

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
01-07-2024 AT 10:30 AM**

**CP(IB) No. 329/7/HDB/2020
AND
IA(IBC) 22, 516/2023, IA(IBC) 435 & 1276/2024 in
CP(IB) No. 329/7/HDB/2020
u/s. 7 of IBC, 2016**

IN THE MATTER OF:

State Bank of India

...Financial Creditor

AND

Dharti Dredging and Infrastructure Ltd

...Corporate Debtor

C O R A M:-

**DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)**

O R D E R

IA(IBC) 22/2023

Orders pronounced. **In the result, this application is dismissed. No costs.**

IA(IBC) 516/2023

Orders pronounced. **In the result, this application is dismissed. No costs.**

IA(IBC) 435/2024

Learned Counsel Mr GP Yash Vardhan, for applicant present physically.

Learned Counsel Ms Santhi Chandra, for Respondents present through Video Conference.

Matter passed over.

Matter called again. Heard learned counsel for the applicant and the respondent in part.

At request for continuation, matter adjourned to 16.07.2024.

IA(IBC) 1276/2024

Learned Counsel Mr Malhar Zatakia, for applicant present through Video Conference.

Proof of service filed. As per the same the respondents are served.

Learned Counsel Mr GP Yash Vardhan, present and submits that he has been instructed to appear on behalf of Respondent No.1.

Learned Counsel Mr VVSN Raju, present and submits that he has been instructed to appear on behalf of Respondent Nos.2,3 and 4.

Learned Counsel Mr Anurag Shah, Mr Abhinav More along with Mr Nitish, present and submits that they are instructed to appear on behalf of Respondent No.5. Learned counsel for Respondent No.5 submits that he e-filed the counter and under takes to file physically during the course of the day.

Let learned counsel for 5th Respondent serve a copy of the counter on the applicant side, if not received by the applicant and so also the Respondent Nos 1 to 4 who are to file counter to serve the copy of the counters at least three days before the next hearing date on the applicant.

At request of Learned Counsels for Respondent Nos 1 to 4, for filing counters two weeks' time granted.

Matter adjourned to 16.07.2024.

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

**THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH - I, HYDERABAD**

I.A. No. 22/2023

IN

C.P. (IB) No.329/7/HDB/2020

Under Section 66 of The Insolvency and Bankruptcy Code, 2016 read with
Rule 11 of The National Company Law Tribunal Rules, 2016

BETWEEN

State Bank of India

[Also representing Federal Bank & ICICI Bank Limited]

Stressed Assets Management Branch, Secunderabad,

5-9-76, 2nd & 3rd Floor, Prabhat Towers,

Opp. Amaravathi LHO, Chapel Road, Gunfoundry, Hyderabad-500001

Rep. by Shri P. Prashanth Kumar, Assistant General Manager

...Applicant

VERSUS

1. Krishna Komaravolu

Resolution Professional of Mantovani Di Dharti Private Limited

H.No. 7-1-214, Flat No.409, Vamsikrishna Apartment,

Dharam Karam Road, Ameerpet,

Hyderabad - 500016

2. Rajeshkumar Radheshyam Jhunhunwala

14, Chowpatty View, Morvi Lane,

Chowpatty, Mumbai – 400007

Also, at
1802 A, Vivaren Towers,
Jacob Circle, Sane Guruji Marg,
Mahalaxmi, Mumbai – 400001

3. Akumalla Rajendra

Plot No. 148, Survey No.69/1,
Ravi Colony, Trimulgherry, Hyderabad – 500015

4. Vijaya Lakshmi Alur

Plot No. 148, Survey No.69/1,
Ravi Colony, Trimulgherry, Hyderabad – 500015

5. Nageshwar Rao Cuddapah

23, Shree Krupa, NIICS Layout, Plan 2, 7th A Main,
Govindarajnar, Bengaluru, Karnataka – 560079

...Respondents

Date of Order: 01.07.2024

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

HON'BLE MEMBER (JUDICIAL)

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For Applicant : Mr. GP Yash Vardhan, Counsel

For Respondents No. 2 to 5 : Mr. Rajashekar Rao Salvaji, Counsel

PER BENCH
ORDER

1. This application was originally filed by Mr. G. Madhusudhan Rao, erstwhile 'Resolution Professional' (hereinafter referred as 'RP') of 'M/s. Dharti Dredging and Infrastructure Ltd' (hereinafter referred as 'Corporate Debtor') under Section 66 of 'The Insolvency and Bankruptcy Code, 2016' (hereinafter referred as 'IBC') read with Rule 11 The National Company Law Tribunal Rules, 2016. The reliefs sought for in the present application are as follows:

- *To declare the Agreement of Lease and Purchase of Tremie Barge dated 01.12.2018 null and void.*
- *To pass necessary directions to the Respondent No.1 for handing over the possession of the Tremie Barge immediately to the erstwhile Resolution Professional.*
- *To pass necessary order directing the Respondent No.2 to 5 to make contribution to the asset of the Corporate Debtor to the extent of aggregate amount of Rs.1,71,50,00,000 (Rupees One Hundred and Seventy One Crores Fifty Lakhs only) plus taxes, which is the extent of loss caused to the stakeholders of the Corporate Debtor by having leased out the Tremie Barge at an extremely nominal rate to Mantovani Di Dharti Private Limited.*

2. The Corporate Debtor was put into ‘Corporate Insolvency Resolution Process’ (hereinafter referred as ‘CIRP’) by an order of this Tribunal dated 05.04.2022 in C.P. (IB) NO. 329/7/HDB/2020 and appointed Mr. G. Madhusudhan Rao as the Resolution Professional of the Corporate Debtor. Subsequently, this Tribunal vide order dated 20.07.2023 in I.A. NO. 385/2023, approved the Resolution Plan of the Corporate Debtor and as per the Resolution Plan, State Bank of India (hereinafter referred as ‘Applicant’) replaced the erstwhile RP and is pursuing the present application.
3. It was submitted that Respondent No. 2 to 5 are the suspended directors of the Corporate Debtor and that Respondent No. 3 & 4 are also the suspended directors of ‘M/s. Mantovani Di Dharti Private Limited’ (hereinafter referred as ‘MDPL’) which is undergoing CIRP wherein Respondent No.1 was appointed as the Resolution Professional. Based on this statement, it was submitted that the Corporate Debtor herein and MDPL are related parties.
4. It was submitted that upon scrutiny of the records and books of accounts of the Corporate Debtor, the erstwhile RP found that the Corporate Debtor was subjected to fraudulent transaction/trading

entered with MDPL and the same would fall under the purview of Section 66 of IBC.

5. It was submitted that the Corporate Debtor initially entered into a lease agreement for charter of Tremie Barge titled as “BIMCO Uniform Charter” dated 03.04.2012 with East Marine PTE LTD at the rate of 6,25,000/- Singapore Dollars per month (equivalent to INR 3,50,00,00/-) for 6 months and the same was extended from time to time. Subsequently, the Corporate Debtor purchased this Tremie Barge from East Marine PTE LTD (date of purchase not mentioned).
6. It was submitted that the Corporate Debtor entered into an agreement dated 01.12.2018 (**Exhibit F**) for lease and purchase of Tremie Barge with the MDPL wherein the Tremie Barge was leased out for a period of 7 years commencing from 01.12.2018 to 30.11.2025 for a total consideration of Rs.15,00,00,000/- (which is Rs.17,85,714.30/- per instalment) payable in 84 instalments. That after the payment of this consideration, the ownership in the Tremie Barge would stand transferred to MDPL.
7. It was submitted by the Applicant that this leasing out of the Tremie Barge at the rate of Rs. 17,85,714.30/- per month is much below the

fair market value as the Corporate Debtor earlier took the lease of this same Tremie Barge at a rate of Rs.3,50,00,000/- per month from the erstwhile owner i.e., East Marine PTE Ltd. That the erstwhile Resolution Professional was apprised by the Company Secretary and CFO of the Corporate Debtor vide email dated 10.09.2022 confirmed that the Tremie Barge would fetch around Rs.3,50,00,000/- to Rs.3,60,00,000/- as on the date of email (**Exhibit G**). It was submitted that the Charter Engineer, Institution of Civil Engineers India vide letter dated 30.11.2022 addressed to the Company Secretary of the Corporate Debtor confirmed that the Tremie Barge would fetch around Rs.3,50,00,000/- per month on lease (**Exhibit H**).

8. It was submitted by the Applicant that the above-mentioned facts make it clear that the Respondents No.2 to 5 have caused a significant loss to the Corporate Debtor by leasing out the Tremie Barge at an extremely nominal rate to MDPL and hence, a declaration in this regard may be given.
9. It was also submitted that MDPL, even after taking the lease of the Tremie Barge at a nominal rate, failed to pay the lease rent and also

not even handing over the Tremie Barge even after several reminders and communications.

10. The Respondent no.3 on the other hand, denying all the averments of the Application, raise preliminary objections against the present Application. prayed for dismissal of the same.

Counter on behalf of Respondent No.1

11. It was submitted on behalf of Respondent No.1 (Resolution Professional of MDPL) that an EPC contract was awarded to MDPL by Swan LNG Private Limited, Ahmedabad (SLPL). That in furtherance of execution of this contract, MDPL purchased assets from the Corporate Debtor which also includes the 'Lease and Purchase of Tremie Barge Agreement' entered into by MDPL with the Corporate Debtor on 01.12.2018.

12. It was submitted that the Corporate Debtor requested MDPL to remit an amount of Rs.4 crores as One Time Settlement to be paid to M/s. Federal Bank Limited so as to stop the insolvency proceedings initiated by M/s. Federal Bank Limited against the Corporate Debtor. That an addendum dated 30.08.2021 to the Lease and Purchase Agreement was executed to incorporate this payment of Rs.4 crores to

the Corporate Debtor and that this payment covered the lease rental obligations of MDPL. It was submitted that this payment of Rs. 4 crores was not brought before the Tribunal by the Applicant. It was also submitted that the main business of MDPL was executing EPC contract and that MDPL never involved in renting out assets to any party.

13. It was submitted that the Applicant mentioned about the possible lease rentals of Tremie Barge as Rs.3.5 crore per month but that the Applicant did not disclose the quotation obtained from SLPL (being the present user of Tremie Barge) is Rs.10 lakhs per month for the fare boat and Rs.25 lakhs per month on charter basis (**Annexure A1**).
14. It was submitted that the CoC of MDPL decided to include the lease rents of Tremie Barge in the CIRP costs and that the same was communicated by Respondent No.1 to the erstwhile RP of the Corporate Debtor. It was also submitted that with the permission of CoC of MDPL, the Respondent No.1 is ready to return the possession of Tremie Barge to the Corporate Debtor on condition that the Corporate Debtor has to deposit Rs. 4 crores along with interest @16% from the date of disbursement

Counter on behalf of Respondent No.3

15. It was submitted that all the allegations in the application were made against MDPL but that MDPL was not made a party to the application and instead, the Resolution Professional of MDPL was arrayed as the party. It was further submitted that the erstwhile RP of Corporate Debtor did not adhere to *Regulation 35 A of IBBI (Resolution Process for Corporate Persons) Regulations, 2016* and that as per the same, the present Application was to be filed on 13.08.2022 but whereas it was filed on 29.12.2022 and liable to be dismissed for not complying with the timelines.
16. It was submitted that the erstwhile RP have not applied his own mind and relied completely on the information given by the Charter Engineer, Institute of Civil Engineers India. It was further submitted that the Charter Engineer did not physically check the Tremie Barge and that there is no material in support of the contentions made in the application.
17. It was submitted that the Corporate Debtor initially took the Tremie Barge on lease from M/s. East Marine PTE Ltd Expat at a rate of INR 2.62 crores and not INR 3.6 crores as averred by the Applicant. It was

submitted that the Corporate Debtor hired this Tremie Barge along with a hydraulically operated telescopic tremie pipe arrangement inclusive of maintenance. It was further submitted that the Corporate Debtor purchased the Tremie Barge vide Sale cum Purchase Agreement dated 25.11.2014 from M/s. East Marine PTE Ltd for Singapore Dollars 4,750,000/- (equivalent to Rs.22,80,00,000/-) and that the Applicant claiming an estimated lease rent of Rs.3,50,00,000/- per month in respect of the same is untenable.

18. It was submitted that the Tremie Barge was hired by the Corporate Debtor along with the crew of M/s. East Marine PTE Ltd Expat in 2012, whereas the MDPL hired the vessel in “AS IS WHERE IN CONDITION” without any special arrangements and that the usage of the vessel by the Corporate Debtor deteriorated the condition of the vessel. It was submitted that MDPL invested in repair works and other necessary works to be carried out on the vessel which resulted in the reduction of market value of the vessel. It was also submitted that the terms and conditions in respect of purchase by the Corporate Debtor from East Marine PTE Ltd Expat were different from the lease and purchase terms between the Corporate Debtor and MDPL. It was

- submitted that these two agreements cannot be compared as there is a difference between the rates in the year 2012 and that of in 2018.
19. It was submitted that the Tremie Barge License was expired and the machinery crossed the prime usage capability. It was submitted that the agreement with MDPL was entered generate revenue to the Corporate Debtor even after the expiry of IR Class/NK Class certification and that Respondent No.3 took all the steps to maximise the revenue of the Corporate Debtor.
 20. The Respondent No.3 also denied the contentions made in respect of the pending lease dues to be paid by MDPL to the Corporate Debtor.
 21. Respondent No.2, 4 & 5 adopted the contentions of the Counter of Respondent No.3.
 22. Denying the defences put on behalf of Respondents No. 1 to 5, the Applicant filed a rejoinder.
 23. The applicant and the Respondents No.2, 3, 4 & 5 filed written submissions in support of the contentions raised.
 24. In the light of the contest put forth as above by both the parties, the point that emerges for the consideration of this Tribunal is:

Whether the transaction of leasing the Tremie Barge in the facts and circumstances averred in the present application disclose that the said transaction is carried out in a fraudulent or wrongful manner so as to defraud the creditors as provided under Section 66 of IBC? If so, to what relief?

25. Heard Mr. GP Yashvardhan, Ld. Counsel on behalf of Applicant and Mr. Rajashekar Rao Salvaji, Ld. Counsel on behalf of Respondents No. 2, 3, 4 & 5, perused the record and the submissions.

POINT

Whether the transaction of leasing the Tremie Barge in the facts and circumstances averred in the present application disclose that the said transaction is carried out in a fraudulent or wrongful manner so as to defraud the creditors as provided under Section 66 of IBC? If so, to what relief?

Submissions

26. Ld. Counsel for the applicant submitted that the erstwhile RP after assuming the duties as Resolution Professional of the Corporate Debtor observed that a transaction was entered into between Corporate

Debtor and MDPL which would fall under the purview of Section 66 of IBC and submitted that MDPL is a related party to the Corporate Debtor as Respondent No.3 & 4 are the suspended Directors of both the Corporate Debtor and MDPL.

27. Ld. Counsel for Applicant further submitted that earlier, the Corporate Debtor took a Tremie Barge on lease from M/s. East Marine PTE Ltd Expat at a price of Rs.3,50,00,000/- per month and subsequently, purchased the said Tremie Barge. It was submitted that this Tremie Barge was leased out to MDPL at a price of Rs.17,50,000/- per month which is less than the actual market value and in support of this contention, Ld. Counsel submitted that the lease charges at which MDPL took the Tremie Barge for lease is very much less when compared with the lease rent paid by the Corporate Debtor to M/s. East Marine PTE Ltd Expat in respect of the same Tremie Barge.

28. Ld. Counsel for Applicant submitted that the Company Secretary and CFO of Corporate Debtor informed the erstwhile RP that this Tremie Barge would fetch an amount of Rs.3,50,00,000/- as a monthly lease rent and that the same information was received from Charter Engineer, Institute of Civil Engineers India. Basing on these

contentions, it was submitted by Ld. Counsel for Applicant that this leasing of Tremie Barge at a price lower than the market price is a fraudulent transaction covered by Section 66 of IBC.

29. Learned Counsel for applicant, refuting the contention of non-adherence to the timelines as provided by *Regulation 35A of The IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016* by the erstwhile RP, Ld. Counsel submitted that the timelines provided therein are directory and not mandatory. In support of this contention, reliance was placed on *Aditya Kumar Tibrewal RP vs Om Prakash Pandey and Ors.*, dated 06.04.2022, *Company Appeal (AT) Insolvency No. 583 of 2021*, Hon'ble NCLAT, New Delhi which is as follows:

“viii. One of the objectives 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”

30. Learned Counsel for applicant further submitted that Respondent No.1 has handed over the possession of this Tremie Barge to the erstwhile RP of Corporate Debtor on 21.07.2023.

31. Per Contra, Ld. Counsel for Respondent No.2 to 5 submitted that the erstwhile RP failed to adhere to the timelines as provided under Regulation 35A of The IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 so as to file the present application.

32. Ld. Counsel for Respondents No. 2 to 5 also submitted that to paint a transaction as fraudulent or wrongful, the strict test of malafide intent and execution in pursuance thereof, is necessary and the same criteria is not met in respect of the alleged transactions averred in the application. Learned Counsel further submitted that the Fraudulent Trading needs to meet the High Standard of Proof which is attached to a Fraudulent Intent and relied on ***Renuka Devi Rangaswamy, IRP of Regen Infrastructure and Services Pvt Ltd vs Mr. Madhusudan Khemka and Ors., Company Appeal (AT) (CH) (INS) No. 356 of 2022*** which is as follows:

“32. Before the `Adjudicating Authority`, the Respondent Nos. 1 and 2, took a stand that they had not gained personally anything, from any transaction, with the `1 st Respondent` and the `Appellant / Applicant`, had not produced any material / proof, to substantiate the allegations, so made.

33. To be noted that, the expression `Party to the carrying on business`, indicates `taking positive steps`, in carrying on `company's business`, in a `fraudulent manner`. The intent to `defraud`, is to be judged, by its `effect` on a `Person`, who is the `object of conduct`, in question.

34. A `preponderance of probability suffices`, but the degree of probability must be such that the `Tribunal`, is satisfied and further that under Section

66 of the I & B Code, 2016, it is not essential to attract that there ought to be a 'Debtor' and a 'Creditor' relationship.

35. It must be borne in mind that for proving a 'Fraudulent Trading' needs meeting the 'High Standard of Proof', which is attached to a 'Fraudulent Intent'. A 'Director', of a 'Company', may be proceeded against for a 'Wrongful Trading', because of the reason of 'Negligent Failure of Management'. Besides this, 'a person', knowingly a 'Party' to a 'Fraudulent Trading', by the 'Company' concerned, may be subject to the proceedings.
36. A 'Single Fraud', against 'a person', may result in Civil Action in the 'Realm of Tort'. It does not lie in the mouth of 'Directors of a Company', being accused of 'Fraudulent Trading', to allege that the 'Company's Claim', for recovery in Civil Action is barred.
37. 'Dishonesty', is an essential ingredient of 'Fraudulent Trading'. The 'Aspect of Dishonesty', is to be established and it cannot be inferred in any manner. Whether a 'Director', had exercised his skill, experience and general knowledge, to be expected of a person, in carrying out the 'duties of his functions', is to be determined for a 'Liability', in the considered opinion of this 'Tribunal'.
38. The Appellant has a 'duty', to establish to the satisfaction of this 'Tribunal', that a 'person', is knowingly carrying on the business with the 'Corporate Debtor', with an 'dishonest intention', to 'defraud', the 'Creditors'. For a 'Fraudulent Trading' / 'Wrongful Trading', necessary materials are to be pleaded by a 'Litigant' / 'Stakeholder', by furnishing 'Requisite Facts', so as to come within the purview of the ingredients of Section 66 of the I & B Code, 2016. Suffice it, for this 'Tribunal', to pertinently point out that the ingredients of Section 66 (1) and 66 (2) of the I & B Code, 2016, operate in a different arena."

33. Learned counsel for the respondent further submitted that Applicant has arrived at possible lease rentals of Tremie Barge as Rs.3.5 crore per month without even considering the quotation obtained from SLPL, the present user of Tremie Barge, only at Rs.10 lakhs per month for the fare boat and Rs.25 lakhs per month on charter basis. Learned counsel denied that Tremie Barge was hired at lease rent of Rs 3.6 crores per month from M/s. East Marine PTE Ltd Expat and submitted

that this lease rent was Rs 2.62 crores per month and further this contract of lease of Tremie Barge was along with a hydraulically operated telescopic tremie pipe arrangement inclusive of maintenance. Learned counsel further submitted that the Tremie Barge was hired by the Corporate Debtor along with the crew of M/s. East Marine PTE Ltd Expat in 2012, whereas the MDPL hired the vessel in “AS IS WHERE IN CONDITION” without any special arrangements and that the usage of the vessel by the Corporate Debtor deteriorated the condition of the vessel.

34. Ld. Counsel contended that in view of the above, both the contracts are not comparable as terms of both these contracts are at much variance and both are executed in different time periods. Ld. Counsel also contended that argument of applicant is also not tenable on logical ground as how can a Tremie Barge purchased for Rs Rs.22,80,00,000/-can generate an estimated lease rent of Rs.3,50,00,000/- per month.

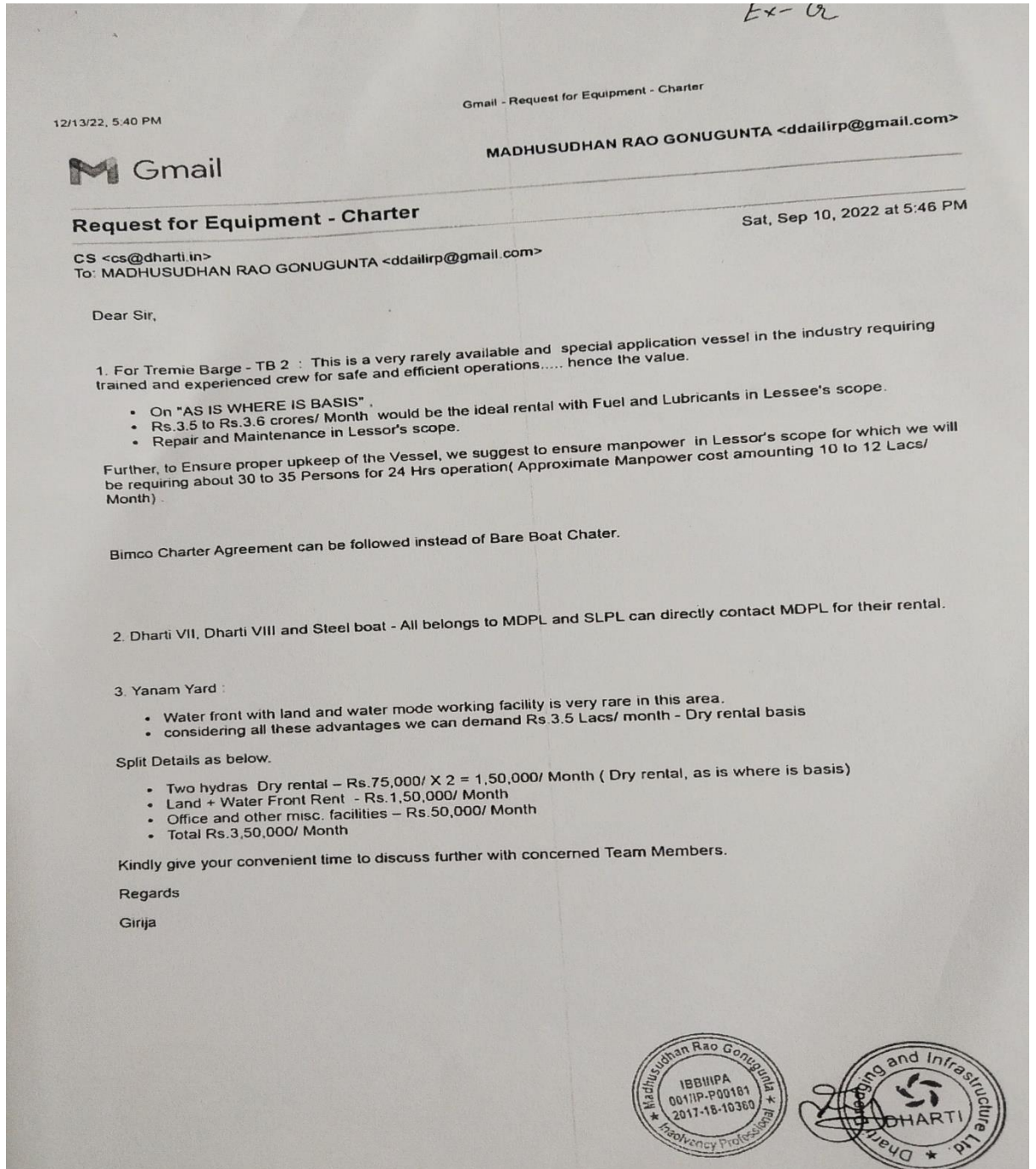
35. Learned Counsel submitted that the agreement with MDPL was entered to generate revenue to the Corporate Debtor even after the

expiry of IR Class/NK Class certification and that Respondent No.3 took all the steps to maximise the revenue of the Corporate Debtor.

Our analysis and findings:

36. Having heard both the counsels and after perusal of written statements and other documents submitted to this Tribunal, we find merit in the submissions made by the learned counsel of the respondents that both the contracts are not comparable as terms of both of them and time periods during which they were executed are totally different. We have perused the e-mail dated 10.09.2022 from CS & CFO of the company on the basis of which applicant has arrived at a lease rent of Rs 3.5 crores per month and find that applicant has merely compared the lease rent amount and ignored comparing all other facts like repair and maintenance, manpower etc. We further find that this was a mere suggestion and cannot be relied upon to decide a transaction as fraud. Interestingly, we find that the same CS & CFO of the company obtained a report dated 30.11.2022 from one Charter Engineer, Institution of Civil Engineers India. We carefully perused the above said report and find that this report has arrived at the above said rate subject to certain factors which are not applicable to the lease

agreement between Corporate Debtor and MDPL. The copy of the email communication dated 10.09.2022 addressed by CS & CFO to the erstwhile RP is reproduced hereunder:



37. We also find that the applicant could not produce any evidence suggesting that respondents have done these acts with malafide intent and have gained some pecuniary gains out of this transaction.
38. In the above backdrop, we decide that alleged transaction of leasing the Tremie Barge in the facts and circumstances averred in the present application do not disclose any fact that the said transaction is carried out in a fraudulent or wrongful manner so as to defraud the creditors as provided under Section 66 of IBC. The point is accordingly decided.
39. In view of the answer to the point before us, we are of the view that this application deserves dismissal, hence dismissed with no costs.

Sd/-

Charan Singh
Member Technical

Sd/-

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Anil

**THE NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH - I, HYDERABAD**

I.A. No. 516/2023

IN

C.P. (IB) No.329/7/HDB/2020

Under Section 66 of The Insolvency and Bankruptcy Code, 2016 read with
Rule 11 of The National Company Law Tribunal Rules, 2016

BETWEEN

State Bank of India

[Also representing Federal Bank & ICICI Bank Limited]

Stressed Assets Management Branch, Secunderabad,

5-9-76, 2nd & 3rd Floor, Prabhat Towers,

Opp. Amaravathi LHO, Chapel Road, Gunfoundry, Hyderabad-500001

Rep. by Shri P. Prashanth Kumar, Assistant General Manager

...Applicant

VERSUS

1. Rajeshkumar Radheshyam Jhunjunwala

14, Chowpatty View, Morvi Lane,

Chowpatty, Mumbai – 400007

Also, at

1802 A, Vivaren Towers,

Jacob Circle, Sane Guruji Marg,

Mahalaxmi, Mumbai – 400001

2. Akumalla Rajendra

Plot No. 148, Survey No.69/1,
Ravi Colony, Trimulgherry, Hyderabad – 500015

3. Vijaya Lakshmi Alur

Plot No. 148, Survey No.69/1,
Ravi Colony, Trimulgherry, Hyderabad – 500015

4. Nageshwar Rao Cuddapah

23, Shree Krupa, NIICS Layout, Plan 2, 7th A Main,
Govindarajnar, Bengaluru, Karnataka – 560079

5. Amrut Tradecom Private Limited

100/Old Hanuman Lane,
Mumbai, Maharashtra – 400002

6. Krishna Equity and Capital Services Private Limited

Mumbai Samachar Marg,
Mumbai, Maharashtra – 4000023

7. Windemere India Ltd

110, Sir Vithaldas Chambers,
16 Apollo St
Mumbai, Maharashtra – 400001

8. Nishigandha Polymers Pvt Ltd

3rd Floor, Rustom BLDG29,
VN Road, Fort,

Mumbai, Maharashtra – 400023

9. Hung Hua Construction Co. Ltd.

2, Ground Floor, Sopan tower,
Near Samvad Hospital,
Near Commerce Six Roads,
Navarangpura Ahmedabad, Gujarat - 380009

...Respondents

Date of Order: 01.07.2024

Coram:

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

HON'BLE MEMBER (JUDICIAL)

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Parties/Counsels present:

For Applicant : Mr. GP Yash Vardhan, Counsel

For Respondents 1 to 4 : Mr. Rajashekar Rao Salvaji, Counsel

PER BENCH

ORDER

1. This application was originally filed by Mr. G. Madhusudhan Rao, erstwhile 'Resolution Professional' (hereinafter referred as 'RP') of 'M/s. Dharti Dredging and Infrastructure Ltd' (hereinafter referred as

‘Corporate Debtor’) under Section 66 of ‘The Insolvency and Bankruptcy Code, 2016’ (hereinafter referred as ‘IBC’) read with Rule 11 The National Company Law Tribunal Rules, 2016. The reliefs sought for in the present application are as follows:

- a. To declare the transaction between the Corporate Debtor and Respondent No. 1 to be fraudulent and wrongful trading in terms of Section 66 of the Insolvency and Bankruptcy Code, 2016, and consequently pass necessary order(s) directing Respondent No. 2 to 4 and Respondent No. 1 to make contribution to the asset of the Corporate Debtor to the extent of Rs.32, 13,421/-jointly and severally;*
- b. To declare the transaction between the Corporate Debtor and Respondent No. 5 to be fraudulent and wrongful trading in terms of Section 66 of the Insolvency and Bankruptcy Code, 2016, and consequently pass necessary order(s) directing Respondent No. 1 to 4 and Respondent No. 5 to make contribution to the asset of the Corporate Debtor to the extent of Rs. 1,08,35,000/-, jointly and severally;*
- c. To declare the transaction between the Corporate Debtor and Respondent No. 6 to be fraudulent and wrongful trading in terms of Section 66 of the Insolvency and Bankruptcy Code, 2016, and consequently pass necessary order(s) directing Respondent No. 1 to 4 and Respondent No. 6 to make contribution to the asset of the Corporate Debtor to the extent of Rs.2,30,83,548/-, jointly and severally;*
- d. To declare the transaction between the Corporate Debtor and Respondent No. 7 to be fraudulent and wrongful trading in terms of Section 66 of the Insolvency and Bankruptcy Code, 2016, and consequently pass necessary order(s) directing Respondent No. 1 to 4 and*

Respondent No. 7 to make contribution to the asset of the Corporate Debtor to the extent of Rs.3,50,000/- jointly and severally;

e. To declare the transaction between the Corporate Debtor and Respondent No. 8 to be fraudulent and wrongful trading in terms of Section 66 of the Insolvency and Bankruptcy Code, 2016, and consequently pass necessary order(s) directing Respondent No. 1 to 4 and Respondent No. 8 to make contribution to the asset of the Corporate Debtor to the extent of Rs.26,57,81,199/-, jointly and severally;

f. To declare the transaction between the Corporate Debtor and Respondent No. 9 to be fraudulent and wrongful trading in terms of Section 66 of the Insolvency and Bankruptcy Code, 2016, and consequently pass necessary order(s) directing Respondent No. 1 to 4 and Respondent No. 9 to make contribution to the asset of the Corporate Debtor to the extent of Rs. 1,56,49,206/-, jointly and severally.

2. The Corporate Debtor was put into ‘Corporate Insolvency Resolution Process’ (hereinafter referred as ‘CIRP’) by an order of this Tribunal dated 05.04.2022 in C.P. (IB) NO. 329/7/HDB/2020 and appointed Mr. G. Madhusudhan Rao as the Resolution Professional of the Corporate Debtor. Subsequently, this Tribunal vide order dated 20.07.2023 in I.A. NO. 385/2023, approved the Resolution Plan of the Corporate Debtor and as per the Resolution Plan, State Bank of India (hereinafter referred as ‘Applicant’) replaced the erstwhile RP and is pursuing the present application.

3. It was submitted that Respondent No. 1 to 4 are the suspended directors of the Corporate Debtor and that Respondent No. 5 to 9 are the entities to whom loans were advanced by the Corporate Debtor. It was submitted that Respondent No.5, 6, 7 are the related entities of Corporate Debtor since Mr. Yashpal Changu Lokhande is a common director in all these entities (**Master Data of R. 5 to 7 at Exhibit B**).
4. It was submitted that upon scrutiny of the records and books of accounts of the Corporate Debtor during CIRP, the erstwhile RP identified that there are significant receivables which are in due from the Respondents towards loans advanced by the Corporate Debtor.

And the details are as follows:

Respondent No.	Name of Respondent	Amount Receivable (In Rs.)
1.	Sri Rajeshkumar Radheshyam Jhunjhunwala	32,13,421
5.	Amrut Tradecom Private Limited	1,08,35,000
6.	Krishna Equity and Capital Services Private Limited	2,30,83,548
7.	Windmere India Ltd.	3,50,000

8.	Nishigandha Polymers Pvt. Ltd.	14,17,50,199
9.	Hung Hua Construction Co. Ltd.	1,56,49,206
	Total	19,48,81,374

5. It was submitted that the erstwhile RP was not able to trace any agreement copies or other relevant documents to decide the nature of these transactions entered into between the Corporate Debtor and the Respondents. It was submitted that as no relevant documents pertaining to these transactions were available, the independent auditor in the Audited Balance Sheet for the Financial Year 2021-22 was unable to arrive at an opinion *at as to whether these transactions are in detriment to the interests of the Corporate Debtor*. It was submitted that the receivables due from the Respondents is shown under the head of 'Other Advances' under Schedule 13 in the Balance Sheet for the Financial Year 2021-22 (**Exhibit C**).
6. It was submitted that there are also receivables amounting to Rs. 95,00,000/- from M/s. Shardha Commercial Pvt. Ltd, but that the said entity is not arrayed as Respondents as the same was struck off (**Exhibit D**).

7. It was submitted that in order to ascertain the nature of these transactions, the erstwhile RP sent a letter dated 16.05.2022 to Respondent No.5, letter dated 18.05.2022 to Respondent No.6, email dated 08.03.2023 to Respondent No.7, letter dated 18.05.2022 to Respondent No.8, letter dated 18.05.2022 to Respondent No.9 seeking explanations from them pertaining to the receivables as mentioned in the ledger accounts of the Corporate Debtor and also asking them to remit the dues in the account of the Corporate Debtor (**Exhibit E to I**).
8. It was submitted that the Corporate Debtor also made investments in Respondent No.8 to a tune of Rs.12,40,31,000/- as per Annexure A to the Independent Auditor's Report for the Financial Year 2021-22. That the erstwhile RP requested Respondent No.8 orally to share the copies of share certificates issued, the investment balance sheet etc., but that the same were not provided.
9. It was submitted that the erstwhile RP addressed an email dated 31.10.2022 to Respondent No.1 to 4 asking for documents pertaining to the loans and advances, bank statements, agreement copies etc. of

the Corporate Debtor, but that no response was received from the Respondents (**Exhibit J**).

10. It was submitted that as no response was received from the Respondents, the erstwhile RP in consultation with CoC of the Corporate Debtor appointed M/s. Sarath & Associates, Chartered Accountants on 19.07.2022 for conducting Transaction Audit of the Corporate Debtor for the period 01.04.2020 to 05.04.2022 (Audit Period) and the Audit Report was submitted on 23.02.2023 (**Exhibit K**).

11. It was submitted that due to lack of any agreement copies of loans and investments, the Transaction Auditor was unable to decide whether the said loans and investments are prejudicial to the interests of the Corporate Debtor. It was submitted that the Transaction Auditor also marked that the Corporate Debtor never received any interest or principal from these investments or loans and that all these are overdue for more than 90 days.

12. It was submitted that based on the above information, the erstwhile RP has a reason to believe that Respondent No.1 to 4 in connivance with other respondents, siphoned-off monies from the account of the

Corporate Debtor in the guise of investment and loans when the Corporate Debtor is not into the business of lending or finance and that these transactions constitute fraudulent transactions as stated under Section 66 of IBC.

Counter on behalf of Respondent No. 2

13. Denying the allegations in the application, it was submitted on behalf of Respondent No.1, 2 & 3 that the Resolution Professional failed to adhere to the timelines as provided by *Regulation 35A of The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations*. It was submitted that the present should have been filed before 13.08.2022 but that the same was submitted on 14.03.2023.
14. It was submitted that the erstwhile RP have not conducted any proper and independent exercise to ascertain the nature of the alleged transactions in the present application even when the erstwhile RP was in possession of all the books of accounts of the Corporate Debtor.
15. It was submitted that the transactions alleged in the application were entered into by the Corporate Debtor between 2008 and 2017 in the course of ordinary business practices. That in this regard, there are advances and liabilities which were recorded in the books of accounts

of the Corporate Debtor and that the liabilities of the Corporate Debtor were ignored by the erstwhile RP. It was also submitted that the outstanding liabilities of the Corporate Debtor are more than the receivables/investments since 2016-17. It was submitted that an amount of Rs.30,00,00,000/- were brought into the Corporate Debtor during the Financial Year 2016-17. It was submitted that the funds borrowed from financial institutions and the repayment thereof was never affected from the alleged transactions. In support of these contentions, these Respondents relied on the Balance Sheet of the Corporate Debtor for the Financial Year 2016-17 (**Annexure A**).

16. It was also submitted that the transaction audit was for the period pertaining to 01.04.2020 to 05.04.2022 whereas the alleged transactions in the present application were prior to this period and mostly more than 5 years prior to CIRP. It was further submitted that the Transaction Auditor did not give any opinion as to the nature of the alleged transactions and hence, the present application under Section 66 of IBC is not maintainable.

17. It was submitted that the Financial Creditors of the Corporate Debtor carried out Forensic Audit after declaring the account of Corporate Debtor as NPA and did not find any irregularities.
18. It was submitted that only because there were no relevant records and documents, the erstwhile RP categorized the alleged transactions as fraudulent. It was submitted that in the present application, the observations made by the statutory auditor of the Corporate Debtor for the Financial Year 2021-22 were reproduced whereas the alleged transactions were carried forward from earlier years.
19. In response to the allegation of receivables from Respondent No.1, it was submitted that Respondent No.1 is a director of the Corporate Debtor and there are various transactions between the Corporate Debtor and Respondent No.1 since 2005. That various transactions pertaining to the Corporate Debtor were carried on by using the credit card of Respondent No.1 and that if all transactions are properly accounted (as per the records available with Respondent No.1), the Corporate Debtor will be liable to pay an amount of Rs.5,81,162.83 instead of recovering any amount from Respondent No.1 (**Annexure B**).

20. In respect of transactions with M/s. Shraddha Commercial Pvt. Ltd., it was submitted that the name of the entity is M/s. Shraddha Communications Pvt. Ltd and that as on 31.03.2013, an amount of Rs.3,60,00,000/- remains to be payable by the Corporate Debtor and a balance of Rs.95,00,000/- remains outstanding as on 27.10.2015. It was submitted that the Corporate Debtor was servicing this debt and that there was no default committed by the Corporate Debtor. It was further submitted that M/s. Shraddha Communications is existing and appears on the records of RoC (**Annexure C**).

21. In respect of the transactions with Respondent No.5 (M/s. Amrut Tradecom Pvt. Ltd), it was submitted that the outstanding balance of Rs.1,08,35,000/- relates to the transaction between M/s. Amrut Tradecom Pvt. Ltd and Marine Dredging Pvt. Ltd during the period 07.01.2010 to 21.05.2014. That M/s. Marine Dredging Pvt. Ltd merged into the Corporate Debtor on 31.08.2015 with effect from 01.04.2014 (**Annexure D**) and the asset of M/s. Marine Dredging Pvt Ltd became the asset of Corporate Debtor. It was submitted that there was no transaction in this account since 21.05.2014 and the amount could not be realised from M/s. Amrut Tradecom Pvt Ltd as it was in

financial difficulties. It was further submitted that this transaction has no correlation with the subsequent default committed by the Corporate Debtor (**Annexure E**).

22. In respect of transactions with Respondent No.6 (M/s. Krishna Equity and Capital Services Pvt Ltd), it was submitted that the Corporate Debtor gave a loan to Respondent No.6 long ago. That the recoverable amount as on 01.04.2013 was Rs.1,12,33,728/- and that interest was charged upto the Financial Year 2017-18. It was submitted that due to financial distress, no provision for interest was made and that the amount earned as interest was used for taxation. It was submitted that the dealings with this Respondent No.6 are continuing since long without having any correlation with the funds borrowed from financial institutions or default in payment thereof. That financial statements were submitted to the lenders and no doubt was raised by the lenders as regards to these transactions.

23. In respect of transactions with Respondent No.7, it was submitted that the amount of Rs.3,50,000/- was advanced in the year 2014-15 and the same is insignificant having regard to the business of the Corporate Debtor. That the same cannot be treated as a fraudulent transaction.

24. In respect of transactions with Respondent No.8, it was submitted that the recoverable amount of Rs.14,17,50,199/- was given prior to 2011-12 and that as per the records of Respondent No.8, this amount stands at Rs.1,28,88,736/-. It was submitted that the Corporate Debtor was provided with interest till 2017-18. It was submitted that in the Financial Year 2018-19, this amount was at Rs.12,54,68,362/- and that the Corporate Debtor took a decision to subscribe to optionally convertible non-cumulative redeemable preference shares issued by Respondent No.8 at a premium. That the Board of Directors of Respondent No.8 in the Board Meeting dated 29.03.2019 passed a resolution to this effect (**Annexure F**). It was submitted that out of Rs.12,54,68,362/-, an amount of Rs.12,40,31,051/- was transferred to preference capital and the same is shown in the books of accounts of the Corporate Debtor. That an amount of Rs.14,17,50,199/- paid as a premium in the next financial year was inadvertently shown under the head loans and advances.

25. In respect of the transactions with Respondent No.9, it was submitted that the Corporate Debtor and Respondent No.9 executed a project for Indian Oil Corporation. It was submitted that the receivable amount

of Rs.1,56,49,206/- was incurred for various expenses of Respondent No.9 viz., air tickets, hotel accommodation etc., and was not paid directly by the Corporate Debtor. It was submitted that as per the accounts of Corporate Debtor, there is an ECB outstanding amount of Rs.13,12,92,000/- to be paid by the Corporate Debtor to the parent company of Respondent No.9 and that adjustments can be made in this regard in respect of the receivables and outstanding amounts.

26. It was submitted that the Respondents No. 1 to 4 provided most of the documents relating to various points raised by the erstwhile RP. That after initiation of CIRP, there was no access to 'Oracle' application to the Respondent and hence, the other details could not be furnished. That the helplessness of the Respondents in not replying to the erstwhile RP as averred in the application cannot convert the genuine transactions into fraudulent or wrongful trading transactions without any corroborating evidence.

27. The Respondents No.1, 3 and 4 filed a memo dated 07.08.2023 adopting the contents of the Counter filed on behalf of Respondent No.2.

Counter on behalf of Respondent No.8

28. It was submitted that no letter dated 18.05.2022 was received by Respondent No.8 from the erstwhile RP of the Corporate Debtor seeking repayment of short term loan advances of an amount of Rs.14,17,50,199.
29. It was submitted that the Corporate Debtor opted for optional Convertible Redeemable Preference Shares of Respondent No.8 and an amount of Rs.26,57,81,250/- was paid towards subscription to OCRPS in 2019 (**Annexure R1**). It was submitted that Respondent No.8 filed Form PAS-3 with RoC, Maharashtra in respect of the allotment of OCRPS to the Corporate Debtor (**Annexure R3**).
30. It was submitted that this transaction cannot be treated as a fraudulent transaction and that the Transaction Audit report also did not classify this transaction as one covered under Section 66 of IBC. It was also submitted that no details were sought from Respondent No.8 by the erstwhile RP in respect of this transaction.
31. Reiterating the contents put forth in the applicant and denying the averments of the Counter of Respondent No.2, and also Respondent No.8, rejoinder was filed on behalf of the applicant.

32. The applicant and the Respondents No.1, 2 and 3 filed written submissions in support of the contentions raised.

33. In the light of the contest put forth as above by the parties, the point that emerges for the consideration of this Tribunal is:

Whether the transactions averred in the present application were carried in a fraudulent or wrongful manner so as to defraud the creditors as provided under Section 66 of IBC?

If so, to what relief?

34. Heard Mr. GP Yashvardhan, Ld. Counsel on behalf of Applicant and Mr. Rajashekar Rao Salvaji, Ld. Counsel on behalf of Respondents No. 1,2, 3 & 4, perused the record and the submissions.

POINT:

Whether the transactions averred in the present application were carried in a fraudulent or wrongful manner so as to defraud the creditors as provided under Section 66 of IBC? If so, to what relief?

Submissions

35. Ld. Counsel for the applicant submitted that the erstwhile RP after assuming the duties as Resolution Professional of the Corporate

Debtor observed that there are significant receivables which are due from the Respondents herein payable to the Corporate Debtor. It was submitted that based on the books of records, the erstwhile RP sought explanations from the Respondents with an intent to ascertain the nature of these receivables, but that no reply was received from the Respondents.

36. Ld. Counsel for the applicant further submitted that erstwhile RP was unable to trace any relevant documents pertaining to these transactions so as to ascertain the nature of these transactions. That in order to ascertain the nature of these transactions, the erstwhile RP appointed M/s. Sarath & Associates to conduct the Transaction Audit of the Corporate Debtor for the period 01.04.2020 to 05.04.2022. It was submitted that based on this Transaction Audit, the Auditor opined that no interest or principal was received from the investments made and loans advanced by the Corporate Debtor to the Respondents herein. That no efforts were made by Respondent No.1 to 4 in recovering these receivables from Respondent No. 5 to 9 and hence, the erstwhile RP termed these transactions as fraudulent.

37. Ld. Counsel for the applicant submitted that Respondent No.1 to 4 in connivance with Respondent No. 5 to 9 siphoned off the funds of Corporate Debtor in the guise of investments and loans.

38. Learned Counsel also refuted the contention of respondents for non-adherence to the timelines as provided by *Regulation 35A of The IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016* by the erstwhile RP. Ld. Counsel submitted that the timelines provided therein are directory and not mandatory. In support of his contention, reliance was placed on *Aditya Kumar Tibrewal RP vs Om Prakash Pandey and Ors.*, dated 06.04.2022, *Company Appeal (AT) Insolvency No. 583 of 2021*, Hon'ble NCLAT, New Delhi which is as follows:

“viii. 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

Ld. Counsel for applicant further relied on the following observation of the Division Bench of The Hon'ble Delhi High Court in ***Tata Steel BSL Ltd. vs Venus Recruiter Pvt Ltd*** as follows:

“..... It is submitted that the amendment to regulation 35A dated 16.09.2022 makes it amply clear that an avoidance application can be pending even beyond the submission of the resolution plan. The timelines under this regulation are directory and not mandatory in nature. Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound its timelines. The intent behind regulation 35A appears to be that a resolution applicant is able to take cognizance of the avoidable transactions at the earliest”

39. Ld. Counsel for applicant also submitted that The Hon'ble Supreme Court in ***Phoenix Arc Private Limited vs Spade Financial Services Limited & Ors.***, observed that to paint a transaction of the nature of fraudulent and wrongful trading, the strict test of malafide intent must be done. That the erstwhile RP has filed enough documents to prove that the Respondents had malafide intention in carrying out the transactions mentioned in the application. Ld. Counsel also submitted that the case of ***Gluckrich Capital Pvt. Ltd vs State of West Bengal & Ors.***, relied on by the Respondents is not applicable to the facts of the

present case. Ld. Counsel for the applicant submitted that Section 66 of IBC do not provide 'look back period' in respect of fraudulent transactions and relied on *Thomas George vs K. Easwara Pillai*, Hon'ble NCLAT, Chennai which is as follows:

"... this Tribunal is of the considered view that Section 66 of the Code does not provide for any 'look back period' as far as fraudulent transactions are concerned"

40. Per Contra, Ld. Counsel for Respondent No.1 to 3 submitted that the erstwhile RP failed to adhere to the timelines as provided under Regulation 35A of The IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 so as to file the present application. It was submitted that the Transaction Auditor was also unable to arrive at an opinion as to whether the transactions averred in the application are detrimental to the interests of the Corporate Debtor and also whether the same are fraudulent under Section 66 of IBC.

41. Ld. Counsel for Respondents No.1 to 3 submitted that the Financial Creditors of the Corporate Debtor carried out Forensic Audit after the account of Corporate Debtor turned NPA and found no irregularities in the transactions of the Corporate Debtor.

42. Ld. Counsel for Respondents No.1 to 3 further submitted that merely because the transactions of loans or receivables which were entered into during normal course of business and the same being overdue for a period more than 90 days to 10 years, the erstwhile RP termed the transactions as fraudulent transactions. It was submitted that there are entries in the balance sheet of the Corporate Debtor which show the advances given and also the liabilities. It was submitted that the erstwhile RP ignored the outstanding liabilities of the Corporate Debtor in respect of these entities from which receivables are pending.
43. Ld. Counsel for Respondents No.1 to 3 submitted that the Transaction Audit was conducted for the period 01.04.2020 to 04.04.2022 whereas the alleged fraudulent transactions pertain to a prior period to more than 5 years and that these transactions fall beyond the look back period of two years.
44. Ld. Counsel for Respondents No. 1 to 3, relying on *Phoenix Arc Private Limited (supra)*, submitted that to paint a transaction as fraudulent or wrongful, the strict test of malafide intent and execution in pursuance thereof is necessary and the same criteria is not met in respect of the alleged fraudulent transactions averred in the

application. It was submitted that the Fraudulent Trading needs to meet the High Standard of Proof which is attached to a Fraudulent Intent and relied on ***Renuka Devi Rangaswamy, IRP of Regen Infrastructure and Services Pvt Ltd vs Mr. Madhusudan Khemka and Ors., Company Appeal (AT) (CH) (INS) No. 356 of 2022*** which is as follows:

“32. Before the `Adjudicating Authority`, the Respondent Nos. 1 and 2, took a stand that they had not gained personally anything, from any transaction, with the `1 st Respondent` and the `Appellant / Applicant`, had not produced any material / proof, to substantiate the allegations, so made.

33. To be noted that, the expression `Party to the carrying on business`, indicates `taking positive steps`, in carrying on `company's business`, in a `fraudulent manner`. The intent to `defraud`, is to be judged, by its `effect` on a `Person`, who is the `object of conduct`, in question.

34. A `preponderance of probability suffices`, but the degree of probability must be such that the `Tribunal`, is satisfied and further that under Section 66 of the I & B Code, 2016, it is not essential to attract that there ought to be a `Debtor` and a `Creditor` relationship.

35. It must be borne in mind that for proving a `Fraudulent Trading` needs meeting the `High Standard of Proof`, which is attached to a `Fraudulent Intent`. A `Director`, of a `Company`, may be proceeded against for a `Wrongful Trading`, because of the reason of `Negligent Failure of Management`. Besides this, `a person`, knowingly a `Party` to a `Fraudulent Trading`, by the `Company` concerned, may be subject to the proceedings.

36. A `Single Fraud`, against `a person`, may result in Civil Action in the `Realm of Tort`. It does not lie in the mouth of `Directors of a Company`, being accused of `Fraudulent Trading`, to allege that the `Company's Claim`, for recovery in Civil Action is barred.

37. `Dishonesty`, is an essential ingredient of `Fraudulent Trading`. The `Aspect of Dishonesty`, is to be established and it cannot be inferred in

any manner. Whether a 'Director', had exercised his skill, experience and general knowledge, to be expected of a person, in carrying out the 'duties of his functions', is to be determined for a 'Liability', in the considered opinion of this 'Tribunal'.

38. The Appellant has a 'duty', to establish to the satisfaction of this 'Tribunal', that a 'person', is knowingly carrying on the business with the 'Corporate Debtor', with an 'dishonest intention', to 'defraud', the 'Creditors'. For a 'Fraudulent Trading' / 'Wrongful Trading', necessary materials are to be pleaded by a 'Litigant' / 'Stakeholder', by furnishing 'Requisite Facts', so as to come within the purview of the ingredients of Section 66 of the I & B Code, 2016. Suffice it, for this 'Tribunal', to pertinently point out that the ingredients of Section 66 (1) and 66 (2) of the I & B Code, 2016, operate in a different arena."

Ld. Counsel for Respondents No.1 to 3 also relied on *M/s.*

Regen Powertech Pvt. Ltd vs Madhusudhan Khemka, IA (IBC)/490

(CHE)/2021 in IBA/1099/2019, Ld. NCLT Chennai and stated that the

same was later affirmed by Hon'ble NCLAT, Chennai in M/s. Regen

Powertech Pvt Ltd, Rep. by Erstwhile RP Ebenezar Inbaraj vs M/s.

Wind Construction Pvt Ltd, (Company Appeal (AT) (CH) (INS) No.

349 of 2022 which is as follows:

"17. A careful perusal of Section 66 of IBC, 2016 would manifest the fact that it deals with two transactions; Section 66(1) of IBC, 2016 deals with 'Fraudulent Trading' and Section 66(2) of IBC, 2016 deals with 'Wrongful Trading', Section 66(1) of IBC, 2016 imposes liability on 'any person' who were knowingly parties to the carrying on the business with a dishonest intention to defraud the creditors, to make contribution to the assets of the Corporate Debtor. Thus, essentially for a transaction to qualify under Section 66(1) of IBC, 2016, the following conditions should be satisfied:

(a) Liability can be fixed upon any person;

(b) The said person should knowingly carry on the business with the Corporate Debtor;

(c) The said person should have a dishonest intention to defraud the creditors;”

45. Ld. Counsel for Respondent No. 1 to 3 submitted that the financial creditors were not even financial creditors during the time of the transactions mentioned in the present application and hence, the question of defrauding the creditors do not at all arise.

Analysis and Findings

46. Having heard learned counsels from both sides and after careful perusal of the written statements and other documents submitted to this Tribunal, our analysis is as under:

(1) We are of the view that contention of the respondents that there is a look back period of 2 years prior to the commencement of CIRP in respect of fraudulent transactions and the transactions mentioned in the present application pertain to more than 5 years prior to CIRP of Corporate Debtor hence the same cannot be treated as fraudulent transaction, is not tenable because IBC provides look back period only in respect of transactions covered under Section 43, 45 and 50 and not in respect of Section 66. This is evident from Section 66 of IBC which is as follows:

“Section 66: Fraudulent trading or wrongful trading.

(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.*

(2) *On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—*

(a) *before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and*

(b) *such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.*

(3) *Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.*

Explanation. -For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”

Further, in one of the recent decisions **Mr. Thomas George vs K.**

Easwara Pillai RP Mathstraman Manufacturers and Traders Pvt Ltd &

Ors. Company Appeal (AT) (CH) (Ins.) No. 293/2021 dated 05.12.2022, The

Hon’ble NCLAT, Chennai observed as follows:

“12. As regarding the contention of the Learned Counsel for the Appellant that the look back period for Section 66 is to be construed as three years as the law of Limitation under the Code is three years from the date of default. This Tribunal is *of the considered view that Section 66 of the Code does not provide for any ‘look back period’ as far as fraudulent transactions are concerned. Further, this Tribunal is also conscious of the fact that the Appellant has not denied even in this Appeal about taking over the factory, plant and machinery of the ‘Corporate Debtor Company’.* Therefore, we see no grounds in giving any additional opportunity to the Appellant as this Tribunal is *of the earnest view that the RP has produced sufficient material to evidence that the Appellants have committed the fraudulent act knowingly and in a dishonest manner to hoodwink the Creditors.*

13. *Unlike other types of transactions provided under the Code, there is no specified look back period for fraudulent trading under Section 66. Hence, the Resolution Professional is allowed to retrieve/repossess without any limitation of time and correct all the wrong doings for any relevant point of time. Section 66 of the Code envisages that the losses caused to the Creditors are recovered in the event of the Liquidation and that the Directors who caused such losses are made liable to make good such losses.”*

- (2) *We are of the view that the contention of respondents that this application is not maintainable as it is not filed in the timelines as provided under Regulation 35A of The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, is also not tenable because in lieu of the decision of The Hon’ble NCLAT in Aditya Kumar Tibrewal (supra), the timelines provided under Regulation 35A of The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are to be treated as directory and not mandatory. We reproduce Regulation 35A of The*

IBBI (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 hereunder:

“35A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the *resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.*

(2) *Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date*

(3) *Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirtieth day of the insolvency commencement date.*

(3A) *The resolution professional shall forward a copy of the application to the prospective resolution applicant to enable him to consider the same while submitting the resolution plan within the time initially stipulated.*

(4) *The creditors shall provide to the resolution professional, relevant extract from the audits of the corporate debtor, conducted by the creditors such as stock audit, transaction audit, forensic audit, etc.”*

- (3) We find that as per Regulation 35, *Supra*, initially the Resolution Professional has to form an opinion, then to make a determination that the affairs of the Corporate Debtor were conducted in a manner as mentioned under Section 43, 45, 50 or 66 of IBC and after determination only apply to the Adjudicating Authority for appropriate relief. Thus, in our view this whole process is a three-step process involving firstly forming of an opinion, secondly to

determine that opinion on the basis of records and evidences and thirdly to file application with Adjudicating Authority. Hon'ble NCLAT, New Delhi in the case of *Shri Baiju Trading and Investment Private Limited vs Nandkishor Vishnupant Deshpande (Resolution Professional for Royal Refinery Private Limited)*, *Company Appeal (AT) (Ins.) No. 699 of 2021* dated 29.03.2023 also hold the same view, the relevant extract of the same is reproduced hereunder:

“37. We also note that, similarly, as per Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016, the Resolution Professional is required to form an ‘opinion’ whether the ‘Corporate Debtor’ has been subjected to any transaction covered under Sections 43, 45, 50 & 66 of the I & B Code, 2016 and where such opinion has been formed the ‘Resolution Applicant’ shall make a ‘determination’ and subsequently is required to ‘apply’ to the ‘Adjudicating Authority’ for appropriate relief.”

- (4) In the present case, the Corporate Debtor has some receivables in the form of loans and advances and investments for which erstwhile RP was unable to trace the agreement copies or other relevant documents to decide the nature of these transactions. In lieu of this statement, we wonder as to how the erstwhile RP of the Corporate Debtor came to a determination that the transactions averred in the application are fraudulent as mentioned under

Section 66 of IBC even when he is unable to decide the nature of these transactions. We also observe that independent auditor in the Audited Balance Sheet for the Financial Year 2021-22 was also unable to arrive at an opinion as to whether these transactions are in detriment to the interests of the Corporate Debtor. We also find that the receivables due from the Respondents are disclosed in the balance sheet of corporate debtor under the head “Short Term Loans and Advances”. On perusal of the petition, we find that petitioner has not given any details of these transactions, except providing a table on page 3-4 of the petition showing details of loans and advances outstanding against the respondents and pleading that since respondents are not responding to his communication for payment of these loans and advances, these loans and advances should be treated as fraudulent transaction under Section 66 of IBC, 2016. We have also perused the transaction audit report, filed as Exhibit -K with the petition and thereto also we do not find any details about fraudulent nature of these transactions.

(5) Keeping in view the above facts, we hold a view that the petitioner has utterly failed in his duties, to make a determination before filing this application, that the Corporate Debtor has been subjected to transactions covered under Section 66 of IBC, 2016.

47. In the above backdrop, we hold that transactions averred in the present application cannot be treated as transactions carried out in a fraudulent or wrongful manner so as to defraud the creditors as provided under Section 66 of IBC. The point is accordingly decided and petition is dismissed with no costs.

Sd/-

Charan Singh
Member Technical

Sd/-

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial

Anil