

**THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-I**

**I.A. 2853 OF 2021**

Under Section 66 of Insolvency &  
Bankruptcy Code, 2016

**Mr. Rajendra Kumar**  
The Resolution Professional

**...Applicant**

Vs.

**Invent Asset Securitisation and  
Reconstruction Pvt. Ltd.**

**...Respondents**

In the matter of

C.P.(IB) No. 3962/MB/2018

Bank of Baroda

**Financial Creditor**

Vs.

Chamber Construction Pvt. Ltd.

**Corporate Debtor**

*Order delivered on: 07.05.2024*

*Coram:*

**Shri Prabhat Kumar**  
Hon'ble Member (Technical)

**Justice V.G. Bisht (Retd.)**  
Hon'ble Member (Judicial)

*Appearances:*

For the Applicant : None

For the Respondent : Adv. Aniruth  
Purusothaman

For the Respondent No. 1 : Sr. Adv. Gaurav Joshi a./w  
Adv. Rohan Agarwal a/w  
Adv. Amey Hadwade and  
Adv. Kajol Punjabi

**ORDER**

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

1. This Application IA 2853/2021 is filed by Mr. Rajendra Kumar Girdhar (“Applicant”) against Invent Assets Securitisation and Reconstruction Pvt, Ltd, & others, in the matter of Chamber Constructions Pvt. Ltd. (Corporate Debtor) under Section 66 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs :

- a) That this Hon'ble Tribunal order and direct Respondent No. I to execute the Assignment Agreement in favour of the Corporate Debtor as agreed upon, under the MoU and refund to the Corporate Debtor the excess amount of Rs. 3,29,05,000/- (Rupees Three Crore Twenty-Nine Lakh and Five Thousand Only) paid by the Corporate Debtor to Respondent No. I together with any further monies received from the Official Liquidator of Mafatial;
- b) In the alternative to prayer clause (a) above, that this Hon'ble Tribunal, order and direct the Respondents to joint and severally

make payment of an amount of Rs. 38,19,05,000/- (Rupees Thirty-Eight Crore Nineteen Lakhs Five Thousand Only) towards refund of consideration received under the MoU along with interest.

c) For such other reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.

2. It is submitted that by an Order July 16, 2019 (the "Admission Order"), the National Company Law Tribunal, Mumbai Bench ("NCLT") had admitted the present Company Petition filed under Section 7 of the Code for initiation of corporate insolvency resolution process ("CIRP") of the Corporate Debtor. The Applicant was appointed as the Interim Resolution Professional and subsequently confirmed as the Resolution Professional by the Committee of Creditors ("CoC") at its first meeting held on August 19, 2019.

2.1. Vide an Order dated January 17, 2020 passed by this Tribunal, in Miscellaneous Application No. 94 of 2020, the period for completion of CIRP was extended to April 11, 2020. Furthermore, on account of COVID-19 outbreak and subsequent insertion of Regulation 400, in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020 whereunder, the period of lockdown imposed by the Central Government would not be computed for the purpose of CIRP and the last date for completion of CIRP was further extended to September 18, 2020.

2.2. Thereafter, since no resolution plan was received in the present case, in or about September 2020, the Applicant filed an Application under Section 33 of the Code seeking orders for liquidation of the Corporate Debtor. This Application, being MA

No. 2471 of 2020, is pending hearing before this Hon'ble Tribunal. It may be relevant to note that during the hearing of the aforesaid liquidation Application, the erstwhile directors of the Corporate Debtor proposed to settle the dues of the lenders and this Tribunal has granted time to the lenders to consider the same.

2.3. During the corporate insolvency resolution process ("CIRP"), the Applicant learnt of a very peculiar transaction entered into between the Corporate Debtor (under the control of the erstwhile management) and Respondent No.1 (the "Transaction"), which from its sequence of events, reeks of mala fides and collusion. The Applicant has assessed this transaction and all its facets in great detail and has arrived at the inexplicable conclusion that the said transaction is fraudulent in terms of Section 66 of the Code. In the paragraphs to follow, the factual matrix of the Transaction is described.

2.4. Vide an Assignment Agreement dated November 29, 2011, Kotak Mahindra Bank assigned the debt receivable under a credit facility availed by Mafatlal Engineering Industries Ltd. ("Mafatlal") in favour of Respondent No.1. Mafatlal is in liquidation under the Official Liquidator of the Hon'ble Bombay High Court since September 30, 1999 which liquidation process is still ongoing.

2.5. Thereafter, the Corporate Debtor and Respondent No.1 entered into a Memorandum of Understanding dated December 17, 2011 (the "MoU") for assignment of debt of Mafatlal, in favour of the Corporate Debtor. Some of the key terms and conditions of the MoU are as follows:

- i) The debt to be assigned was dues (of Kotak Mahindra Bank) to the tune of Rs. 15,34,49,940/- together with interest at the rate

of 12% starting from January 16, 1999 till payment and or realization due and payable by Mafatlal under a credit facility (the "Debt") as per Clause 4 in Schedule 1 of the MOU.

- ii) The Corporate Debtor was liable to pay a total purchase consideration of Rs. 36,90,00,000/- (Rupees Thirty Six Crore Ninety Lakh Only) to Respondent No. I in the following manner:

As per Schedule 3 of the MoU:

99% of purchase consideration by November 28, 2011 (being a date prior to execution of the MoU and even prior to assignment by Kotak Mahindra Bank).

Balance of 1% of Purchase Consideration by June 30, 2013, or on the date of execution of Assignment Agreement.

- iii) Upon payment of the consideration as above, the Debt was to be assigned to the Corporate Debtor.

2.6. It is also relevant to note that the Official Liquidator in the proceedings of liquidation of Mafatlal, admitted a claim amount of Rs. 16,68,35,784/- (Rupees Sixteen Crore Sixty-Eight Lakh Thirty-Five Thousand Seven Hundred and Eighty-Four Only). The rationale behind the quantum of admitted claim is the principal amount plus interest calculated till September 30, 1999 (being the date of the winding up order for Mafatlal.)

2.7. Pertinently, the Applicant was unable to locate the Assignment Agreement in the records of the Corporate Debtor. Therefore, vide a letter dated February 29, 2020, the Applicant, inter alia, called upon Respondent No.1 to (i) confirm receipt of payment consideration; and (ii) furnish a copy of the Assignment

Agreement. To the utter shock and disbelief of the Applicant, Respondent No.1, vide a letter dated March 17, 2020, informed the Applicant that, the amounts paid by the Corporate Debtor in lieu of the MoU stood forfeited on account of non-payment of the consideration by the Corporate Debtor as per clause 2 of the MoU. Moreover, it was stated by Respondent No.1 that, it is not liable to execute the Assignment Agreement in favour of the Corporate Debtor as a result of non-payment of consideration.

2.8. Subsequently, on August 31, 2020, the Applicant put forth the queries with regards to the MoU before the erstwhile management of the Corporate Debtor during the Seventh meeting of the Committee of Creditors of the Corporate Debtor. The Applicant was informed by Respondent No. 3 that an amount of Rs. 38,19,05,000/- (Rupees Thirty-Eight Crore Nineteen Lakh Five Thousand Only) was paid by the Corporate Debtor to Respondent No.1 between the period of October 11, 2011 till January 07, 2014. In addition, vide letter dated October 7, 2020 addressed by Respondent No.3 to the Applicant, the Respondent No. 1 is also liable to transfer back an amount of Rs. 2,00,00,000/- (Rupees Two Crore Only) which was received from the Official Liquidator of Mafatlal.

2.9. It is most pertinent to note that, an amount of Rs. 40,19,05,000/- (Rupees Forty Crore Nineteen Lakh and Five Thousand Only) in total was paid by the Corporate Debtor to Respondent No. 1 in lieu of the MoU. Consequently, an amount of Rs. 3,29,05,000/- (Rupees Three Crore Twenty Nine Lakh and Five Thousand Only) was found to have been paid over and above the purchase

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consideration as mentioned in the MoU i.e., Rs. 36,90,00,000/- (Rupees Thirty Six Crore Ninety Lakh Only).

2.10. The Applicant submits that, the Corporate Debtor had made payments of Rs. 36,33,00,000/- (Rupees Thirty-Six Crore Fifty Three Lakh Only) being 98.99% of the total purchase consideration by November 28, 2011 (i.e., on a date prior to the execution of the MoU and assignment of Debt from Kotak to Respondent No.1) and further, an amount of Rs. 1,66,05,000/- (Rupees One Crore Sixty Six. Lakh and Five Thousand Only) was paid in smaller instalments during the period December 18, 2013 to January 07, 2014, aggregating to a total of Rs. 38,19,05,000/- (Rupees Thirty-Eight Crore Nineteen Lakhs Five Thousand Only). A summary of the above payments is mentioned below:

| Sr. No.   | Issue Date | Cheque No. | Drawn on             | Amount (Rs.)           |
|---|------------|------------|----------------------|------------------------|
| 1.  | 11.10.2011 | 420280     | Punjab National Bank | 3,69,00,000.00         |
| 2.  | 28.11.2011 | 888758     | Dena Bank            | 10,00,00,000.00        |
| 3.  | 28.11.2011 | 888759     | Dena Bank            | 10,00,00,000.00        |
| 4.  | 28.11.2011 | 888760     | Dena Bank            | 12,84,00,000.00        |
| <b>Paid till 28.11.2011</b>                             |            |            |                      | <b>36,53,00,000.00</b> |
| 5.  | 18.12.2013 | 698292     | State Bank of India  | 36,05,000.00           |
| 6.  | 07.01.2014 | 698293     | State Bank of India  | 50,00,000.00           |
| 7.  | 07.01.2014 | 698294     | State Bank of India  | 50,00,000.00           |
| 8.  | 07.01.2014 | 698295     | State Bank of India  | 30,00,000.00           |
| <b>Paid (18.12.2013 – 07.01.2014)</b>                   |            |            |                      | <b>1,66,05,000.00</b>  |
| <b>Total Amount Paid</b>                                |            |            |                      | <b>38,19,05,000.00</b> |
| <b>Total Consideration Amount to be paid as per MOU</b> |            |            |                      | <b>36,90,00,000.00</b> |

- 2.11. In view of the above, the Applicant vide letter dated October 23, 2020 addressed to Respondent No.1, inter alia, stating that, (i) an excess amount of Rs. 3,29,05,000/- has been paid to the Respondent; (ii) as per the MoU, the seller could extend the date for execution of the Assignment Agreement till June 30, 2014; and (iii) Respondent No.1 was liable to refund the excess amount and bound to execute the Assignment Agreement as per the terms of the MoU. Hereto annexed and marked as Annexure "H" is a copy of the letter dated October 23, 2020,
- 2.12. In response to the above letter, vide letter dated November 09, 2020, Respondent No.1 denied being in receipt of any excess amount and blatantly contended that an amount of Rs. 4,90,53,905/- (Rupees Four Crore Ninety Lakhs Fifty-Three Thousand Nine Hundred and Five Only) out of the total payment of Rs. 38,19,05,000/- was adjusted against expenses, part handling charges and consultancy charges in terms of the MoU. Respondent No.I never provided any justification for the deduction of patently exorbitant and unsubstantiated amount. Further, Respondent No. I contended that instead of Rs. 2,00,00,000/- only Rs. 76,77,497/- (Rupees Seventy Six Lakh Seventy Seven Thousand Four Hundred and Ninety Seven Only) was received red from from the Official Liquidator of Mafatlal. However, the said receivable from the Official Liquidator was also appropriated by Respondent No. I on the ground that Respondent No.I was no longer obligated to execute the Assignment Agreement.
- 2.13. Further, the Applicant addressed another letter dated February 06, 2021 to Respondent No.1 reiterating that, the Corporate Debtor has already paid Rs. 36.53 Crores prior to the date of execution of the



MoU. Furthermore, when Respondent No.1 had previously admitted that they are in receipt of Rs. 76,77,497/- from the official Liquidator of Mafatlal then the same amount was ought to be transferred to the Corporate Debtor. Also, Respondent No. I ought not to have adjusted any amount, expenses, part handling charges or consultancy charges.

- 2.14. Respondent No.1 replied to the above letter vide its letter dated February 26, 2021, inter alia, stating that, only an amount of Rs. 33,30,00,000/- (Rupees Thirty-Three Crore Thirty Lakhs Only) was received from the Corporate Debtor after making adjustments for handling and consultancy charges. Further, Respondent No. I erroneously contended that an additional amount of Rs. 1,48,905/- (Rupees One Lakhs Forty-Eight Thousand Nine Hundred and Five Only) was recoverable from the Corporate Debtor, for charges incurred by Respondent No.1 on behalf of the Corporate Debtor.
- 2.15. Vide letter dated August 23, 2021 addressed to the Respondents, the Applicant, inter alia, reiterated the abovementioned facts and requested Respondent No.1 to (i) execute a deed of assignment in respect of the Debt of Mafatlal; and (ii) refund an amount of Rs. 3,29,05,000/- (Rupees Three Crore Twenty-Nine Lakh and Five Thousand Only) being the excess amount paid under the MoU
- 2.16. Vide a letter dated September 2, 2021, Respondent No.1 once again wrongly denied the request of the Applicant by contending that the Corporate Debtor was in default of Clause 2 of the MoU and therefore, Respondent No.1 had forfeited the amount received from the Corporate Debtor. Further, an amount of Rs. 1,48,905/- is also recoverable from the Corporate Debtor but the same had been forgone on account of cancellation of the MoU.

- 2.17. The Applicant has not received any response from Respondent Nos. 2 to 3 to its letter dated August 23, 2021. To ensure that transaction involving acquisition of assets is just and transparent, the RBI, while exercising its powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 passed a circular dated July 01, 2009. As per the circular few guidelines were issued by the RBI directing Asset Reconstruction Companies to ensure that they have such an Asset Acquisition Policy, which ensures that transactions take place in a transparent manner and at a fair price in a well- informed market and executed at arm's length while exercising due diligence.
- 2.18. The Applicant submits that, it is evident from the following observations that, that Respondent No.1 has demonstrated scant regard to the guidelines issued by the RBI and evidently, benefitting at the cost of the Applicant:
- a. Under the MoU dated December 17, 2011, 99% of the consideration was to be paid on November 28, 2011, which is prior to the date of MoU. Curiously, the MoU does not record the receipt of 98.99% of the consideration as on the date of the MoU. Further, the MoU was executed, knowing fully well that as on the date of execution of the MoU, the Corporate Debtor was already in default of clause 2 of the MoU.
  - b. Further, the assignment by Kotak Mahindra Bank in favour of Respondent No.1 was undertaken by way of an Assignment Agreement dated November 29, 2011. Most surprisingly, an amount of Rs. 36,53,00,000/- was already paid by the Corporate Debtor to Respondent No.1 on

November 28, 2011 i.e., prior to the assignment by Kotak Mahindra Bank in favour of Respondent No.1.

3. The Respondent 1 had filed affidavit in reply stating that Respondent vide its letter dated 09.11.2020 has informed the Applicant that out of the amount of Rs.38,19,05,000/-, an amount of Rs. 33,30,00,000/- crores was adjusted against the purchase consideration specified in the MoU and the balance amount was appropriated towards expenses, handling charges and consultancy charges paid to M/s. Morris Energy Limited and M/s. Savlani Trading & Investment Co. Private Limited. Further, it was informed that as per the terms of MoU, in the absence of execution of Assignment Deed due to default on the part of the Corporate Debtor, the amount received from the Official Liquidator was the property of this Respondent. It was also clarified that the amount received from the Official Liquidator was Rs.76,77,497/- and not Rs.2 crores as falsely alleged by the Applicant. These facts were again reiterated by this Respondent in its letter dated 02.09.2021 addressed to the Applicant in reply to his queries/clarifications sought. Hence, there is no question of any overpayment by the Corporate Debtor.

3.1. Further, vide letter dated 06.02.2020, the Applicant has concocted facts and sought to make allegations against this Respondent. The same is unjustified and baseless allegations made by the Applicant were responded to by this Respondent vide its letter dated 26.02.2021. By this letter, this Respondent inter alia fully disclosed Clauses 2, 3(a) and 3(c) of the MOU and explained that it was therefore under no obligation to disclose the full details of

the amount received from the Official Liquidator and all actions of forfeiture in pursuance of the MOU is a transaction, beyond the scope of review of the Applicant.

3.2. Further, a letter dated 02.09.2021 referred to therein reaffirms as to how this Respondent was within its contractual rights to terminate the MOU. Consequently, an amount of Rs.1,48,905/- is also recoverable from the Corporate Debtor. However, this Respondent has foregone such amount on account of cancellation of MOU.

3.3. The transaction between Respondent No.1 and the Corporate Debtor was purely commercial in nature. The MOU represented the continuance of the transaction between the parties and not culmination of the transaction, as has sought to be alleged by the Applicant. This can be further corroborated by a persual of Clause 2 of the MOU which allows time to the Corporate Debtor for making the payment till 30.06.2013 upon which the Assignment Agreement would be executed. Further, this time could be extended up to 30.06.2014 and even beyond that, with the consent of both parties. However, in view of the defaults on the part of the Corporate Debtor to make payments to this Respondent, no Assignment Agreement was entered into, which was in line with the provisions of the MOU. The Applicant cannot now, after a period of almost 8 years, color a purely commercial transaction into that of a 'fraudulent nature.

3.4. Upon perusal of the provisions of Section 66 of the Code, it will be clear that the same can be invoked only in the case of fraudulent trading or wrongful trading. In the present case, a commercial transaction between this Respondent and the Corporate Debtor was

not taken to its logical conclusion solely in view of the breaches and defaults committed by the Corporate Debtor. That by no stretch of imagination can such a commercial transaction be alleged to be a "fraudulent transaction within the meaning prescribed under the provisions of Section 66 of the Code, or otherwise.

4. Heard learned counsel for the both sides and perused the materials available on record.

4.1. We note that an Memorandum of Understanding was entered into on December 17, 2011 for assignment of debt of Mafatlal, in favour of the Corporate Debtor, which was acquired by the Applicant on 29.11.2011 from Kotak Mahindra Bank Limited. It is pertinent to note that the said MOU stipulated payment of consideration under the transfer of debt to the Corporate Debtor by 28.11.2011, which is a day just preceding the acquisition of said debt by the Respondent No. 1 from Kotak Mahindra Limited. We also note that the Corporate Debtor had already paid a sum of Rs. 36.53 crores by 28.11.2011 out of total consideration of Rs. 36.90 crores, out which a sum of Rs. 3,69,00,000/- constituting 1% of total consideration was paid on 11.10.2011. It is not disputed that the Corporate Debtor was in default when these payments for acquisition of debt from Respondent No. 1 were made. These facts indicate that the acquisition of debt by the Respondent No. 1 from Kotak Mahindra Bank was a pre-arranged transaction whereby the Corporate Debtor had agreed in advance to acquire the debt of Mafatlal from Kotak Mahindra Limited through the Respondent No. 1, which was followed by payment of 1% of total consideration (which may have been agreed in advance between

the Corporate Debtor and the Respondent No. 1) even prior to acquisition of debt by the Respondent No. 1 from Kotak Mahindra Limited. The applicant has stated in rejoinder that the admitted claim of Respondent No. 1 by the Official Liquidator in winding up proceedings of Mafatlal stood at Rs. 15,34,49,940/- only because all the liabilities stands frozen on the date of winding up order. These facts, undoubtedly, lead to irresistible conclusion that this transaction of acquisition of debt of Mafatlal from Respondent No. 1 was undertaken to defraud the creditors of the Corporate Debtor, consciously knowing the loss this transaction would cause to its creditors and benefitting the applicant at their cost.

4.2. The Respondent No. 1 has heavily relied upon the clause 7 of MOU titled as “No Recourse & Forfeiture”, and has contended that the Corporate Debtor failed to make payments by 28.11.2011 in terms of MOU dated 17.12.2011, a fact which was known to both the parties even at the time of such MOU on 17.12.2011 incorporating such condition therein. It follow therefrom that the forfeiture was a fait-accomplis and known to both the parties even at the time of entering into said MOU on 17.12.2011. This MOU appears to have been consciously entered into to cover up the transaction of payment and can not be said to have been entered into the interest of Corporate Debtor.

4.3. Section 66(1) of the Code provides that *“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.”* The fraudulent purpose has not been defined in the Code, however, explanation to Section 447 of the Companies defines Fraud to mean “*in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.*” In the present case, the Respondent No. 2 & 3 have abused and have connived with Respondent No. 1 to injure the interest of corporate debtor’s creditors. Accordingly, we have no hesitation to hold that the transaction, in question, ought to be avoided by setting aside the MOU dated 17.12.2011, which is a sham documents having been entered into defraud the creditors of Corporate Debtor.

4.4. The Hon’ble Supreme Court in the case of Gluckrich Capital has held that no order in terms of section 66 can be passed in relation to third parties. Accordingly, we refrain from directing the Respondent No. 1 to make contributions to the Corporate Debtor in terms of Section 66 of the Code, however, the Applicant shall be at liberty to recover the

amounts paid by Corporate Debtor from Respondent No. 1 under the normal provisions of law, once we have set aside the MOU, which is stated to have vested right in Respondent No. 1 to forfeit the money paid by the Corporate Debtor. Nonetheless, we also make it clear that the Respondent No. 1 claim enrichment by having received the substantial consideration and also laying claim over the contributions to be received from the Official Liquidator.

4.5. Further, the Respondent No. 2 & 3 shall be liable to contribute to the assets of the Corporate Debtor a sum of Rs. 36.53 crores jointly or severally within 30 days of this Order. In case the amounts are not contributed within 30 days, they shall be liable to pay interest @ 12% p.a. compounded annually on the amount remaining unpaid till all the amounts under this order stands paid.

5. In view of the aforesaid, IA 2853 of 2021 is allowed and disposed of accordingly.

Sd/-

**Prabhat Kumar**  
Member (Technical)

Sd/-

**Justice V.G. Bisht**  
Member (Judicial)