guarantee released first.

**3.5.2 Sale of shares to M/s Ajay Ananya Kumar (HUF)/Respondent No.**

**4** - The Corporate Applicant had purchased shares of Kamrup Warehousing Pvt. Ltd. in April, 2010 for an amount of Rs.15.00 Lakh. It is submitted that due to requirement of funds in the business during FY 2015-16, the Corporate Applicant decided that the Corporate Applicant will go for sale out the shares of Kamrup Warehousing Pvt. Ltd. for an appropriate consideration and will accordingly meet its business needs. It is further submitted that the Corporate Applicant was looking after purchasers/buyers for the shares of Kamrup Warehousing Pvt. Ltd. But to the utter dismay of the Corporate Applicant, not very much satisfactory or fruitful offers were received. Later on, after heavy persuasion one offer was received wherein the buyer offered to purchase all the shares of Kamrup Warehousing Pvt. Ltd. for an amount of Rs. 1.50 Lakh only. As such, the Corporate Applicant sold the entire lot of shares and received the money from the buyer in CD's bank account as on 09/10/2015 during the FY 2015-16. It is worthy to mention here that the transaction was completed during that time itself at that time when the business of CD was running smoothly and profitably. However, the documentation process was ignorantly left out and later done in FY 2018-19. The answering deponent had already informed the Transaction Auditor that the purchase happened in April 2010 for Rs. 15.00 lakh. The copy of the Audited Balance Sheet for F.Y 2011-12 is enclosed herewith, wherein as per Note No. 7, Rs. 15 lakh were invested in Kamrup

Warehousing Pvt. Ltd. as on 31.03.2011 as well as 31.03.2012. That means the company invested in the shares of Kamrup Warehousing Pvt. Ltd. way before the bank loan, as the Bank loan was sanctioned in Feb' 2015. In the ABS for the F.Y 2011-12, the Court will find that there was no loan from any financial institutions or bank. That means, as on the date of investment, there was no loan from any Bank in Byrnihat Coal Pvt. Ltd. and the investment was made purely from its own sources by the company. So, the allegation made by the Transaction Auditor in its report that "transactions were entered by Corporate Debtors for keeping assets of the Corporate Debtor beyond the reach of any person who is entitled to make a claim against the Corporate Debtor and is covered under Section 49 of the IBC Code 2016 is totally baseless and to be rejected completely.

**3.5.3 Donation of shares to Mahalaxmi Foundation/ Respondent No. 5-**

The transfer of 80,000 equity shares of M/s Mahalaxmi Continental Ltd. were made in the form of Gift to Mahalaxmi Foundation i.e., the Respondent No.5 it is pertinent to note here that the donation was made after following proper norms and complying with necessary formalities. Also, the same was done way back in Sep, 2016 when business of the CD was running smoothly and was not showing any signs of disruption. Again, the answering deponent wants to state that the investment was made by the company before March 2012. Please refer to the Audited Balance Sheet for the F.Y 2011-12. That means the Company invested in the shares of M/s Mahalaxmi Continental Ltd. way before the Bank loan, as the bank loan was sanctioned in February, 2015. In the ABS for the F.Y 2011-12, the Hon'ble Court will find that there was no loan from any financial institutions or bank. That means, as on the date of investment, there was no loan from any Bank in Byrnihat Coal Pvt. Ltd. and the investment was made purely from its own sources by the company. So, the allegation made by Transaction Auditor in its report that transactions were entered by

Corporate Debtor for keeping assets of the Corporate Debtor beyond the reach of any person who is entitled to make a claim against the Corporate Debtor and is covered under Section 49 of the IBC Code 2016 is totally baseless and to be rejected completely.

4. Respondent Nos. 1, 2 and 3 have also filed their Written Submission citing case laws and relevant issues in support of their arguments/pleadings.
5. To put succinctly, Respondent No. 5 in their reply dated 07.02.2023 submit that:
  - 5.1 The mandatory ingredients to satisfy the requirements of Section 49 are not met by the Applicant. The transaction is not only *ex facie* beyond the look back period under the Insolvency and Bankruptcy Code, 2016 but also beyond the period for which the Transaction Auditor was engaged to scrutinize and prepare its report.
  - 5.2 The CD, in terms of a Deed of Gift dated 09.09.2016, had absolutely and unconditionally granted, conveyed, transferred and gave unto the answering Respondent 80,000 equity shares of Mahalaxmi Continental Limited as gift to the answering Respondent in due compliance of the laws, execution of share transfer form, including Form SH - 4. The allegation that the transaction is undervalued and entered into with the intent to defraud creditors *qua* the answering respondent is baseless and has no legs to stand. Be as it may, the Respondent No. 5, being the donee, is ready and willing to return the shares back in favour of the CD to ensure amicable resolution of the dispute.
  - 5.3 No documents have been annexed and/or enclosed to the Application which shows the decision of the Applicant in deciding upon and arriving at its determination. Regulation 35A of Insolvency (Resolution Process for Corporate Persons) Regulations, 2016 is mandatory in nature and in absence of any document recording the opinion and determination arrived at and the Applicant by simply making an averment for the purposes to show compliance of a provision of law without any basis to substantiate the same cannot be relied upon.
  - 5.4 Transfer of shares by gift will not fall within the definition of transfer in gift which cannot be the nature of business of the CD. The Applicant has failed

to demonstrate that the transaction has been carried out with the intent to defraud the creditors or carried out for the sole purpose of keeping the said shares beyond the reach of its creditors as alleged or at all

- 5.5 Gift deed was executed on 09.09.2016 *i.e.*, approximately more than five years prior to the initiation of the CIRP against the CD. It is obnoxious to contend that a valid transfer of shares by way of gift in favour of the Respondent was carried out as to ensure no funds/assets were available with the Creditors which could be appropriated by the Creditors as alleged or at all. It is denied that the value of the shares donated in favour of the answering respondent is Rs.80 Lakh as is alleged at the behest of the RP. The nominal value of the shares is Rs.10/- towards each share with the aggregate value of such shares being Rs.8,00,000/-.
6. The present Application was first listed on Board on 21.10.2022, when the Ld. Counsel appearing for the Applicant submitted that a copy of the Petition was sent by him to all the respective Respondents where after, upon confirmation of the said fact by Ld. Counsel, Mr. M. Sharma for the Respondent Nos. 1 and 2, all the Respondents were granted time to file their reply. However, no presence from the Respondent Nos. 3, 4 and 5 was recorded on that day. On the next date of hearing, *i.e.* on 01.12.2022, upon non-receipt of reply from Respondent No. 1 and 2, in the interest of justice, another opportunity was given to them to file their reply while also notifying Respondent Nos. 3, 4 and 5 that in case of their non-appearance even on the next date of hearing, *i.e.* 12.01.2023, the matter would proceed *ex parte* on the basis of the materials available on record.
7. However, despite the non-receipt of any reply from Respondent No 4, numerous opportunities stating that their right to reply shall stand forfeited were given over the course of hearings *i.e.* 12.01.2023, 09.02.2023, 23.02.2023, 24.03.2023, 19.05.2023, 16.06.2023, 04.08.2023, 25.08.2023, 03.10.2023, respectively, to file their reply. Since, time and again several opportunities were given to the Respondent No. 4 to file their reply and the same was not exercised by the said Respondent, this Bench is left with no option except to reserve the matter for orders after hearing the

submissions of other Respondents as per the material available on record while setting Respondent No. 4 *ex parte* on the date of final hearing *i.e.* on 06.11.2023.

8. While preparing the order certain discrepancies were observed in regard to the transactions referred in the application and hence the matter was de-reserved and listed for clarification on 11.12.2023 wherein the Authorized representative for the Applicant sought time to make submissions in respect of the discrepancies observed by the Bench and the matter was again listed on 18.01.2024. On 18.01.2024, having heard the counsel for the Applicant, the matter was reserved for order. However, the matter was again listed for clarification, and finally reserved on 13.05.2024.
9. Heard both sides and perused the material available on record. Section 49 of IBC, 2016 lays down the law with regards to “*transactions defrauding creditors*”. Such transactions are undervalued transactions which are “*deliberately*” entered into by the Corporate Debtor either:
  - 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.*
10. The scope of Section 49 of IBC, 2016 is different from other provisions of like nature such as Section 45 and Section 66 of the Code. The two key points of distinction between Section 49 and other similar provisions are that: (a) Section 49 has a mandate of “*intention to defraud*”. For either Section 43 or 45, intention to defraud does not play any role, however, the same cannot be said for Section 49. As soon as an element of “*ulterior intent to defraud*” comes into picture, it can be said that Section 49 comes into play. (b) Section 49 may be connected to Section 45, but is naturally different; otherwise, there was no requirement of having a different section at all. The intent of the debtor is to ‘keep assets of the Corporate Debtor beyond the reach of any person who is entitled to make a claim against the Corporate Debtor’. The UNCITRAL Guide on Insolvency Law clearly states that as the effect of these transactions will generally be to the disadvantage of all unsecured creditors, the transactions cannot be ‘automatically’ avoided by reference to an objective test of fixed period of time in which the transactions occurred because of the need to prove

the intent of the debtor. The intent is proven by identifying circumstances that are common to these type of transactions. Furthermore, on the basis of discussions and recommendations in the Interim Report of the Bankruptcy Law Reform Committee, it may be inferred that there is no look-back period for cases under Section 49. This is reliant on the two classic legal maxims, “*Fraud vitiates everything*” and “*Once a fraud, always a fraud*”.

11. The determination of whether a transaction is an Avoidance Transaction is a mixed question of fact and law, and each transaction is required to be examined on a case to case basis. Consequently, we are of the considered view that the aforementioned three transactions namely, Advance to JSB Properties Pvt. Ltd., Sale of shares to M/s Ajay Ananya Kumar (HUF) and Donation of shares to Mahalaxmi Foundation are all ought to be looked into independently in light of its essential elements of Section 49 *i.e.*, intention to defraud.
12. Further, the contention of the Respondents that the opinion of RP has not been formed stands refuted. After going through the submissions made by the Petitioner, we find that, the facts that Ld. RP had appointed Transaction Auditor on the basis of a pre-existing doubt, which was only later confirmed by the report so submitted by the Auditor, mentioning of specific instance of the transactions in question and filing of this Application with this Adjudicating Authority, are enough to determine that Ld. RP did form an opinion and firm determination with respect to the falling of aforementioned transactions under Section 49 of the Code. Additionally, the same was also affirmed by the Applicants after clarifications with regards to the same were sought by this Tribunal.
13. Furthermore, in relation to the contention of Respondents that Ld. RP has not complied with the prescribed period under Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, we hold that following the precedent already laid down by Hon’ble NCLAT in plethora of cases like *Jagdish Kumar Parulkar, RP of M/s Tayal Foods Pvt. Ltd. Vs. Vinod Agarwal Ex-Director, M/s Tayal Food Pvt. Ltd. Company Appeal (AT) (Insolvency) No.483 of 2022*. Hon’ble

NCLAT in *Aditya Kumar Tibrewal v. Om Prakash Pandey Company Appeal (AT) (Insolvency) No.583 of 2021* clarified:

*“Regulation 35A of the CIRP Regulations imposes a duty on the Resolution Professional to take measure within the timeline as prescribed. In performance of such duty the public in general has no control including the Corporate Debtor. In event it is held that any action taken by Resolution Professional beyond the time prescribed in Regulation 35A of the CIRP Regulations is prohibited, it shall cause serious general inconvenience or injustice to the Corporate Debtor. One of the objective of the Code is to maximise the assets of the Corporate Debtor. In event the actions taken by the Resolution Professional after the timeline prescribed in Regulation 35A of the CIRP Regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of Resolution Process, reach of the Court and shall cause great inconvenience and injustice to Corporate Debtor. Hence, we are of the view that timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the Resolution Professional beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be non-est or void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations. There may be genuine and valid reasons for Resolution Professional not to file Application for avoiding the transactions within time prescribed which are question relating to each case and has to be examined on case-to-case basis and if there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit.”*

14. Coming to the facts of the present case:

14.1 With regards to the **Advance to JSB Properties Pvt. Ltd.**, this Bench notes that as per the available details, JSB Properties Pvt. Ltd. is a shareholder of the CD with shareholding of 19.52% which is the third highest with respect to all shareholdings and can be construed upon as a related party. However, it is mentioned that an entity may enter into avoidance transactions even with an unrelated party, the treatment of avoidance transactions entered into with

related parties as a *sui generis* category arises because related parties may have superior information relating to the said company's financial affairs which may be used to divert assets of the company away from its creditors and stakeholders in during the period leading up to the commencement of insolvency proceedings. Transaction Auditor's Report annexed with the Petition has identified JSB Properties Pvt. Ltd., as a related party. Even if, it is argued that JSB Properties Pvt. Ltd. is not a related party or associate Company by virtue of its shareholding being less than 20 %, this Bench is of the considered view that the Respondents have failed to provide any valid justification for the advance given to JSB Properties Pvt. Ltd. - its 19.52 % stakeholder, without any interest, during the FY 2018-2019 and without any documentation. The Respondents, in their reply have cited help extended by the CD based on Corporate Guarantee provided by JSB Properties Pvt. Ltd. due to some urgent requirement of funds by JSB Properties Pvt. Ltd. However, the Respondents have failed to clarify/explain the urgent requirement of funds so mentioned by them and have also not provided any annexures with regards to the Corporate Guarantee. There is no justification for advance in respect of Corporate Guarantee. In the absence of any evidence in connection with the same, this Bench has no option but to determine that the transaction of advance sum of Rs. 38.60 Lakh is an avoidance transaction, made with the intention to defraud its creditors, as soon after the said advance made in the FY 2018-19, the CD filed an Application with this Tribunal under Section 10 of the Code initiating CIRP against itself, which is clearly indicative of financial stress within the company during the preceding years, as can also be deciphered *vide* Order [CP(IB) No.20/GB/2021] dated 01.04.2022 of this Bench wherein this Tribunal while allowing initiation of CIRP against the CD has also acknowledged that the CD was heavily indebted during the said FYs and that the creditors were also actively requesting outstanding dues. Hence, it can be reasonably inferred that the advance to JSB Properties Pvt. Ltd. is an undervalued transaction which was deliberately entered into by the CD for keeping assets of the CD beyond



the reach of its creditors. Therefore, in the interest of justice, equity and good conscience to aid the revival of CD, we direct Respondent No. 3 to refund/transfer a sum of Rs. 38.60 Lakh to CD.

- 14.2 With regards to the **Sale of shares to M/s Ajay Ananya Kumar (HUF)**, as is observed from the material perused, we find that the purchase of the shares of Kamrup Warehousing Pvt. Ltd. in question was made in the year 2011-12 (*Annexure-1 of Reply dated 06.02.2023 submitted by Respondents No. 1-3*) when CD was not suffering from financial distress. However, the entire lot of shares purchased for 15 Lakh were sold off to one HUF *i.e.*, M/s Ajay Ananya Kumar for a meagre amount of 1.50 Lakh only during the FY 2015-16 with receipt of money from the buyer in CD's bank account on 09.10.2015. The reason for such sale of shares at 1/10th rate, without any valuation, is submitted by the CD to be "*meet its business needs*". However, the same was not reflected in the financial statements until FY 2018-19 owing to ignorantly leaving out the documentation process. Taking into account the fact that bank loan from PNB was sanctioned to the CD on 05.02.2015, which is just a few months prior to the loss incurred by them from the sale of shares to M/s Ajay Ananya Kumar at 1/10th rate. Upon reflecting on the transactions that took place, we are only left to ponder as to why would a Company having being just sanctioned a loan amount of Rs. 7 Crore sell shares at a value of 1.50 Lakh which were originally purchased at a value of Rs. 15 Lakh. Nevertheless, as no valuation has been carried out for the shares to determine the fair value of the shares as on date of transfer and the loss has only been calculated on the basis of the difference in purchase price and sale price of the shares, it would not be proper for this Tribunal to presume any ulterior intent to defraud on part of the CD. Hence, in light of the aforementioned reasoning, this Tribunal cannot arrive at a conclusion that this sale of shares to M/s Ajay Ananya Kumar (HUF) is a transaction carried out with the intention to defraud its creditors.
- 14.3 With regards to the **Donation of Shares to Mahalaxmi Foundation**, we opine that as the Respondent No. 5 while denying the allegation of presence

NATIONAL COMPANY LAW TRIBUNAL  
GUWAHATI BENCH  
GUWAHATI

IA (IBC)/73/GB/2022 in  
CP (IB)/20/GB/2021

---

of any kind of intention to defraud as put forth by the Petitioner, has themselves expressed that are ready and willing to return the shares back in favour of the CD to ensure amicable resolution of dispute *vide* their Reply dated 08.02.2023, it is but just to grant them this liberty to do so in an amicable manner. Hence, in light of the consent given by Respondent No. 5 in Para 4 of their Reply, we direct Mahalaxmi Foundation to transfer 80,000 shares of Mahalaxmi Continental Ltd. to the Corporate Debtor.

15. In view of the foregoing, we pass the following order in terms of all the prayers:
  - i. We declare that the Transaction No. 1 as stated in the present Application as undervalued in terms of Section 49 of the Insolvency and Bankruptcy Code, 2016 and direct Respondent No. 3 to transfer a sum of Rs. 38.60 Lakh to the Corporate Debtor within a period of 3 weeks' time failing which an interest at the rate of 12% per annum shall be levied.
  - ii. We direct Respondent No. 5/Mahalaxmi Foundation to transfer 80,000 shares of Mahalaxmi Continental Ltd. to the Corporate Debtor.
16. Accordingly, with the above orders, **IA(IBC)/73/GB/2022 in CP (IB)/20/GB/2021 is allowed in part and disposed of.**
17. Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
18. Certified copy of this order, if applied for be issued upon compliance with all requisite formalities.
19. File be consigned to records.

Sd/-  
**Satya Ranjan Prasad**  
Member (Technical)

Sd/-  
**H.V Subba Rao**  
Member (Judicial)

*Signed this on 16<sup>th</sup> May, 2024.*