

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

M.A. 423 OF 2020

Under Section 66 & 68 r/w Section 60 (5)
of Insolvency & Bankruptcy Code, 2016

Mr. Alok Saksena
The Resolution Professional
...Applicant

Vs.

Mr. Kishore K. Avarsekar & Another
...Respondents

In the matter of

C.P.(IB) No. 1058/MB/2017

Unity Infraprojects Limited

Corporate Applicant

Order delivered on: 19.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Rohit Gupta, Advocate
a/w Mr. Karma Vivan, Mr.
Sahil Harjani, Advocate Ms.

Aradhana More, Advocate
i/b Desai & Diwanji

For the Respondent : Mr. Prateek Seksaria, Sr.
Advocate a/w Mr. Dharam
Jumani, Advocate, Mr. Mihir
Nerulkar, Advocate a/w Mr.
Munaf Virjee, Mr. Akash
Agarwal, Advocate i/b AMR
Law

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This application MA 423/2020 was filed by Mr. Alok K Saksena (“Applicant”) in the matter of Unity Infraprojects Limited (Corporate Applicant) under Section 66 & 68 of The Insolvency and Bankruptcy Code, 2016 (“Code”), seeking following reliefs:
 - a. This Hon'ble Tribunal be pleased to pass necessary orders under section 66 (1) of the Code thereby directing the Respondents to immediately make contributions jointly as well as severally, to the assets of the Corporate Debtor for the amount equivalent of Rs. 1946.15 Crores being fraudulent transactions;
 - b. This Tribunal be pleased to pass appropriate orders under section 68 of the Code against the Respondents for committing acts of fraudulently siphoning and removing the property of the Corporate Debtor;

- c. This Hon'ble Tribunal be pleased to pass appropriate orders under section 67 of the Code, as this Hon'ble Tribunal may think fit in the facts and circumstances of the case and in the interest of the justice; and
2. In and around June 2017, a Company Petition being C.P(IB)-1058/(MB)/2017 was filed by the Corporate Debtor/Corporate Applicant, Unity Infraprojects Limited ("Corporate Debtor"), under Section 10 of the Insolvency & Bankruptcy Code, 2016 ("Code") for initiation of Corporate Insolvency Resolution Process ("CIRP").
- 2.1. By an order dated 20th June 2017 this NCLT, Mumbai admitted the Company Petition. Thus, the CIRP commenced on 20th June 2017 and appointed Mr. Arun Kapoor having registration number IBBI/IPA-003/IP- N00030/2017-2018/10230 as Interim Resolution Professional.
- 2.2. Vide order dated 1st September 2017, this Hon'ble Bench appointed the Applicant, Mr. Alok K. Saksena as the RP. The Applicant complied with the procedure laid under the Code read with the regulations. The extended period for completing the CIRP expired on 16th March 2018. None of the resolution plans in respect of the Corporate Debtor were approved by the Committee of Creditors.
- 2.3. Accordingly, on 20th March 2018, the Resolution Professional filed a Miscellaneous Application being M.A. No. 227 of 2018 under Section 33 (1) of the Code seeking liquidation of the Corporate Debtor (hereinafter referred to as "M.A. No. 227 of 2018").

- 2.4. Erstwhile, Interim Resolution Professional had appointed M/S MGRS & Associates for conducting a Due Diligence of the Corporate Debtor. M/s MGRS & Associates had submitted their report on 25th July 2017. It may be noted that the appointment letter of MGRS & Associates did not include the scope of conducting a forensic audit as contemplated under section 66 of the Code.
- 2.5. Pursuant to the directions of the COC member, the Applicant appointed BDO India LLP on 5th October 2018 for conducting a forensic audit of the Corporate Debtor. M/s BDO India LLP have submitted their report dated 25th September 2019 on 18th October 2019.
- 2.6. Pursuant to the review of the aforesaid reports and the accounts, the Applicant noticed certain transactions with Magnum Infraprojects Limited, a party identified as an interested party by the forensic auditor. The Applicant observed that LC's amounting to Rs. 1643.33 were issued by the Corporate Debtor from various banks without any supporting purchase document and without recording purchases in the books of accounts of the Corporate Debtor. It is evident that these transactions have been done to siphon-off funds and to defraud the creditors. An amount of Rs. 1454.62 crores has been received back from Mangum Infraprojects Limited in a circular transaction. After adjustment of interest etc. a sum of Rs. 225 crores is still recoverable from Magnum Infraprojects Limited.
- 2.7. It has further been observed that the Corporate Debtor has paid excess funds amounting to Rs. 87.54 Crores to a related party

Unity Axellia; Rs. 32.41 crores to an interested party Mahendra Brothers; Rs. 182.87 Crores to other suppliers such as Pandhe Infracons based on unexplained JV's and book entries.

- 2.8. In view of above, it is apparent that the transactions of the payments made and various transactions by JV's and book entries done by the Respondents were with the sole intention to defraud the creditors of the Corporate Debtor as the resultant impact was to reduce funds /assets being available with the Corporate Debtor or increase the banks liability of the Corporate Debtor. The purpose of making these payments were without any supporting documents / agreements so as to defraud the creditors of Corporate Debtor.
- 2.9. Accordingly, the Respondents are liable to make such contributions to the assets of the Corporate Debtor as the tribunal may deem fit, in terms of section 66 of the Code.
- 2.10. Section 67 of the code provides that where the Adjudicating Authority passes an order under sub section (1) of (2) of section 66, as the case may be, it may give such further directions as it may deem appropriate for giving effect to the order.
- 2.11. In view of above it is submitted that the aforesaid transaction of siphoning amounts to fraudulently removing the property of the Corporate Debtor under section 68 (i) (b) of the Code, and hence punishable under section 68 of the Code with an imprisonment of a term which shall not be less than 3 years but which may extend up to ten years or with a fine which shall not be less than One lakhs Rupee but may extend to one crore Rupees or both.

3. Respondent Nos. 1 and 2 who are suspended board of directors have filed Reply on 10.12.2021 stating that none of the essential ingredients of Section 66(1) have even been averred and that absolutely no case is made out on the basis of pleadings. The Application is vague ambiguous and without any substance. An opportunity ought to have been given to Respondents to defend himself before making such omnibus allegations. Though a forensic auditor is deemed to be expert in his filed however his individual perceptions ought not to be allowed to replace and substitute the judicial wisdom and discretion of this Tribunal; therefore, it would be necessary and expedient to adjudicate the matter by providing due opportunity to the Respondents.

3.1. It is further stated that all the Companies whose name is appeared in the Forensic Audit Report are actually in similar business activities. It can be very well verified from their accounts/annual returns that these companies have been doing a good turnover/business. As a going concern, UIL itself- in spite of its liquidity problems and heavy debt has been achieving substantial annual turnover and to the best of my knowledge, the transactions of UIL with various companies were bonafide business transactions in the ordinary and usual course of business of IL with various companies. It is nobody's allegation that there were a shell or bogus companies which were floated for the purpose of committing a fraud.

4. Heard learned counsel for both sides and perused the records.

4.1. We note that the Forensic Auditor had flagged the Transaction with Magnum Infra Projects Limited stating that a sum of Rs. 1643.33 Crores was paid to Magnum by ILC opened for

purchase of goods; however, the total purchase is made by the Corporate Debtor as reflecting in the books of accounts of Rs. 6.52 Crores interestingly a sum of Rs. 1454.62 Crores was paid back by Magnum. This indicates that purpose of affecting transaction with Magnum was fall making available funds without any motive for underlined purchases to non funds based borrowings in the garb of letter of Credit. The transaction auditor has also pointed out that in all 8 sample cases pertaining to LC Documentation; there was no transport documentation to evidence actual movements of the goods and in some cases, the same truck number was used for multiple trips in a day and even truck number was not found on E-Vahan Portal. These facts clearly indicate that act of opening of LC for the benefit of Magnum Infra Project was purely an accommodation transaction whereby the Corporate Debtor was made to payment of Rs. 1643.33 Crores to the LC Opening Bankers and only a sum of Rs. 1454.62 Crores was received back from the Magnum. Besides this Corporate Debtor charged interest of Rs. 42.93 Crores on such accommodation.

4.2. Section 66 deals with the carrying on a business for any fraudulent purpose. The facts culled out in the Report, which have not been recruited by the Respondents in their Reply clearly demonstrate that the transaction of LC was merely a accommodation transaction and not for the purpose of any business of the Corporate Debtor and such transaction resulted into inflated borrowings in the form of LC maturity amounts not fully refunded back by Magnum. Accordingly, we are of the considered view that a loss of Rs. 231.64 Crores {Rs.

1643.33 Crores being the amount paid under LC and interest of Rs. 42.93 Crores as reduced by amount received from Magnum amounting to Rs. 1454.62 Crores} has been caused to the Corporate Debtor by the said transaction having been conducted for the fraudulent purpose.

5. The Applicant has also pointed out transactions with Unity Axellia, Mahindra Brothers and Pandhe Infracons. Unity Axellia is stated to be a joint venture and remaining Two Parties are supplier/sub-contractor. The Applicant has demonstrated amount excess paid to these parties; however, the pleadings do not demonstrate that such excess payment was done with any fraudulent intent or purpose. Merely payments to the joint venture entity or supplies in normal course of business even if paid in excess cannot be said to be falling under act of defrauding Creditors or Fraudulent Purpose. Accordingly, we are of the considered view that no order can be passed in relation to these transactions. It is noteworthy that the Applicant in its written submissions filed on 26.02.2024 has not made any reference to these transactions.
6. Accordingly, we direct Respondents No. 1 and 2 to jointly or severally pay a sum of Rs. 231.64 Crores to the Corporate Debtor within 30 days. This amount shall carry interest at the rate of interest of 12% p.a. compound annually if paid beyond 30 days.
7. In view of the forgoing, the Interlocutory Application bearing IA No. 423 of 2020, is partly allowed and disposed of.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)