

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH (COURT- I) CHENNAI**

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **26.04.2024** THROUGH VIDEO CONFERENCE

PRESENT: HON'BLE SHRI SANJIV JAIN, MEMBER (JUDICIAL)
HON'BLE SHRI VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

IN THE MATTER OF : IDBI Bank Ltd
Vs
Auromatrix Hotels Pvt Ltd

MAIN PETITION NUMBER : IBA/726/2020

(IA/MA) APPLICATION NUMBERS

IA/882(CHE)/2022; IA/883(CHE)/2022

ORDER

IA/882(CHE)/2022:

Present: None for the Applicant /Resolution Professional.

Vide separate order pronounced in the open court, the application is dismissed.

IA/883(CHE)/2022:

Present: None for the Applicant / RP
Mr. Dev Eshwar, Ld. Counsel for R2.

Vide separate order pronounced in the open court, the application is dismissed.

-sd-
[VENKATARAMAN SUBRAMANIAM]
MEMBER (TECHNICAL)

MS

-sd-
[SANJIV JAIN]
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IA/882/2022 INIBA/726/2020

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. AUROMATRIX HOTELS PRIVATE LIMITED

Tharuvai Ramachandran Ravichandran

Resolution Professional of

M/s. Auromatrix Hotels Private Limited

G-3, Block-2, Shivani Apartments,

40, East Coast Road,

Thiruvanmiyur, Chennai – 600 041

auromatrixcirp@gmail.com

... Applicant

-Vs-

1. KumaranSitaraman

4/1, KalaignarKarunanidhiSalai

First Floor,

Kapaleeswarar Nagar,

Neelangarai, Chennai – 600 041

sitaramankumaran@gmail.com

... 1st Respondent

2. RadhakrishnanSitaraman

46, 3rd Avenue

VGP Layout

Injambakkam

Chennai – 600 115

rksitaraman@yahoo.com

... 2nd Respondent

3. Rajasekaran

14, NanjundaravSalai

VGP Layout

Injambakkam

Chennai – 600 115

Shekar3663@yahoo.com

... 3rd Respondent

Order Pronounced on 26th April, 2024

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

*For Applicant: Ashish Makhija, Senior Advocate for RP
assisted by Deep Bisht, Advocate*

*For Respondents: Sathish Parasaran, Senior Advocate for R1
assisted by Vishnu Mohan, Advocate
E.Om Prakash, Senior Advocate for R2& R3
assisted by Dev Eshwar, Advocate*

ORDER

(Heard through VC)

The Applicant / RP of Auromatrix Hotels Private Limited has filed an application under Section 66 read with 60(5) of IBC, 2016 seeking reliefs as follows:

- a) Declare that the alleged transactions constitute fraudulent transaction under Section 66 of the Code;*
- b) Direct the Respondents 1 to 3 to make contribution to the assets of the Corporate Debtor to the extent of Rs. 17.93 Crores; and*
- c) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.*

2. The facts relevant for the disposal of the application that on an application filed by the Financial Creditor under Section 7 of IBC, 2016,

the Corporate Debtor / Auromatrix Hotels Private Limited was admitted into CIRP vide an order dated 26.11.2021. The Applicant was appointed as the RP. The Applicant invited and collated the claims and constituted a committee of creditors. He issued form-G i.e. invitation of expression of interest and received eight expressions of interest. He received five resolution plans which he opened in the 6th CoC meeting for consideration.

3. It is stated that the Applicant, after verifying the books of accounts and available records, formed a prima facie opinion that the Respondents, being the Suspended Directors of the Corporate Debtor, entered into fraudulent transactions. They made adjustment of cash and bank balance and wrote off the investments and loan / advances in the books of accounts of the Corporate Debtor without any reason. It is stated that the Applicant with the approval of the CoC appointed M/s. Nangia Andersen LLP to conduct transaction Audit who submitted a report on 08.04.2022. It is stated that the draft report was circulated to the Respondents for their response but the Respondents failed to give any proper response.

4. It is alleged that the Respondents made adjustment of cash and bank balance of Rs. 56.0 Lakhs and wrote off the investments to the extent of Rs. 16.69 Crores and loan / advances of Rs. 68.0 Lakhs in the books of accounts of the Corporate Debtor without any justification as tabulated below;

S. No.	ALLEGATION	AMOUNT
1.	Written off investment in 3 companies	16.69 crore
2.	Written off loans/advances	68 lakh
3.	Adjustment of cash and bank balance	56 lakh
	TOTAL	17.93 CRORE

5. It is stated that the Respondents wrote off the investment in three companies viz. *Auro Southland Food Services Pvt Ltd., Urbanedge Hotels & Holdings Pvt Ltd and Auro Investments Partners LLC* on the ground that the companies have been wound up, but the MCA Portal shows that these companies are alive and active. It is stated that the Respondents wrote off the loans / advances recoverable from seven persons out of which three are the related parties i.e. *Marine Technologies, M/s. S.K. Marine Technologies India Pvt Ltd., and Star Hills Hotels Pvt Ltd.,* without any rationale. The reasons given by them could not be correlated with the third party verifications. The written off amount is tabulated below.

(Rs. In Crores)

S. No.	PARTY NAME	RELATIONSHIP	AMOUNT IN CRORES
1	Easy Access Financial Services Limited	Non-related	0.22
2	Miles MW Roche	Non-related	0.19
3	Advance from import of material from Srilanka	Non-related	0.18
4	Design Dna – Vellore	Non-related	0.03
5	Marine Technologies	Related	0.02
6	SK Marine Technologies India Pvt Ltd.	Related	0.02
7	Star Hills Hotels Pvt Ltd.	Related	0.01
	TOTAL		0.68

6. It is alleged that the Respondents wrote off the cash and bank balance of Rs. 0.51 Crore by debiting an equivalent amount as Prior period expenses by an entry dated 31.03.2021. It is alleged that the Respondents being Suspended Directors not only failed to exercise due diligence but also effected the fraudulent transactions benefitting

themselves with an intention to defraud the creditors of the Corporate Debtors and against the interest of the Corporate Debtor. They are therefore liable to contribute to the assets of the Corporate Debtor compensating the loss incurred with respect to the above fraudulent transactions.

7. On getting notice of the application, **the Respondent No. 1 / Suspended Director filed his Reply** wherein he denied the averments made in the application and alleged that the application is ex-facie untenable since no grounds set out under Section 66 have been made out what so ever in order to form an opinion that the purported transactions are in any manner fraudulent or wrongful transactions or trading. He alleged that the Applicant did not follow the procedure set out under Regulation 35A of the IBBI(Insolvency Resolution Process for Corporate Persons) Regulations, 2016. He alleged that the Applicant has made bald assertions and acted mechanically without any application of mind to the factors envisaged in Section 66 of IBC, 2016. It is stated that it is imperative for the Applicant to demonstrate that the business of the Corporate Debtor was carried out knowingly with the intent to defraud

its creditors or for any fraudulent purpose which he miserably failed. It is stated that the Respondent had given responses to the queries posted to him by the Transaction Auditor and given full cooperation in both, access to the records and response to the queries. At some instances, records from 10 years before were shared. He admitted that the Transaction Audit report was shared with him. In response there to, he had communicated that he would require previous records of multiple years and that the Corporate Debtor does not have sufficient accounting staff / man-power to undertake the same. It is alleged that the Applicant had given him short time to respond despite request. It is stated that the points raised in the Audit report were discussed appropriately in the Annual Audited Financial Statements, which statements were shared with the Financial Creditors regularly and no objection to any of the transactions was raised by the creditors. It is stated that the write off were well reasoned and had sound basis in the accounting standards and the same by no stretch of imagination fall within the scope of Section 66 of IBC, 2016.

8. As to the allegation of writing off investments in *Auro Southland Food Services Pvt Ltd (ASF SPL)*, he denied that the company is still alive.

It is stated that the company was formed in 2010 to undertake a trading business. Initially the Corporate Debtor transferred funds to subscribe to the shares of the company which was in the import and sale of energy drinks. Owing to the changes in the Government Regulations, the business became no longer viable and it stopped. At that time, the company did not have any assets in it nor had any liabilities. There was no possibility of recovery of any investment. Therefore the investments made in ASF SPL were treated as unsecured loans in the books of ASF SPL but the same were treated as investment in the books of the Corporate Debtor as was intended / agreed by it. Since there was no recoverable value for the said investments after the company ceased to do any business, the same were written off by the Corporate Debtor which were duly recorded in the financial statements which can be seen in the Balance Sheet extract of ASF SPL as of FY 2020-21. It is stated that the total assets of ASF SPL were only Rs. 1.7 Lakhs which were insufficient to justify the value of the investment. Thus, there was a reasonable cause for the written off as per the Accounting Standard 13.

9. As regards, writing off investments in *Urbanedge Hotels & Holdings Private Limited (UHHPL)*, it is stated that UHHPL was owning only one

Hotel and operating the same. It had loan outstanding towards State Bank of India which turned into NPA in the year 2015. The outstanding loan was taken over by Phoenix Asset Reconstruction Company (PARC) in 2017. The sole asset was sold / transferred to settle the dues of the creditors including PARC during the period from 2019-20, and there was no asset in UHHPL as evident from the Business Transfer agreement in respect of the said asset transfer dated 25.11.2019. It is stated that immediately after sale of assets through BTA and settling the dues of the Creditors, UHHPL did not have any residual value as it had already ceased the operations. Therefore the investment of the Corporate Debtor was written off in its books based on the principle of conservatism and prudence in the immediate following financial year. It is stated that as per AS-13 Accounting of Investments, Long-term investments are usually carried at cost. When there is a decline other than temporary, in the value of a long term investment, the carrying amount is reduced to recognise the decline. The Respondent has filed the Audited profit and Loss Statement of UHHPL for FY 2020-21 to submit that it had been incurring losses and the investment of the Corporate Debtor in the said

entity had no value. It is stated that there was adequate basis for written off the investment.

10. As to writing off investment in *Auro Investments Partners (AIP)*, it is stated that the investment in the AIP was made in 2010 to explore attractive business opportunities, however, the said investments did not take off due to unfavourable conditions in the global economy and markets owing to global recession. Since there was no possibility of revival of the company, the investment was written off over a period of time starting from the financial year 2016-17. It is stated that the balance sheet of AIP of 13.12.2011 also shows that the liabilities exceed the assets available.

11. It is stated that there is no occasion for the Applicant / RP to question the transactions or alleging the said transactions under Section 66. It is stated that none of these companies are active in operation as alleged by the RP and further there is no evidence to substantiate this fact.

12. The Respondent also denied the allegations of writing off the loans / advances recoverable from seven persons alleging that this is wholly misconceived. It is stated that most of the entities referred to are not the related parties to the Corporate Debtor. Out of Rs. 68 Lakhs falling within the ambit of such transactions, an amount of Rs. 63 Lakhs (more than 90%) is towards non related parties as admitted in the transaction audit report. Only an amount due from the related parties is Rs. 5.0 Lakhs, which is not material / trivial. It is stated that the written off amounts show as due from *Easy Access Financial Services Ltd* i.e. 22.0 Lakhs was due to wrong accounting as the said amount was recorded inadvertently as advances instead of interest expenses / repayment of loan. It is stated that loan agreement with the said entity was shared with the auditors and that entity had advanced loan to the Corporate Debtor which was wrongly shown as advances. It is stated that the same was rectified when the written off was made.

13. As to the advances given to *Mr. Miles* i.e advance for import of material from Sri Lanka, it is stated that these were the payments for the Resort project undertaken in Sri Lanka through the investment in *Auro Lanka Hotels Pvt . Limited* against which accrual entries were not posted.

The project could not be completed and the lease given by the Sri Lanka Tourism Development Authority was terminated by it. It is stated that Mr. Miles was working as part of the project and the payments made to him were the actual expenses for which accrual entries were not made which was the accounting mistake. It is stated that advances paid for the import of materials could not be recovered as the said materials could not be utilized fully to complete the project. It is stated that Corporate Debtor had invested Rs. 9.7 Crores in Auro Lanka Hotels and Resorts Pvt Ltd which was incorporated on 06.05.2010 and it was in the business of Hotels and Resorts managements in Sri Lanka. The company entered into a JV with a local person as required by the Government of Sri Lanka to develop the property leased by the Tourism Department, but due to unstable political scenario, the project could not be completed, lease was cancelled and the project was forfeited. It is stated that a provision was created for the diminution of the value of the investment in the books of accounts of the Corporate Debtor. (The Respondent, in support of the same has filed the extract of profit and loss statement of Auro Lanka Hotels & Resorts Pvt Ltd and the communication received from the Tourism Department.)

14. It is stated that the smaller amounts were written off as the cost of legal proceedings for pursuing the recovery would be higher than the amounts due to be recovered and it was a commercial decision taken by the Board of Corporate Debtor.

15. As to the expenses incurred in cash which were not recorded in the books of accounts in the year of incurring of such expenses, it is stated that it happened due to non-availability of full information. To rectify the error, the prior period expenses were identified and rectified during the audit for the financial year 2021. The balance in the current account of OBC and deposit were written off as prior period expenses owing to omission of recording of lien marked by the Income Tax Department for recovery of tax dues and payment of proceeds of the FD on maturity to the Custom Department. It is stated that Income Tax attachment order shows that an amount of Rs. 13.0 Lakhs was transferred to the Income Tax Department. Further Custom Department invoked the bank guarantee of Rs. 7.66 Lakhs which includes Rs. 5.0 Lakhs which were written off on 18.06.2016.

16. It is stated that the Suspended Directors always acted in good faith and in the interest of the Corporate Debtor judiciously without any intention to defraud the creditors.

17. **The Applicant filed the Rejoinder** wherein he denied the averments made in the Reply and reiterated what was stated in the application. It is stated that the transaction audit report was submitted on 08.04.2022 within the prescribed period as per Regulation 35(A). The Auditor had requested the Respondents to provide the relevant documents for conducting the transaction audit, but the Respondents did not provide the complete data / information / clarification to the auditor, which can be seen from the mail dated 15.03.2022. It is stated that the time period prescribed in Regulation 35(A) is only directory and any action taken by the RP beyond the time prescribed cannot be held to be non-est or void only on the ground that it is beyond the period prescribed. Reference is made of the case '*Aditya Kumar Tibrewal vs. Om Prakash Pandey & Ors. (Company Appeal (AT) Insolvency No. 583 of 2021)*'.

18. It is stated that the Suspended Directors had written off investments in three companies to the extent of Rs. 16.69 Crores. They /

their relatives had majority of shares in the aforesaid companies which clearly reflect that the investments were not made at arm's length. It is stated that no investee company has been struck off as can be seen from the RoC records and written off were made without any proof, justifying the complete erosion in the value and consequent nil realisation of investments. The Corporate Debtor in the Board meeting held on 01.03.2021 while approving the write off had specified the reason that the Corporate Debtor deemed to believe that there is uncertainty to realise the said investments in the group companies / joint ventures and there is uncertainty to recover the loans and advances from the group companies / joint ventures. It had resolved to write off Rs. 29.28 Crores of non-current investments. It is stated that as per the audited finances for the financial year ending 31.03.2021, an additional amount of Rs. 5.86 Crores being the advance for purchase of shares was written off without proper approval, and the written off investments increased to 35.14 Crores which included diminution to the extent of 9.7 Crores as compared to NIL in FY 2019-20 and Rs. 3.03 Crores in FY 2018-19. It is stated that Respondents did not provide the copy of share purchase agreement, share certificates, investment valuation, auditors' workings, email

communication and other supporting documents relating to the write off investments, to the Applicant and the transaction auditor and the writing off these valuable investments and consequently removing these assets from the books of the company prove the malafide intention to defraud the creditors which is in violation of the AS13 which provides that the carrying amount of the long-term investment is typically the cost of such an investment. It is stated that if there is a permanent reduction in the value of the long term investment, the carrying amount of such an investment is also to be reduced and such reduction is charged to P & L statement. Applicant also denied that sufficient time was not given to the Respondents to respond to the audit report.

19. The Applicant in order to justify the application submitted as under.

a) Urbanedge Hotels & Holdings Private Limited.

The company for the year 2019-20 had earned an income before interest, tax etc. of Rs. 15.57 Crores and the company wrote off the followings from the earnings which resulted in a loss of Rs. 8.07 Crores.

a. Prior period expenses- depreciation Rs. 2.77 Crores.

b. Impairment of the assets	Rs. 6.11 Crores.
c. Loss on sale of assets	Rs. 2.77 Crores.
d. Prior period expenses	Rs. 5.48 Crores.

The details for the expenses of Rs. 5.48 Crores were not given in the audited finances. In the BTA, no detail, about the assets which were transferred including the sale value, has been given. As per the company audited finances for the year 2019-20, the entire assets were deleted from the books of accounts and consequently fixed assets as on 31.01.2020 were shown as 0.01 Crores as compared to 80.83 Crores as on 31.03.2019. As per the reports, the company is a going concern and had operating revenues in the financial year 2020-21 and 2021-22. The current asset of the company during 31.03.2021 were of Rs. 7.16 Crores, short term loans and advances were Rs. 6.45 Crores which almost remained the same in 31.03.2022. Thus, investee company had value and did not merit write off.

b) Auro Investments Partners LLP

There is no justification for writing off the investments, PRM Ltd., The management has elected to omit substantially all of the disclosures ordinarily included in the financial statement on the Income Tax Basis of accounting, including statement of cash flows. If the omitted disclosures were included in the financial statements, they could be influenced in the user's conclusions

about the Company's assets, liabilities, equity, revenue and expenses.

c) Auro Southland Food Services Private Limited

The erroneous accounting by the Corporate Debtor was not noticed by the Respondents but by the transaction auditor.

20. The Applicant stated that the Respondents submission as to writing off Rs. 22 Lakhs in the case of Easy Access Financial Service Limited due to wrong accounting is incorrect. The writing off advance in the case of Miles Mx Roche due to accounting error is also incorrect. As to the investment in Sri Lanka, it is stated that as per the audited finances for the financial year ended 31.03.2021, the auditors in Para 2.1.2 have stated that " the Directors have made an assessment of the Company's ability to continue as a going concern and they do not intend either to liquidate or to cease trading. Directors have made an assessment and are confident in the Companies ability to continue as going concern and company intends to reschedule and recuperate its development activities in future". Hence, writing off of the investments is not justified. It is stated that as per the annual performance report for the period from 01.04.2020 to 31.03.2021, the net project worth was LKR 194,547,194 and as on 31.02.2021, it was LKR 192,355,937. Despite positive net worth and

fixed assets available with the company as on 31.03.2021 for LKR 229,011,936, the Corporate Debtor provided for the loss of entire amount of investments.

21. It is stated that submission of the Respondent that there was an error in recording of cash transactions is an afterthought. It is stated that no supporting documents were provided. It is stated that the prior period expenses debited for Rs. 38 Lakhs, by offsetting the cash balance in the current year at Head Office tantamount to “misappropriation of cash”.

22. We have heard Ld. Counsel for the parties.

23. **Ld. Counsel for the Applicant** reiterated what has been stated in the application and the Rejoinder. He stated that the RP had appointed a transaction auditor to conduct the audit of the Corporate Debtor who submitted its report on 08.04.2024 detailing the fraudulent and wrongful transactions. He stated that Regulation 35 A is not mandatory. He stated that there was lack of cooperation from the Respondents as no documents / information were provided to the Auditor. In support of his

contentions, he referred to the case of *Aditya Kumar Tibrewal vs Om Prakash Pandey & Ors.* [AT Ins No. 583 of 2021) Judgment dated 06.04.2022 (Para 10, 11(viii) & 13) and *Prasant Chandra Rath & Anr vs Surya Kanta & Anr.* [AT Ins. 869 of 2022] Judgment dated 30.09.2022 (Para 18).

24. Ld. Counsel tabulated the transactions allegedly the fraudulent transactions in Para 5 of the written submissions stating that there were written off investments in three companies to the tune of 16.69 crores, written off loans / advances to the tune of Rs 68.0 Lakhs and adjustment of cash and bank balance to the tune of Rs. 56.0 lakhs total amounting to Rs. 17.93 Crore on the basis of the Board Resolution passed by the Board of Directors on 01.03.2021.

25. Ld. Counsel contended that the investments in the shares as Rs 86 per share were made as against the nominal value of Rs 10 per share thus Rs. 10.35 crores were paid. He stated that out of the total sum, Rs. 107,265,70/- is reflected in the share capital and the rest is shown under share premium account. He submitted that UHHPL entered into OTS with SBI in December 2018 to pay Rs. 13.39 crores as against recovery of Rs. 28.84 Crores. UHHPL sold the hotel at Chandigarh in March 2020

vide deed dated 17.03.202 after entering into OTS where it was mentioned that the hotel was free of charge on the date of sale. He stated that once the OTS was entered and payment was made, there was no need to sell the hotel at Rs. 21.81 crores. He stated that the funds generated through sale were siphoned off by the promoters. Order dated 16.12.2019 in CP/1227/2018 shows that a joint memo was filed where Phoenix ARC Pvt Ltd received Rs. 36.30 crores and released the property of UHHPL which led to withdrawal of petition against UHHPL. There is no evidence to show that the hotel was sold at a fair market value as no valuation report has been attached. He submitted that the submission of the Respondent that there was an income of Rs. 22 Lakhs in FY 2021 is irrelevant as the audit report of FY 2021 reflects that UHHPL had a substantial brand value and the management was confident to revive the company. Ld. Counsel submitted that write off is done when the status of the going concern is lost and there is no possibility to revive the company. Since UHHPL allotted the shares at premium so it had higher brand value in the market.

26. Ld. Counsel further contended that business of ASFSP stopped in 2012-13 and there was no business income since then. The investment

made by the CD in ASF SPL in FY 2012-13 was Rs. 1.5 crores which increased to 2.13 crores in FY 2021-22. No justification was given by the Respondent to increase the investment. Ld. Counsel stated that the paid up capital of ASF SPL was Rs. 1.0 lakh whereas the investment of CD was Rs. 2.13 crore, so ASF SPL should have been 100% wholly owned subsidiary of CD. No reason has been given to sudden write off in 2021.

27. Ld. Counsel contended that the Respondent did not file any document as to the closure of Aero Investments Partners LLC/(AIP). The transaction audit report and balance sheet of FY 2019-20 show that AIP had a positive net worth of USD 566,055 and USD 566,025 as on 31.12.2019 and 31.12.2020 respectively and there was no justification for writing off the investments in the LLP. Further CD was entitled to proportionate share of realisation upon closure. Ld. Counsel stated that the transaction dated 26.09.2019 in the ledger shows that an amount of Rs. 5.28 lakh was received from Aurolanka Investments Partners LLC, but it was adjusted against AIP. Ld. Counsel stated that net worth of AIP was 50% of the total liabilities reflecting in the balance sheet for the FY 2019-20 and therefore 50% of the total investment should have been credited in the books of CD.

28. As to the cash payments, Ld. Counsel contended that CD never raised any demand from the group companies for the invested amount prior to CIRP date. No satisfactory explanation has been given to write off the said amounts and as such the said transactions would be termed as fraudulent transactions with an intent to defraud the creditors of CD.

In support of his contentions, he referred the case of

- *Shri Baiju Trading and Investment Pvt Ltd vs. ArihantNenawati and Ors [Company Appeal [AT] Ins No. 699 of 2021] Judgment date- 29.03.2023 (Para 35 & 41);*
- *Prasant Chandra Rath&Anr. vs Surya Kanta&Anr. [AT Ins. 869 of 2022) Judgment dated 30.09.2022 (Para 18)*
- *Mr.Tenny Jose &Ors. Vs. Prathap Pillai (ATCH Ins. No. 95/2023) Judgment date- 04.08.2023 (Para 22 and 40)*

and also gave the list of the related parties of the Corporate Debtor.

29. Ld. Counsel submitted that the terms of sanctions with the banks / lenders provided that no payments can be made to the group companies without fully paying the dues of the banks / lenders, however, in the present case, payments were made in the group companies, which were in violation of loan agreements. Further, the main object of the CD was not to engage in the business of lending, finance and investment which

can also be seen from the guarantee agreement dated 10.11.2010 executed by the CD in favour of the IDBI Bank.

30. Ld. Counsel contended that the loans / advances recoverable from 7% / equity were written off without proper rational as submitted in Para 10. Ld. Counsel submitted that the Respondents wrote off the cash and bank balances as detailed in Para 11 without identifying the prior period expenses, nor there are supporting documents such as invoices / vouchers and the same would tantamount to misappropriation of funds and after thought action. The Respondents did not challenge the attachments / invocation of bank guarantee by the Income Tax / Customs Department and they failed to clarify as to why these entries were not made in books of account since 2016-19 when bank entries were clearly known and identified.

31. **Ld. Counsel for the Respondent No.1** per contra argued that the ingredients of section 66 IBC are not fulfilled to maintain the present application. CD had four directors but the Applicant has filed the application only against three directors. The audit report was circulated to Respondent No. 1 (R1) only and not to the other directors.

32. Ld. Counsel stated that UHHPL was owning only one hotel and deriving the revenue since 2011. It had a outstanding loan towards SBI which turned into NPA in 2015. The loan was taken over by PARC in 2017 which filed an application before NCLT vide CP/1277/2018. In 2019, UHHPL along with PARC sold the hotel and settled the dues of PARC and other creditors / Authorities. There was no asset or revenue in the entity. The income of Rs. 22.0 lakhs shown in FY 2021 was that Rs. 12.81 lakhs were received as brand promotion from a US hotel for marketing its brand in India, Rs. 5.0 Lakhs as write back of Sundry creditors / expenses from prior periods and Rs. 4.0 lakhs as write off of discount / commission of prior periods which can be seen from the audited financials for FY 2020 and 2021 . In FY 2022, UHHPL received Rs. 13.0 lakhs as brand promotion from US hotel for marketing its brand as can be seen from the FY 2021 and 2022. Ld. Counsel stated that in the absence of any revenue generating asset, it was not justifiable to carry the share capital investment at book value in the books of the CD and it had to be impaired, so the Board passed a resolution to write off the share capital investment on 01.03.2021 following AS 13. Before the audit could be completed, CIRP commenced on 26.11.2021. RP had coordinated with

the auditors to complete the audit for the FY 2020-21 and the auditor shared the draft financial along with the write off to the RP and the CoC, but still the RP finalised the statements with the write off on 16.01.2022. Ld. Counsel stated that the RP even otherwise did not write back the value of the investment in the next audit conducted for FY 2021-22. He stated that writing off had no monetary impact on the CD since the investment was unrecoverable.

33. Ld. Counsel submitted that due process was followed for writing off the investment in ASF SPL which was formed in 2010 to undertake a trading business mainly for import and sale of energy drinks which business stopped in FY 2012-13 due to various changes in the Government Regulations on import of energy drinks and there had been no business income since then which can be seen from the audited financial statements. Other income reported in FY 2013-14 was write back of old creditors in the books. There were no fixed assets and there were liabilities only to the tune of Rs. 2.99 crores. Therefore, it was not justifiable to carry the share capital investment at book value in the books of CD and it had to be impaired and therefore the Board took decision to write off the share investment on 01.03.2021. Ld. Counsel stated that

share investment made by the CD was rightfully treated as investment but has been wrongfully treated as unsecured loans in the books of ASFSPL.

34. Ld. Counsel submitted that the investment in AIP was undertaken in 2012 to explore business opportunities in USA. The said investments did not take off due to unfavourable conditions in global economy and there was no possibility of revival and the same were written off over a period of time starting from FY 2016-17 until FY 2020-21. Ld. Counsel stated that no operational revenue was generated by AIP since 2012. This investment started in 2013 and in 2019 an amount of 1.85 crores was recovered and repatriated to India. Although 2020 financials deflected a positive net worth of USD 566,000 but liabilities of USD 1,139,000 still were to be retired and the AIP filed the final text report of closure in February 2021 after completing the balance sheet upto 31.12.2020, so AHPL Board took a decision to write off the balance investment in March 2021.

35. Ld. Counsel submitted that Easy Access Financial Services Limited is not a related party to CD. The loan was serviced by CD from July 2013

to March 2014. Principal amount was paid on March 2015 with pending interest of Rs. 22.35 lakhs and the interest was paid in full in 2019 through bank transfers. Ld. Counsel submitted that it was wrongly accounted as advances instead of interest expenses and subsequently it was written off in March 2021 as Prior period and duly reported under "Other Income" in the audited financials of CD in FY 2019-20. As to the writing off advances to Sri Lanka Project (Rs. 18 Lakhs) & Miles Roche (Rs. 19 Lakhs), Ld. Counsel submitted that these were the transactions with the non-related parties. The advances were the payments for business purposes for the resort project at Sri Lanka and these advances have not been set off against the expenses. The project at Sri Lanka could not be completed as the lease was terminated by the Government. Mr. Miles was working on the project and the payments were made to him being part of the project expenses. Ld. Counsel stated that CD had invested Rs. 9.7 Crores in Auro Lanka Hotels & Resorts Private Limited which was incorporated in 2010. It entered into JV with a local person but after the land lease was cancelled, the project was forfeited.

36. As to writing off advance paid to Design DNA being Rs. 3.0 Lakhs, Ld. Counsel stated that Design DNA is a architectural firm which had

been working on the multiple projects for the CD. The advance paid to it was erroneously not set off/accounted under the actual expense head in the respective years. This was not an “Unsecured Loan” and was only an “Advance”. The written off was made in March 2021 as Prior period and duly reported under “Other Income” in the audited financials of CD in FY 2019-20.

37. As to writing off advances to Marine Technologies (Rs. 2 Lakhs); SK Marine (Rs. 2 Lakhs) “Related Party” and Star Hills Hotels (Rs. 1.00 Lakhs)- “Related Party”, Ld. Counsel stated that the advances to these two related parties have not been written off as alleged. The balances are still appearing as advances. The advance to Star Health has also not been written off as alleged which is also evident from the ledger accounts.

38. As to the writing of cash and bank balance to a tune of Rs. 56.0 Lakhs, Ld. Counsel stated that the Income Tax Department had attached the bank account of the CD on 31.10.2019 against one of its claims as the amount was written off as prior period adjustment shown under “Other Income” in FY 2021. In this respect, DD paid to Income Tax Department and the bank statement of the CD showing debit for the same have been

filed with the counter of R1. Ld. Counsel stated that the Customs Department had invoked a bank guarantee amounting to Rs. 7.66 Lakhs in 2016 and the same was debited in the bank account of CD on 18.06.2016. Hence this amount was written off as prior period adjustment and duly shown under Other income in FY 2021. As to the cash payments not accounted in books in FY 2019-20 which were considered as expenses in FY 2020-21 as Prior period Expenses amounting to Rs. 35 Lakhs, Ld. Counsel referred the cash ledger account of CD for FY 2017 to 2021 as below.

AHPL HO Cash Ledger Summary :

Particulars	Ratio of Payments to Receipts/ Withdrawals	Sales (Full year)	Ratio of Receipts/ Withdrawals to Sales	Ratio of Cash Payments to Sales
FY 2021-22	99.9%	8,63,69,310	1.02%	1.01%
FY 2020-21	116.8%	5,44,23,227	1.39%	1.63%
FY 2019-20	48.8%	15,31,28,011	4.89%	2.38%
FY 2018-19	101.7%	16,33,86,528	6.42%	6.53%
FY 2017-18	97.9%	15,22,72,000	5.76%	5.64%

39. Ld. Counsel stated that from the table of cash ledger summary, it can be seen that the cash payments for the expenses averages Rs. 70.0 Lakhs per year in FY 2016-17, 2017-18 & 2018-19. In FY 2019-20, it was only 19.69 Lakhs. Ld. Counsel stated that in March 2020 due to Covid-19, the business was closed. Due to dislodgement of staff, all the relevant

cash expenses vouchers could not be aggregated and accounted prior to the completion of the audit in December 2020 and the cash balance of Rs. 41.0 Lakhs was shown in the Balance sheet for the FY 2019-20. If this Rs. 41.0 Lakhs is added to the accounted cash expense of 19.69 Lakhs, it would total (Rs. 69.69 Lakhs) Rs. 70 Lakhs of cash expense, which is the average cash expense of previous three years as well. Hence, in FY 2021, the cash balance was accounted as prior period expenses and was not written off as. In FY 2020-21, the cash expense is only Rs. 1.10 Lakhs, since the resorts were under lockdown from April to August of 2020 and with continued travel restrictions for several months after the lockdown, the resorts were barely operational.

40. Ld. Counsel contended that none of the factors set out in Section 66 of IBC are satisfied. RP failed to adhere to the mandates under Section 35 A of CIRP regulations 2016, no due process was followed and there was no question of any / fraudulent transaction to the prejudice to any secured creditors. The writing off the investments by the Corporate Debtor are not the fraudulent transactions to attract Section 66 of IBC. In support of his contentions, Ld Counsel placed reliance on the following documents.

- (i) The Audited Financials of UHHPL for FY 2020 and 2021.
- (ii) The Audited Financials of UHHPL for FY 2021 and 2022.
- (iii) The Audited Financial Statements of ASF SPL for FY 2012-13 & FY 2021-22 and Extract of P&L from audited financials of ASF SPL for FY 2014 to FY 2021.
- (iv) The Audited Financial Statement of ASF SPL for FY 2021-22.
- (v) Extracts of write off entries passed in CD books, from FY 2017 to 2021.
- (vi) The Income & Expenditure extract from Financials of AIP from 2013 to 2020.
- (vii) The CD's ledger Account of AIP for FY 2019-20 as well as the FIRC's issued by SBI.
- (viii) Loan agreement between Easy Access and Cd; Ledger account of Easy Access in CD's books for FY 2013-14 & 2014-15, Easy Access letter dated 23.03.2015, on pending interest payable; Ledger account of Easy Access in CD for FY 2019-20 and extract of Audited Financials of CD showing Other Income.
- (ix) The Audited Financials of Auro Lanka Agreement between Board of Investments, Sri Lanka and Auro Lanka and Agreement of cancellation with Auro Lanka by Sri Lanka Tourism Development Authority(SLTDA).
- (x) The letter from SLTDA dated 12.12.2019 giving extension of time and Land lease deed entered by Auro Lanka, dated 05.08.2010.
- (xi) The Emails from Design DNA to CD and Invoice copies from Design DNA.
- (xii) Extract from the audited Financials of CD for FY 2021.

41. We have considered the submissions, perused the documents and gone through the case laws supra.

42. As perusal of the record shows that the Corporate Debtor was incorporated in April 2002. It was doing the business of owning and operating the hotels including resorts at Tiruvannamalai and Kanyakumari. It entered into a Design Development and Construction Agreement with Urbanedge Hotels Private Limited (UHPL) in January 2007 for constructing hotels for UHPL. It received the advances from UHPL for managing the hotels. As per the agreement, the advances paid by UHPL for the management of the hotels were to be set off / repaid by the Corporate Debtor from the management fees received by it from UHPL. The fees were paid by UHPL but the Corporate Debtor in turn paid some of the advances received under the agreement due to GST implication. Record shows that it had been managing the UHPL hotels since November 2009 till the hotels were sold by UHPL.

43. Record reveals that Corporate Debtor had given corporate guarantee to IDBI Bank Ltd in November 2010 for the loan given to Ms.Auromatrix Pvt Ltd. The Corporate Debtor had also a financial

agreement with Edelweiss Asset Reconstruction Company (EARC), the only secured financial creditor of the Corporate Debtor. The account of the Corporate Debtor was never the NPA as there were no over dues to EARC till the date of start of CIRP. It was the IDBI Bank Ltd which invoked the bank guarantee in January 2020 and filed CIRP against the Corporate Debtor being an unsecured financial creditor. Thus in the present case, the CIRP commenced due to the effect of default of loan by a group company i.e. Ms.Auromatrix Pvt Ltd.

44. Record further shows that in the 2ndCoC meeting, accounts finalisation for 31.03.2021 was discussed and RP was asked by the CoC to discuss with the auditor for provisioning instead of write off. The financial statements were completed and audited which the Suspended Director signed on 24.01.2022.

45. In the present case, the RP had taken the charge of the Corporate Debtor on 26.11.2021. The transaction auditor was appointed on 30.01.2022 who commenced the audit on 01.02.2022. The financial and audit completion were reported to the CoC on 16.02.2022 in the 3rdCoC meeting and EOI was submitted on 09.03.2022. RP issued the RFRP

including evaluation matrix and information memorandum. He received the Provisional list of the Resolution Applicants in which Respondent No. 1 / Suspended Director also participated. RP prepared the list of PRA's, but by that time, he had not received the draft transaction audit report which was submitted only on 11.04.2022 i.e. after 136 days, the RP took over the affairs of the Corporate Debtor. Thereafter he filed the application under Section 66 of IBC, 2016.

46. As per the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, Regulation 35A reads as under.

“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 thirty-fifth day of the insolvency commencement date.”

47. Regulation 35A prescribes a period during which the RP has to form an opinion whether the Corporate Debtor has been subjected to any transaction covered under Section 43, 45, 50 or 66 and the period during which he shall make a determination and a period of one hundred and thirty five days of Insolvency commencement date during which he shall apply to Adjudicating Authority.

48. Admittedly, Regulation 35A of CIRP Regulations imposes a duty on the RP to take measure within the timeline and any action taken by RP beyond the time prescribed is prohibited, but it has been held in catena of judgements i.e. in the case of *Aditya Kumar Tibrewal vs Om Prakash Pandey &Ors (Company Appeal (AT) Insolvency No. 583 of 2021)* and *Prasant Chandra Rath&Anr vs Surya Kanta&Anr (Company Appeal (AT) Insolvency No. 869 of 2022)* by Hon'ble NCLAT that the timeline prescribed in Regulation 35A of CIRP Regulations is only directory and any action taken by the RP beyond the time prescribed, cannot be held to be non-est or void on the ground that it is beyond the prescribed period, if there are genuine and valid reasons for the RP for not filing the application for avoidance transactions within the time prescribed.

49. In the present case as claimed by the Applicant / RP, and as seen from email dated 15.03.2022, there was non-cooperation from the Suspended Directors. The documents and assets were not handed over to the RP. RP had to move an application under Section 19(2) of the Code. An order was also passed by this Tribunal directing the Suspended Directors to extend cooperation. This was the reason why the transaction audit report was not finalized and the application could not be moved within time as provided under CIRP Regulation 35A. That being the position, the application filed by the RP relating to Section 66 of the Code, cannot be rejected being filed beyond the period of 135 days of Insolvency commencement date on the ground of non-compliance of Regulation 35A of CIRP Regulations, 2016.

50. It was argued that no due process was followed and no proper notice was given to all the Respondents calling for any explanation or giving opportunity to Reply. On a perusal of record we find that, there were four directors of the Corporate Debtor, managing the affairs of the company. It was mainly the Respondent No. 1 who was participating in the CIRP proceedings for himself and for the other directors. It was the Respondent No. 1, who during the CIRP also filed the Resolution Plan as

MSME. There is nothing to indicate that Respondent No. 1 was acting independently and was not consulting the other directors while responding to the queries / applications of the RP as at any stage no such objection was raised by the other Directors that they were not circulated the minutes of CoC meetings or no queries were raised during the transaction audit or they were not served with the report. They were free to participate in the process but it appears that since Respondent No. 1 was participating in the proceedings and was having know how of the proceedings, they did not interfere and left with Respondent No. 1 to respond. Nothing can be inferred from the record that they were not aware of the proceedings. We are of the view that principles of natural justice were duly followed by the RP. We may also note that on the application filed by the RP, notice was given to all the Directors but it was only Respondent No. 1 who filed the Reply.

51. Before proceeding to decide the issue, the relevant provision of law under which the application has been made needs to be addressed.

Section 66 of IBC, 2016, reads thus

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 subsection (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

52. 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 of 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;

53. Section 66(1) of IBC, 2016 is parimateria to the provisions of Section 213 of UK Insolvency Act, 1986, which is extracted hereunder;

213 Fraudulent trading.

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

54. On analysing Section 66(2) of IBC, 2016 it is seen that it deals with 'Wrongful Trading'. For a transaction to qualify under Section 66(2) the following conditions must be satisfied;

- (a) Liability can be fixed upon only 'Director' or 'Partner';
- (b) They knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvency proceedings;
- (c) They did not take due diligence with a view to minimizing the potential loss to the company's creditors;

55. Section 66(2) of IBC, 2016 is akin to the provisions of Section 214 of UK Insolvency Act, 1986, which is extracted hereunder;

214 Wrongful trading.

(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

(2) This subsection applies in relation to a person if—

(a) the company has gone into insolvent liquidation,

(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and

(c) that person was a director of the company at that time; but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he had knowledge of the matter mentioned in subsection (2)) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

(b) the general knowledge, skill and experience that that director has.

(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

(6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(6A) For the purposes of this section a company enters insolvent administration if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration.

(7) In this section "director" includes a shadow director.

(8) This section is without prejudice to section 213.

56. Thus, there seems to be a stark contrast in relation to Section 66(1) and 66(2) of IBC, 2016. It is needless to say that even the scope of sub – section (1) and (2) of Section 66 of IBC, 2016 are different. In the present case, the Applicant has sought the Respondents to make contribution to the Corporate Debtor, under Section 66(1) of IBC, 2016.

57. By keeping in mind the scope of sub – section (1) of Section 66 of IBC, 2016, this Tribunal is required to examine as to whether the transactions as alleged by the Applicant in the present Application

against the Respondents would fall within the confine of 'Fraudulent Trading' that is to say that whether the business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose. In this context, it is significant to refer to the decision of the Supreme Court in the case of **Anuj Jain IRP for JaypeeInfatech Limited –Vs- Axis Bank Limited Etc.**, in Civil Appeal No. 8512 – 8527 of 2019; where it was held that:

Specific material fact in relation to the transaction which is sought to be challenged by the Resolution Professional / Liquidator is required to be pleaded in the Application. As to the present case, the Applicant sought to reverse the transactions purported to be done by the Respondents under Section 66(1) of IBC, 2016.

58. Writing-off investments by the Corporate Debtor,

In Urbanedge Hotels & Pvt Ltd (UHHPL) – Rs. 10.35 Crores

As seen from the Reply and documents, UHHPL was owning only one hotel asset in Chandigarh and earning the revenue since 2011. It had a loan outstanding towards State Bank of India which turned into NPA in 2015. The loan outstanding was taken over by Phoenix Asset

Reconstruction Company (PARC) in 2017 which filed an application in the Tribunal vide CP/1277/(IB)2018. UHHPL entered into a business transfer agreement (BTA) on 25.11.2019 to settle the dues with Mountania Developers and Hospitality Private Limited. On 17.03.2020, it signed a conveyance deed for sale of immovable property. There was no other asset or revenue in the entity. The Respondent has filed copy of the sale deed executed on 17.03.2020 in this regard. It was also submitted that audit finalization and financial statements for FY 2019-20 recording the BTA was done on 14.12.2020. The BTA clearly shows that the entire sale proceeds were utilized to pay off the liabilities of the company and there was no excess to be shared and paid to any shareholder. Since nothing was left to be distributed to any shareholder, there was no value for the shares held in UHHPL entity by the Corporate Debtor which facts are also reflected in the financial statements of UHHPL.

59. It is pertinent to note that when the Corporate Debtor invested in the shares of UHHPL, which was also in the hotel business, at a premium of Rs. 86 per share and paid Rs. 10.35 Crores, the account of the Corporate Debtor was normal. The investment was made way back. It was a commercial decision of the Corporate Debtor in the best interest of

the Corporate Debtor which is beyond question. None of the shareholders raised objection as to the investments made by the Corporate Debtor in the share capital. Record shows that UHHPL utilized the money received from the sale of the sole asset in the form of hotel to pay the debts and the dues of the creditors. After payment nothing was left with UHHPL to pay to the Corporate Debtor. We do not find merits in the contention of the Applicant that there was no need to sell the hotel property or the funds generated by UHHPL through the sale of hotel property were syphoned off by the Promoters. We have to see the records in entirety and on perusal of the same we find that there was a liability upon UHHPL at the time of sale of the property which led to sale off the property.

60. It is true that in FY 2021, UHHPL had shown an income of Rs. 22 Lakhs but the said income was received as brand promotion from a US hotel brand for marketing for their brand in India, write back of Sunday creditors and expense provisions from prior periods and write back of discount / commission provision expenses from prior periods. The Respondent has filed the audited financials of UHHPL for FY 2020 and 2021 in support of the same. In the FY 2022, UHHPL, had reported an

income of Rs. 13.00 Lakhs received as a brand promotion from US hotel for marketing their brand in India which is reflected in the audited financials of the FY 2021 and 2022.

61. We are in agreement with the contention of the Respondent that in the absence of any revenue generating asset in the entity, it was not justifiable to carry the share capital investment at book value in the books of the Corporate Debtor. It was there after the board of the Corporate Debtor passed a resolution to write off the share investment on 01.03.2021. In this case, the auditor had shared the draft financial statements along with the write off with the RP who presented it before the CoC in the 2ndCoC meeting where CoC had asked the RP to discuss with the auditor to avoid the write off and make provisioning in the books for the amount if requires but the RP went ahead and finalized the bank statements with the write off. Since the financials were prior to commencement date of CIRP, it were signed by the Suspended Directors.

62. Considering the above facts and the explanations, we are of the view that since the investment was unrecoverable and the writing off had no monetary impact on the Corporate Debtor, the said transaction cannot

be said to be the fraudulent transaction with an intent to deceive the creditors.

Investment in Auro Southland Food Service Pvt Ltd (ASF SPL) to the tune of Rs. 2.13 Crore.

63. As seen from the Reply and record, ASF SPL was formed in 2010 for import and sale of energy drinks. The business stopped in FY 2012-13 owing to changes in Government Regulations on the import of energy drinks. There was no business for about ten years, as evident from the financial statements of ASF SPL for FY 2012-13 and FY 2021-22. The income reported in FY 2013-14 was write back of old creditors in the books which showed only the liabilities to the extent of 2.99 Crores. There were no fixed assets / current asset in the company.

64. We find force in the submissions of the Respondent that in the absence of any revenues being generated by the Company for the last 10 years and also because there were no assets, it was not justifiable to carry the share capital investment at the book value in the books of the Corporate Debtor and it had to be impaired, so a decision was taken in the Board by passing a resolution to write off the investment on

01.03.2021. It was also explained that the share investment made by the Corporate Debtor in ASF SPL was rightfully treated as investment in the books of Corporate Debtor, but it was wrongfully treated as unsecured loans received in the books of ASF SPL.

Investments in Auro Investment Partner (AIP) – 4.21 Crores

65. It is seen from the record that investment in AIP was undertaken in 2010 to explore business opportunities in USA. However, due to unfavourable conditions in global economy, these investments did not take off. There was no possibility of revival and for this reason the same was amortized and written-off over a period of time from FY 2016-17 to FY 2020-21. No operational revenue was generated since 2012, as seen from the Income and expenditure extract. Disinvestment / recovery of investments started in 2013 and in 2019 in AIP an amount of Rs.1.85 Crores was recovered and repatriated to India and Foreign Inward Remittance Certificates were issued by State Bank of India as seen from the Corporate Debtor ledger account of AIP for FY 2019-20. Although 2020 Financial of AIP reflected a positive networth of USD 566,000 but the liabilities of USD 1,139,000 were still to be retired. This made the AHPL Board to take decision to write off. The above company is a US

based company and there is no document indicating the existence of the above company or that it is active with RoC. It is not the case that the investments made were fraudulent and fall under Section 66 of IBC, 2016. The Respondent has submitted a screenshot of the US Government website showing that the entity has been dissolved. That being the case, we do not find merit in the arguments of the Applicant that the company is active or that Corporate Debtor was entitled to proportionate share of realization upon closure. Since the liabilities were more than the networth of Corporate Debtor, the investment was rightly written off and it cannot be said that the transactions were done with the intent to defraud the creditors of the Corporate Debtor.

Payment in group companies in violation of loan agreement / sanction letter / MOA / Guarantee Agreement

66. The Applicant has alleged that in terms of sanctions with the banks / lenders, no payment can be made to the group companies without fully paying the banks / lenders, but in the present case, payments were made in the group companies. A perusal of the record shows that neither the banks / lenders raised any objection as to the investments made by the Corporate Debtor in the group companies, rather it is seen that the

investment was made to explore more business opportunities and in related business. It was a commercial decision taken in the ordinary course of business and the said payments cannot be said to be fraudulent transactions, considering the fact that Corporate Debtor was regular in repayment of loans to its lenders / creditors and its accounts never turned into NPA. It went into CIRP because of the corporate guarantee given by it in its sister concern to IDBI Bank Ltd.

Writing off loans / advances recoverable from seven persons / entities without any rational

67. It is seen from the record that Easy Access Financial Services Ltd, is not related to the Corporate Debtor. The loan was serviced by the Corporate Debtor since July 2013 till March 2015. Principal amount was paid in March 2015 with pending interest of Rs. 22.35 Lakhs. It has been explained that pending interest was paid in full in 2019 through bank transfers, however, it was wrongly accounted as advance instead of interest. The Respondent has filed document to this effect which clearly justifies the action of the Respondents.

68. As to the writing off the advances to Sri Lanka Project (Rs. 18 Lakhs) and Miles Roche (Rs. 19 Lakhs), the Respondent has filed the

documents stating that the above transactions were with the non-related parties. Advance to Sri Lanka project was made for business purpose for the Resort project in Sri Lanka, however, these advances were not posted / set off against the expenses head. The project in Sri Lanka could not be completed and the land lease given by Sri Lanka Tourism Department was terminated by it. Therefore the project had to be surrendered to it. Mr. Mile was working as a part of the project and the payments made to him were the project expenses. The advances paid for the import of the materials in Sri Lanka could not be recovered as the material could not be utilized to complete the project. The Corporate Debtor had invested 9.07 Crores in Auro Lanka Hotels and Resort Pvt Ltd which was in the business of Hotel and Resorts Managements in Sri Lanka. The company had entered into JV with a local person as required by the Government of Sri Lanka to develop the property, but due to unstable condition the same could not be completed. We are of the view that satisfactory explanation has been given to the above transactions which in no terms can be said to be fraudulent transactions to invoke Section 66 of IBC, 2016.

69. As to writing off advance paid to Design DNA (Rs. 3 Lakhs), it is also a non-related party. It was an architectural firm which had been working on the multiple projects for the Corporate Debtor. It is explained that the advance was erroneously not set off / accounted under the actual expenses heard in the respective years. The Respondent has also referred to a mail from the company in 2016 seeking payment of Rs. 1.35 Lakhs. He has also filed the invoices for Rs. 3,23,500/-.

70. As to writing off advances to Marine Technologies (Rs. 2 Lakhs), SK Marine (Rs. 2 Lakhs) and Star Hills Hotels (Rs. 1Lakhs), the Respondent has explained that the advances to Marine Technologies and SK Marine had not been written off. He has enclosed the documents to this respect. He has also explained that the advances to Star Hills were also not written off as can be seen from the Star Hills Hotels ledger accounts in the Corporate Debtor books.

Writing of Cash and Bank balance amounting to 56 Lakhs

71. In the instant case, the Respondent has filed the evidence / documents as to the expenses for Rs. 20.66 Lakhs stating that Income Tax Department had attached bank balance of Rs. 13 Lakhs and the Custom

Department had invoked the bank guarantee of Rs. 7.66 Lakhs. He has stated that for the remaining amount which was utilised, the vouchers could not be obtained during Covid -19 pandemic. He explained that Respondent had infused Rs. 52 Lakhs in the Corporate Debtor for its operational needs and servicing the debts between April 2021 and September 2021. The Respondents had to recover about Rs. 1.0 Crore before the CIRP commencement for which they had filed the claims. This shows the bonafides of the Respondents that they had infused more money than the alleged write off of the cash amounts. He has submitted the summary at Para 43 of the Reply explaining the facts in the subsequent paras and also tabulated the AHPL HO cash ledger summary which is reproduced as under.

Table – A
AHPL HO Cash Ledger Summary :

Particulars	Ratio of Payments to Receipts/ Withdrawals	Sales (Full year)	Ratio of Receipts/ Withdrawals to Sales	Ratio of Cash Payments to Sales
FY 2021-22	99.9%	8,63,69,310	1.02%	1.01%
FY 2020-21	116.8%	5,44,23,227	1.39%	1.63%
FY 2019-20	48.8%	15,31,28,011	4.89%	2.38%
FY 2018-19	101.7%	16,33,86,528	6.42%	6.53%
FY 2017-18	97.9%	15,22,72,000	5.76%	5.64%

AHPL HO Cash Ledger Summary:

Particulars	Opening Balance	Debit			Credit			Closing Balance
		Receipts	Contra	Journal	Payments	Contra	Journal	
2021-22	1,083	7,79,500	97,375	-	8,46,528	29,500	-	1,930
2020-21	38,82,813	2,82,064	4,76,925	-	1,10,655	7,76,064	37,54,000	1,083
2019-20	52,039	12,51,865	62,29,669	-	19,69,565	16,81,195	-	38,82,813
2018-19	2,32,268	56,42,075	48,52,784	-	55,87,888	50,87,200	-	52,039
2017-18	47,779	44,67,152	43,02,655	-	59,95,818	25,89,500	-	2,32,268

Table – B

Particulars	Actual 2017-18	Actual 2018-19	Avg of 2 yrs	Actual 2019-20 Accounted as Prior Period Expenses in 2020-21 2019-20
Petty cash expenses	8,20,945	6,55,069	7,38,007	7,94,511
Audit Expenses - Reimbursement	6,365	20,749	13,557	-
Fuel Expenses	16,114	20,093	18,104	19,640
Kalbros Electricals	1,14,172	75,867	95,020	4,540
Legal Expenses	13,810	44,560	29,185	37,892
Miscellaneous Expenses	43,677	8,789	26,233	24,000
Mobile/ Telephone Reimbursement	28,349	28,719	28,534	28,778
Office Maintenance	50,367	3,87,414	2,18,891	2,74,595
Petrol/Diesel - TN.06.L.3663	12,200	25,800	19,000	24,000
Petrol/Diesel - TN.07.CE.3830	4,050	4,300	4,175	1,900
Printing & Stationary	33,509	15,090	24,300	23,546
Repair & Maintenance Vehicle	12,691	23,264	17,978	17,270
Salary Advance - Murali	2,000	6,843	4,422	-
Salary Advance - Prahaladen	3,000	1,000	2,000	-
Salary Advance - Rathina Panju	15,300	5,000	10,150	-
Sales Promotion Expenses	1,000	4,858	2,929	6,555
Staff Welfare	1,46,222	5,86,802	3,66,512	3,44,016
Telephone Expenses	24,254	1,239	12,747	14,444
Telephone Expenses	1,778	2,569	2,174	2,122
Vehicle Maintenance - TN.06.E.6526	2,100	2,315	2,208	3,498

Books & Periodicals		1,080	1,080	-
Freight Charges		100	100	-
Fuel Expenses Reimbursement - Alexander		2,500	2,500	2,000
Fuel Expenses Reimbursement - Arumugam		1,000	1,000	700
Fuel Expenses Reimbursement - Jagadeeshan.K - SUP		10,000	10,000	11,500
Fuel Expenses Reimbursement - Kamal		750	750	-
Fuel Expenses Reimbursment - Palani		10,000	10,000	10,000
Hire Charges		1,000	1,000	-
Late Fees		75,000	75,000	-
Loading and Unloading Charges		450	450	-
Petrol/Diesel - TN.06.K.6030 -		5,000	5,000	6,000
Petrol/Diesel - TN.06.M.3656		14,100	14,100	13,000
Petrol/Diesel - TN.14.E.1366 -		20,600	20,600	19,500
Postage & Courier		36,117	36,117	33,680
Repair & Maintenance - General		4,26,146	4,26,146	4,11,294
Reserve & Surplus		9	9	-
Salary Advance - Arul		1,152	1,152	-
Salary Advance - Arumugam		100	100	-
Salary Advance - Jayachandran		670	670	-
Salary Advance - Velmurugan		200	200	-

Particulars	Actual 2017-18	Actual 2018-19	Avg of 2 yrs	Actual 2019-20 Accounted as Prior Period Expenses in 2020-21 2019-20
SARAVANAN		3,000	3,000	-
Star Logistics Pvt Ltd		575	575	-
TA - Rajasekaran		10,000	10,000	10,000
Transporting Charges		4,920	4,920	4,400
Travelling Expenses		83,531	83,531	96,444
Vehicle Maintenance - TN.06.C.1256		4,597	4,597	4,597
Vehicle Maintenance - TN.06 3962		1,700	1,700	-
Vehicle Maintenance - TN.07.CE.4576 -CRETA		1,534	1,534	-
Cash Sent to Kanyakumari Resort for COVID Lockdown Expenses				6,00,000
Cash Sent to Tiruvannamamli Resort for COVID Lockdown Expenses				6,00,000

72. Having regards to the totality of facts and circumstances and the explanation given by the Respondent which are supported with documents, we are of the considered view that the findings of the

Transactions Auditor do not per se fall under Section 66 of IBC, 2016. In fact, the Respondent has given a detailed and satisfactory explanation to the observations / findings made by the Transaction Auditor. The RP has filed the Application under Section 66 of IBC, 2016 fastening liability upon the Respondents, however without fulfilling the essential ingredients required under Section 66 of IBC, 2016 to maintain the present Application. The RP has made the bald assertions to show that the business of the Corporate Debtor was carried out by the Respondents with a dishonest intention and to defraud the creditors.

73. It is significant to refer to the Judgment of the Hon'ble NCLAT in the matter of *RegenPowertech Pvt. Ltd. –Vs- Wind Construction Pvt. Ltd. in Company Appeal (AT)(Ins) No.349 of 2022*, wherein it was held that :

33. *Be it noted, this 'Tribunal', significantly, points out that, whenever 'Fraud' on a 'Creditor' is perpetrated in the course of 'carrying on Business', it does not necessarily follow that the 'Business' is being carried on with an 'Intent to Defraud' the 'Creditor'.*

34. *One cannot remain 'oblivious' of the candid fact that, if the 'Directors' of a 'Company' had acted on a 'bonafide belief' that the 'Company' would 'recover' from its 'Financial Problems' / 'Difficulties', then, they will not be held liable for the 'act' / 'offence' of 'Fraudulent Trading'.*

35. *As a matter of fact, the 'aspect' of 'Fraudulent Trading' requires a very 'High Degree of proof', which is attached to the 'Fraudulent Intent'.*

To put it emphatically, a more compelling 'Material' / 'Evidence' is required to satisfy the conscience of this 'Tribunal', 'on a preponderance of probability'.

36. *Barring the aforesaid 'Reliefs' / 'Directions' being sought for, in the instant case, there are no 'Convincing Tangible' / 'Documentary Materials' to fortify the 'Plea' of the 'Applicant' that the 'Business' of the 'Corporate Debtor' was carried out by the Respondents with a 'Dishonest Intention' and, especially, to 'Defraud' the 'Creditors'. To put it precisely, the averments projected by the 'Applicant' do not come within the 'Four Parameters', of the ingredients of Section 66 of the Insolvency and Bankruptcy Code, 2016).*

74. In the light of what has been stated above, we are of the view that the Applicant has not made a case of fraud or dishonest intention on the part of the Respondents except making sweeping allegations and hence Section 66 of IBC, 2016 cannot be invoked under such circumstances. The present Application being sans merit is liable to be dismissed.

75. Accordingly IA(IBC)/882(CHE)/2022 stands **dismissed**. No orders as to costs.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IA/883/2022 INIBA/726/2020

(filed under Section 43 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. AUROMATRIX HOTELS PRIVATE LIMITED

Tharuvai Ramachandran Ravichandran

Resolution Professional of

M/s. Auromatrix Hotels Private Limited

G-3, Block-2, Shivani Apartments,

40, East Coast Road,

Thiruvanmiyur, Chennai – 600 041

auromatrixcirp@gmail.com

... Applicant

-Vs-

1. KumaranSitaraman

4/1, KalaignarKarunanidhiSalai

First Floor,

Kapaleeswarar Nagar,

Neelangarai, Chennai – 600 041

sitaramankumaran@gmail.com

... 1st Respondent

2. RadhakrishnanSitaraman

46, 3rd Avenue

VGP Layout

Injambakkam

Chennai – 600 115

rksitaraman@yahoo.com

... 2nd Respondent

3. Rajasekaran

14, NanjundaravSalai

VGP Layout

Injambakkam

Chennai – 600 115

Shekar3663@yahoo.com

... 3rd Respondent

4. Urbanedge Hotels Pvt Ltd

4/1, KalaignarKarunanidhiSalai

First Floor,

Kapaleeswarar Nagar,
Neelangarai, Chennai – 600 041
cs.uhpl@gmail.com
cs@urbanedgehotels.com

... 4th Respondent

5. Star Logistics. Pvt. Ltd.

4/1, KalaignarKarunanidhiSalai
First Floor,
Kapaleeswarar Nagar,
Neelangarai, Chennai – 600 041
Krishnan.sitaraman@auromatrix.com

... 5th Respondent

6. Auromatrix Holdings Pvt Ltd.

4/1, KalaignarKarunanidhiSalai
First Floor,
Kapaleeswarar Nagar,
Neelangarai, Chennai – 600 041
... 6th Respondent

Order Pronounced on 26th April, 2024

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)

VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

*For Applicant: Ashish Makhija, Senior Advocate for RP
assisted by Deep Bisht, Advocate*

*For Respondents: Sathish Parasaran, Senior Advocate for R1
assisted by Vishnu Mohan, Advocate
E.Om Prakash, Senior Advocate for R2& R3
assisted by Dev Eshwar, Advocate*

ORDER

(Heard through VC)

The Applicant / RP of Auromatrix Hotels Private Limited has filed an application under Section 43 read with 60(5) of IBC, 2016 and Rule 11 of NCLT Rules, 2016 seeking reliefs as follows:

a) Declare that the alleged transactions constitute preferential transaction under Section 43 of the Code;

b) Direct the Respondents 1 to 3 to make contribution to the assets of the Corporate Debtor to the extent of Rs. 3.98 Crores;

c) Direct the Respondents 4 to 6 to make contribution to the assets of the Corporate Debtor to the extent of benefit received by the 4th to 6th Respondents; and

d) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

2. The facts relevant for the disposal of the application that on an application filed by the Financial Creditor under Section 7 of IBC, 2016, the Corporate Debtor / Auromatrix Hotels Private Limited was admitted into CIRP vide an order dated 26.11.2021. The Applicant was appointed as the RP. The Applicant invited and collated the claims and constituted a committee of creditors. He issued form-G i.e. invitation for expression of interest and received eight expressions of interest. He received five resolution plans which he opened in the 6thCoC meeting for consideration.

3. It is stated that the Applicant after verifying the books of accounts and available records formed a prima facie opinion that the

Respondents entered into preferential transactions as envisaged under Section 43 of the Code. It is alleged that the Respondents 1 to 3 being the Suspended Directors of the Corporate Debtor made the adjustment of unsecured loan and advances extended to the directors and repayments of unsecured loans to the related parties during the look back period. It is stated that the Applicant with the approval of the CoC appointed M/s. Nangia Andersen LLP to conduct transaction Audit who submitted a report on 08.04.2022. The draft report was circulated to the Respondents for their response but the Respondents failed to give any proper response.

4. It is stated that the Corporate Debtor does not have any document for the unsecured loans or the terms of such unsecured loans. It is stated that the company maintained separate ledger accounts of unsecured loans from the Directors and advances / receivables from the Directors. As per the terms of sanction with the Banks / Lenders, the unsecured loan availed from the Directors should not be paid or adjusted without fully paying the Banks / Lenders, however, the Respondents adjusted the unsecured loans /

advances / receivables from the Directors on 31.03.2021 as tabulated below:

(Rs.InCrores)

S.No	Name of Director	Amount
1	Mr.KumaranSitaraman	1.76
2	Mr.Radhakrishnan	0.25
3	Mr.Rajasekaran	0.17

5. It is stated the Suspended Directors also repaid the unsecured loans to the related parties as detailed below:

(Rs.InCrores)

S.No.	Name of the related Party	Amount
1	Urbanedge Hotels Pvt Ltd	1.43
2	Star Logistics Pvt Ltd	0.36
3	Auromatrix Holdings Pvt Ltd.	0.01
	TOTAL	1.80

6. It is stated that the amounts were transacted within the look back period and the transaction are preferential in nature as they gave preference to the Respondents over the other creditors of the Corporate Debtor and the same would fall under Section 43 of IBC, 2016. It is stated that the transactions were not made in the ordinary course of

business rather the transactions had been done with an intent to put themselves in a beneficial position.

7. On getting notice of the application, **Respondent No.1 filed the reply** wherein he denied the averments made in the application. He stated that no grounds set out under Section 43 are made out to form an opinion that the purported transactions in a manner are the preferential transactions. It is stated that the Applicant did not follow the procedure under Regulation 35(A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and has made a bald averment. It is stated that he had given responses to the queries raised by the transaction auditor and given full cooperation to the access to the records. It is stated that at some instances, the records prior to ten years were also shared with the auditor. It is stated that to respond to the queries in a comprehensive manner, the Respondent had sought time since the records were of multiple years and the Corporate Debtor did not have sufficient accounting staff / man power but the Applicant refused the additional time. It is stated that the points in the transaction audit report forming the basis of the application were replied appropriately in the annual audited financial statements of the

Corporate Debtor which were also shared with the Financial creditors regularly and no objections were raised by them.

8. It is stated that the Suspended Directors had given short term loans and advances to the Corporate Debtor in times of financial crunch in order to meet its operational / working capital requirements and the settlement of unsecured loans / adjustments with the amounts due to the directors was done in the ordinary course of business and as a part of closure of books of accounts at the end of the financial year and the same were set off to ascertain the accurate financial position of the Corporate Debtor. It is stated that the Director's loan account, unsecured loans and advances accounts referred to in the report were netted off and disclosed under the short term Borrowings under current liabilities in the audited balance sheets for the relevant financial years. It is stated that it is a normal accounting practice to maintain separate ledgers for accounting convenience and to net off the credit and debit balances of the same parties and showing it under the single item in the annual audited accounts. These adjustments in the ledgers were done to tally with the books of accounts / annual statements as under.

AUROMATRIX HOTELS PRIVATE LIMITED.			
No.4/1 Kalaingar Karunauidhi Salai First Floor Kapaleeswarar Nagar, Neelankarai Chennai 600 041, India.			
Provisional Balance Sheet as at 31 st March 2021			
(Amount in Rs.)			
Particulars	Note No.	As At	As At
		31st March 2021	31st March 2020
I EQUITY AND LIABILITIES			
1 Shareholders' funds			
(a) Share capital	1	14,74,56,400	14,74,56,400
(b) Reserves and surplus	2	-32,00,16,081	7,72,40,900
Total	A	-17,25,59,681	22,46,97,300
2 Non-current liabilities			
(a) Long-term borrowings	3	30,00,65,129	30,00,65,129
(b) Long-term provisions	5	56,75,066	57,84,866
Total	B	30,57,40,195	30,58,49,995
3 Current liabilities			
(a) Short-term borrowings	6	9,93,00,987	11,05,04,047
(b) Trade payables	7		
(f) total outstanding dues of micro enterprises and small enterprises			

Note 6 :	B	C	D	E	F	G	H
Short Term Borrowings							
						31st March 2021	31st March 2020
Over Draft(Secured)							
Loans from other parties							
Interest free loan and advances from related parties						15,00,000	15,00,000
other loans and Advances						9,75,00,987	10,72,04,047
Current maturities of long-term borrowings						3,00,000	18,00,000
						9,93,00,987	11,05,04,047
Note 7 :							
Trade Payables							
						31st March 2021	31st March 2020

Particulars	Q		R		S		T		U	
	1,82,95,143.42		1,00,92,083.00		(9,90,00,986.09)				(9,75,00,986.89)	
	Consolidated TB		Closing Balance		Closing Balance		ATV		Final Closing Balance	
	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit	Debit	Credit
Star Logistics Pvt Ltd	17,57,069	3,16,700		27,66,664		15,00,000		42,66,664		
Auromatrix Holdings Pvt Ltd	-	70,000		(1,21,23,848)		-		(1,21,23,848)		
Director Loan	-	-		(2,17,95,000)		2,17,95,000		-		
Medallion Hotels Pvt Ltd	5,100	-		(2,17,858)		-		(2,17,858)		
Mr. Kunaran Sitaraman	2,17,500	7,63,200		1,38,43,545		(1,75,70,581)		(37,27,036)		
Mr. Radhakrishnan	8,66,173	8,30,368		25,35,167		(25,35,167)		-		
Mr. Rajasekaran	10,56,706	24,492		16,89,252		(16,89,252)		-		
Mr. Udaykumar Krishnan	2,65,000	12,290		(9,05,028)		-		(9,05,028)		
Peninsular Life Style Products Pvt. Ltd.	5,000	-		5,000		-		5,000		
Peninsular Life Style Products Private Limited	-	-		(1,41,484)		-		(1,41,484)		
Urbanedge Hotels Pvt Ltd	1,14,40,417	2,10,502		(11,35,63,288)		-		(11,35,63,288)		
URBAN EDGE HOTELS PVT LTD (ALOFT-AHMEDABAD)	5,30,233	56,26,286		18,45,143		-		18,45,143		
URBAN EDGE HOTELS PVT LTD (ALOFT-BENGALURU)	7,47,218	8,19,047		1,32,18,368		-		1,32,18,368		
Urbanedge Hotels Pvt. Ltd. (Aloft Chennai)	3,34,366	3,74,594		(40,228)		-		(40,228)		
Urbanedge Hotels Pvt. Ltd. (Aloft Coimbatore).	10,70,363	10,44,604		25,759		-		25,759		
Urbanedge Hotels Pvt Ltd - Court	-	-		1,99,000		-		1,99,000		
URBAN EDGE HOTELS PVT LTD (ALOFT-CHENNAI)	-	-		77,86,012		-		77,86,012		
URBAN EDGE HOTELS PVT LTD (ALOFT-COIMBATORE)	-	-		58,71,838		-		58,71,838		

9. It is stated that, as per Section 43 (3) of IBC, the transfers made in the ordinary course of business for the financial affairs of the Corporate Debtor or the transferee do not fall within the ambit of preferential transactions. It is stated that no moneys were paid out from the Corporate Debtor company as repayment to the Suspended Directors during look back period in actual terms. It is alleged that the transaction audit report is based on the information available to the auditors which is clearly incomplete. As to the repayment of 1.80 Crores, against the unsecured loans from the related parties in the last two years with Respondent No. 4 to 6, it is stated that the allegations are false.

10. As regards the transaction with 4th Respondent i.e. *Urbanedge Hotels Pvt. Ltd.*, it is stated that the payments relate to the Unit Monthly Base Management fee billing made by/to the Corporate Debtor as per the Management Agreement between the two parties, which dates back to the year 2009 which is a regular business transaction. The Applicant / Auditors have not made reference to these documents.

11. As regards the transaction with the 5th Respondent i.e. *Star Logistics Pvt Ltd*, it is stated that the said entity is a service provider to the Corporate Debtor and the amount was paid to the said entity towards the services rendered by it, keeping in view the business interest of the company and to avail uninterrupted services on a regular basis. It is stated that Respondent no. 5 used to provide cars on hires, which were essential for running the hotel business. It is stated that expenses for hire charges were in line with the agreement entered with the 5th Respondent for which invoices were raised on FY 2021-2022(30.04.2021 and 31.10.2021) which the Corporate Debtor was bound to pay. It is stated that these transactions were made in the ordinary course of business. It is stated that the business relationship with the 5th Respondent takes back to the year 2011 i.e. more than a decade.

12. As regards the transaction with the 6th Respondent i.e. *Auromatrix Holdings Pvt Ltd*, it is stated that the amount of Rs. 1.62 Lakhs paid and amount of Rs. 0.92 Lakhs received during the look back period were the transactions happened in the normal course of

business and are immaterial. It is stated that none of the transactions can be termed as preferential transactions and all the transactions were done in the ordinary and regular course of business and link to the operations of the Corporate Debtor.

13. **Respondent No. 2 and 3 jointly filed their reply** to the application wherein they also denied the averments made in the application. It is stated that the most of the allegations in both the applications relate to either supposed accounting write off made by the Respondents of investments or loans or the preferential payments made to certain service providers. It is stated that write off were finalized after the CIRP commencement date by the RP and the Statutory Auditor. The audit was completed under the instructions of the RP and the financial statements were signed on 24.01.2022 which is also evident from the extracts of the meetings of the CoC meetings (2nd and 3rd meeting dated 20.01.2022 and 16.02.2022 respectively). It is stated that the unaudited financial statements were presented to the COC and there after the audit was undertaken and completed for the FY 2021 by the RP after he took control of the Corporate Debtor and thereby consciously decided to write off the said investments and the

loans after the CoC asked him to discuss with the auditors whether the loss on investments could be provisioned instead of write off. It is stated that there was no outflow of funds or resources or transfer of any property or interest thereof during the look back period. It is stated that the shares / securities / loan claims are still in the name of the Corporate Debtor and there was never a transfer of assets from the books of the Corporate Debtor. It is stated that prior to filing of these applications, RP neither sought any clarifications on the transaction audit report nor shared the report with the Respondents. It is stated that the RP did not conduct independent audit as required under the Companies Act. He also changed the auditor of the Corporate Debtor without the approval of the CoC. It is stated that no grounds are made out to invoke Section 43 of IBC as none of the transactions falls within the ambit of Section 43 of IBC. Further the RP did not follow the procedure as contemplated under Regulation 35(A). It is stated that the expenses mentioned as preferential transactions were incurred in the ordinary course of business of the Corporate Debtor and there was no outflow of funds or resources or transfer of any property or interest. It is stated that merely undertaking a transaction with a related entity

does not make the transaction preferential. Respondent No. 2 and 3 replied on the lines of the Respondent No. 1 and stated that the application is misconceived and is liable to be dismissed.

14. **The Applicant filed the Rejoinder to the replies** filed by the Respondents wherein he denied the averments made in the replies and reiterated what he has stated in the application. It is alleged that the Respondents despite request from the auditor did not provide the relevant documents for conduct of the transaction audit as evident from the mail dated 15.03.2022. It is stated that the time period provided under Regulation 35 (A) is directory in nature and any action taken by the RP beyond the time prescribed cannot be held to be non-est or void. Reference is made of the case '*Aditya Kumar Tibrewal vs. Om Prakash Pandey & Ors. (Company Appeal (AT) Insolvency No. 583 of 2021)*'. He denied that he did not give sufficient time to the Respondents to respond to the transaction audit report. It is stated that sharing of financial statements with the creditors and no query raised by them would not construe that the financial statements are true and the creditors had accepted the same. The Applicant referred to Section

43 (2) of IBC, 2016 which states that *“a Corporate Debtor shall be deemed to have given a preference if there is a transfer of property or an interest thereof of the Corporate Debtor for the benefit of the creditor and such transfer has the effect of putting the creditor in a beneficial position.”* It is stated that the alleged transactions are in contravention to the order of priority as set out in Section 53 of IBC, 2016. It is stated that the Respondent did not provide full information of the documents as required by the transaction auditor and now he is estopped from raising a plea that audit report has been formulated on the basis of the incomplete information.

15. It is stated that the explanations rendered for the repayment of the unsecured loans to the related parties to the tune of Rs. 1.80 Crores are afterthought. Page 45 of the report shows that Rs. 0.36 Crores was paid during the relevant period to the Star Logistics Pvt Ltd which was exclusive of transportation charges. It is stated that Rs. 1.43 Crores were paid against the unsecured loans and not towards the management fee as claimed by the Respondent which can be seen from the transaction audit report and further this contention is after thought. It is stated that the allegations contained in the application clearly

demonstrate that the transactions fall within the ambit of Section 43 of the Code.

16. **In Rejoinder to the Reply filed by Respondent No. 2 and 3**, it is stated that Respondent No. 2 and 3 are the brothers of Respondent No. 1. It was only Respondent no. 1 who had participated in the CoC meetings. It is stated that the audited accounts of the Corporate Debtor for the financial year ended on 31.03.2021 were finalized by the Directors of the Suspended Board since the accounts pertained to the period prior to the CIRP. The Applicant had taken control of the affairs of the Corporate Debtor on 26.11.2021 i.e after 8 months from the close of the financial year 2020-21. Finalisation of accounts with respect to the FY 2020-21 was the sole responsibility of the Directors of the Suspended Board as provided under Section 134 of the Companies Act. It is stated that the audited accounts were signed by the Directors only, since the entire information prior to CIRP was known to the Directors only. It is stated that write off were made only by the Directors and it is wrong to allege that audit was completed under the instructions of the RP. It is stated that the role of the RP was only to coordinate with the Corporate Debtor and the Auditors to expedite the

completion of the audit. It is stated that decision to write off investments was already taken by the Directors in the Board meeting dated 01.03.2021. It is stated that he had communicated to the Auditors about the CoC asking him to discuss with the auditors to examine whether the loss on investments could be provisioned instead of write off. It is stated that the decision to write off was already taken in the board meeting on 01.03.2021 and the accounts were finalised accordingly. It is stated that the Applicant had circulated unaudited financials for the financial year 2020-2021 and there was a confirmation that the accounts were finalized and audited. Since in the 2ndCoC meeting unaudited financial results were placed, so in the 3rdCoC meeting the Applicant updated the CoC that the Statutory audit has been completed for the year ended on 31.03.2021. The averment that there was no outflow of funds or resources or transfer of any property during the look back period to constitute avoidance transactions, is false. It is stated that the amounts involved in the transactions were transacted within the look back period and the transactions were the preferential transaction. It is stated that write off of the investments was not done in compliance with AS 13. It is stated that the

transaction audit report was placed before the CoC on 13.04.2022 and CoC had asked the Applicant to forward the report to the Respondents and obtain their reply on each of the points on or before 24.04.2022 which the Respondent No. 1 had agreed to give as he was the only person who had attended the meetings on behalf of the Respondents.

It is stated that transaction audit is not mandated under IBC and the transaction auditor is appointed only as an ex-parte to help the Resolution Professional to deduct any transaction which falls under the PUFEE transaction.

17. As to the replacement or reappointment of Statutory auditors requiring approval of the shareholders under Section 139 of the Companies Act, it is stated that since the company was under CIRP, the Applicant appointed PM & Co., as auditors to comply with the requirement under Section 134 of the Companies Act. It is stated that the financial accounts with the notes of accounts thereon and the auditors report are completely as per the requirements of Section 34 of the Companies Act and the said appointment would not fall within the ambit of Section 28 of IBC as the Applicant neither made changes in

the appointment or the terms of contract of the Statutory Auditors or Internal Auditors of the Corporate Debtor.

18. It is stated that the transaction auditor had submitted its report on 08.04.2022 within the prescribed period as contained in the Regulation 35(A) of the CIRP Regulations. The Auditor had requested the Respondents to provide relevant documents for conducting the transaction audit but the Respondents did not provide the complete data / information / clarification to the auditor. It is stated that the Respondents had made the adjustment / settlement of unsecured loans with the advances extended to the Directors and repayment of unsecured loans to the other related parties during look back period and the said transactions clearly fall under Section 43(4) of IBC, 2016.

19. We have heard Ld. Counsel for the parties.

20. **Ld. Counsel for the Applicant** submits that the amount involved in the transactions under Section 43 of the Code is Rs. 3.98 crores. This is in relation to adjustment of accounts due from the directors in contravention to the order of priority as set out in Section

53 of IBC. Ld. Counsel stated that Section 43(2) does not necessitate the movement of money from the Corporate Debtor, all it requires is only transfer of property and interest thereof and hence the statement of the Respondent that no money was paid by the CD is irrelevant. Ld. Counsel submitted that objection of the Respondents that the opinion has been formulated on an incomplete information to the transaction auditor becomes meaningless when the Respondent themselves did not provide the complete information of the documents required by the Auditors. The explanation for repayment of unsecured loans to the related parties to the tune of Rs. 1.80 crores is after thought. The transaction audit report clearly states that Rs. 0.36 Crores was paid to Star Logistics Pvt Ltd exclusive of transportation charges. As regards, Urbanedge Hotels Pvt Ltd, Rs. 1.43 crores were paid against the unsecured loans and not as the management fees as alleged by the Respondent. It was never informed to the Auditor that the payment relates to the management fees and the said defence taken by the Respondent is after thought. Ld. Counsel submitted that payment in group companies is in violation of the loan agreement / sanction letter which clearly provides that Banks / Lenders loan shall be given

priority. Reliance is placed on the case of *A ONE Greenfield Pvt. Ltd. Vs. RSJ Developers Pvt. Ltd. (I.A./2337/2022 IN IB-1017/ND/2020)* order dated 31.08.2023 and *PandurangRamchandraShinde vs Vijendra Kumar Jain, RP at Cyclo Transmissions Limited(MANU/NL/0396/2021)*.

21. **Ld. Counsel for the Respondent** per contra argued that the application has been filed without complying with the requirement of Regulation 35 A of the CIRP Regulations. The RP has acted mechanically and ignored the provisions contained in Section 43(3) of the Code. The purported transactions do not qualify as preferential transactions as they do not fall within the ambit of Section 43 of IBC. There are four directors in the CD, but notice was only given to Respondent No.1.

22. Ld. Counsel submitted that short terms loans were taken by the CD from the Suspended Directors periodically for many years since inception of Corporate Debtor to meet any shortfall in the operational cash flow and were repaid partially as and when there was a short term surplus. There were two ledgers of the CD ,“Loans & Advances

from Directors” and “ Directors Loans” and at the end of the financial year, these two ledgers were adjusted against each other and only the net balance was shown in the finances. Ld. Counsel stated that CD account with the Financial Creditor till the date of CIRP was not NPA. The directors had infused money in the company which can be seen from the ledger / financial statements even before the commencement of CIRP which was primarily to tide over the business and financial crisis occurred due to Covid. This demonstrates that the Suspended Directors had bonafide intentions towards the Creditors. Further, RP himself had conducted the audit after the CIRP for the FY 2020-21 and no changes were made by him to the accounting treatment. CIRP was initiated by IDBI as unsecured creditor invoking a bank guarantee executed by the CD and there was no agreement between IDBI not to pay or to set off the directors loan prior to paying any amount to it. The business failure / default of other company had the cascading effect on the CD. IDBI bank, there after entered into the settlement with the other entity. It is stated that Edelweiss ARC was the secured creditor but its account was not NPA, so no preference was given in

the payments / receipts to the directors which is also evident from the followings documents:

a. Overall Balance Sheet extract emphasising the Short term borrowing.

b. Note - 6 extract showing Short term borrowings.

c. Trial balance extract where the ledgers have been netted off even earlier.

d. Full Audited Financial Statement is attached.

B. Audited Financial Statement for FY 2021-22 filed by Respondent No.1 as additional documents.

C. Ledger / Receipt proof of funds from Respondent No.1 in FY 2021-2022 (immediately before CIRP commencement) filed by Respondent No.1 as additional documents.

23. As to the unsecured loans repaid to the related parties, Ld. Counsel submitted that there was a construction agreement in 2006 by which CD had to design, develop and build a hotel property for UHPL which was completed in 2009. Management agreement was there after entered with CD in 2010 and under the said agreement, UHPL had given the advances as per the ongoing trade account. Any excess payment was repayable / adjustable under the management

agreement. Since there was GST implication in knocking off the said Trade Advances against the Management Fees Billing, the fee payment was taken / received instead of adjusting, and was paid back towards the advances. This was done in the ordinary course of business and the same cannot be treated as repayment of loan. As of 31.02.2021, CD still owes Rs. 8.48 crores to UHPL towards the construction advances received. In support of the contentions Ld. Counsel placed reliance on the following documents:

1. *Hotel Management Agreement dated 27th October, 2009 filed as Annexure -2 by the 2nd and 3rd Respondent.*
2. *Construction agreement dated July 27, 2009, with an effective date of January 7, 2007 filed by Respondent No. 1 as additional documents.*
3. *UHPL Ledger in CD filed by Respondent No.1 as additional documents.*
4. *Extracts of ledgers of UHPL (both Trade Receivable and Trade Advance ledgers in books of Corporate Debtor filed by Respondent No.1 as additional documents.*

24. As to the transaction with Star Logistics Pvt Ltd (SLPL) for Rs. 36.0 lakhs, Ld. Counsel submitted that SLPL was the service provider

and the amount was paid towards the services rendered by it and also to avail uninterrupted services. This is not a repayment of loan or preferential transaction but a transaction in the ordinary course of business. Ld. Counsel stated that SLPL used to provide cars on hire which the CD had taken to run the business. The invoices were raised which the CD was bound to pay. Ld. Counsel stated that the business relationship with SLPL was since the year 2011. This is also evident from the documents:

- 1. Three Invoices from SLPL dated 30.04.2021, 31.10.2021 and 20.11.2021 filed as Annexure-3 by the 2nd and 3rd Respondent.*
- 2. Engagement letter dated 30.09.2020 between CD and SLPL filed by Respondent No. 1 as additional documents.*

25. As regards transaction with Auromatrix Holdings Pvt Ltd, the CD owes Rs. 1.20 Crores to this company as on 31.03.2021 received as advances. The group company consolidated the financials. Audit fees was paid by the CD during the look back period as can be seen from the CD ledgers.,however, this payment was wrongly captured by the Applicant as return of loans. This is a regular business transaction and was not a paying back of the unsecured loan.

26. We have considered the submissions, perused the documents and gone through the cases supra.

27. A perusal of record shows that the Corporate Debtor was incorporated in April 2002. It was doing the business of owning and operating the hotels including resorts at Tiruvannamalai and Kanyakumari. It entered into a Design Development and Construction Agreement with Urbanedge Hotels Private Limited (UHPL) in January 2007 for constructing hotels for UHPL. It received the advances from UHPL for managing the hotels. As per the agreement, the advances paid by UHPL for the management of the hotels were to be set off / repaid by the Corporate Debtor from the management fees received by it from UHPL. The fees were paid by UHPL but the Corporate Debtor in turn paid some of the advances received under the agreement due to GST implication. Record shows that it had been managing the UHPL hotels since November 2009 till the hotels were sold by UHPL.

28. Record reveals that Corporate Debtor had given corporate guarantee to IDBI Bank Ltd in November 2010 for the loan given to Ms.Auromatrix Pvt Ltd. The Corporate Debtor had also financial

agreement with Edelweiss Asset Reconstruction Company (EARC), the only secured financial creditor of the Corporate Debtor. The account of the Corporate Debtor was never the NPA as there were no over dues to EARC till the date of start of CIRP. It was the IDBI Bank Ltd which invoked the bank guarantee in January 2020 and filed CIRP against the Corporate Debtor being an unsecured financial creditor. Thus in the present case the CIRP commenced due to the effect of default of loan by a group company i.e. Ms.Auromatrix Pvt Ltd.

29. Record further shows that in the 2ndCoC meeting, accounts finalisation for 31.03.2021 was discussed and RP was asked by the CoC to discuss with the auditor for provisioning instead of write off. The financial statements were completed and audited which the Suspended Director signed on 24.01.2022.

30. In the present case, the RP had taken the charge of the Corporate Debtor on 26.11.2021. The transaction auditor was appointed on 30.01.2022 who commenced the audit on 01.02.2022. The financial and audit completion were reported to the CoC on 16.02.2022 in the 3rdCoC meeting and EOI was submitted on 09.03.2022. RP issued the RFRP

including evaluation matrix and information memorandum. He received the Provisional list of the Resolution Applicants in which Respondent No. 1 / Suspended Director also participated. RP prepared the financial list of PRA's, but by that time he had not received the draft transaction audit report which was submitted only on 11.04.2022 i.e. after 136 days, the RP took over the affairs of the Corporate Debtor. There after he filed the application under Section 43 of IBC, 2016.

31. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 35 A reads as under.

“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 thirty-fifth day of the insolvency commencement date.”

32. Regulation 35A prescribes a period during which the RP has to form an opinion whether the Corporate Debtor has been subjected to any transaction covered under Section 43, 45, 50 or 66 and the period during which he shall make a determination and a period of one hundred and thirty five days of Insolvency commencement date during which he shall apply to Adjudicating Authority.

33. Admittedly, Regulation 35A of CIRP Regulations imposes a duty on the RP to take measure within the timeline and any action taken by RP beyond the time prescribed is prohibited, but it has been held in catena of judgments i.e. in the case of *Aditya Kumar Tibrewal vs Om Prakash Pandey & Ors (Company Appeal (AT) Insolvency No. 583 of 2021)* and *Prasant Chandra Rath & Anr vs Surya Kanta & Anr (Company Appeal (AT) Insolvency No. 869 of 2022)* by Hon'ble NCLAT that the timeline prescribed in Regulation 35A of CIRP Regulations is only directory and any action taken by the RP beyond the time prescribed, cannot be held to be non-est or void on the ground that it is beyond the prescribed period, if there are genuine and valid reasons for the RP for not filing the application for preferential transactions within the time prescribed.

34. In the present case as claimed by the Applicant / RP and as seen from the email dated 15.03.2022, there was non-cooperation from the Suspended Directors. The documents and assets were not handed over to the RP. RP had to move an application under Section 19(2) of the Code. An order was also passed by this Tribunal directing the Suspended Directors to extend cooperation. This was the reason why the transaction audit report was not finalized and the application could not be moved within time as provided under CIRP Regulation 35A. That being the position, the application filed by the RP relating to Section 43 of the Code, cannot be rejected being filed beyond the period of 135 days of Insolvency commencement date on the ground of non-compliance of Regulation 35A of CIRP Regulations, 2016.

35. It was argued that no due process was followed and no proper notice was given to all the Respondents calling for any explanation or giving opportunity to Reply. On a perusal of record we find that, there were four directors of the Corporate Debtor managing the affairs of the company. It was mainly the Respondent No. 1 who was participating in the CIRP proceedings for himself and on behalf of other directors. It

was the Respondent No. 1, who during the CIRP also filed the Resolution Plan. There is nothing to indicate that Respondent No. 1 was acting independently and was not consulting the other directors while responding to the queries / applications of the RP as at any stage no such objection was raised by the other Directors that they were not circulated the minutes of CoC meetings or no queries were raised during the transaction audit or they were not served with the report. They were free to participate during that process but it appears that since Respondent No. 1 was participating in the proceedings and was having know how of the proceedings, they did not interfere directly and left with Respondent No. 1 to respond. Nothing can be inferred from the record that they were not aware of the proceedings during the CIRP. We are of the view that principles of natural justice were duly followed by the RP. We may also note that on the application filed by the RP, notice was given to all the directors and Respondents No. 1, 2 and 3 have filed their Reply.

36. The provisions of Section 43 of IBC, 2016 is extracted hereunder;

43. Preferential transactions and relevant time. –

(1) *Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.*

(2) *A corporate debtor shall be deemed to have given a preference, if–*

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53

(3) *For the purposes of sub-section (2), a preference shall not include the following transfers–*

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that –

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if –

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

37. Perusal of Section 43 of IBC, 2016 contemplates that where the liquidator or the resolution professional is of the opinion that the corporate debtor has at a relevant time given a preference in such transaction and in such manner as laid down in sub – section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transaction and for, one or more of the orders referred to in Section 44. Thus, the preliminary enquiry which this Adjudicating Authority is required to

do is to first ascertain as to whether the Corporate Debtor has given any preference and whether the preference has happened during the relevant time.

38. Now coming to the advances / receivables from the Directors / Respondents, the Respondents in their Reply have submitted that the company had maintained separate ledger accounts for the unsecured loans from the directors and the advances / receivables from the directors. A satisfactory reply has been given by the Respondents as to the aforesaid action that at the end of the financial years, the two ledgers were adjusted against each other and only the net balance was shown in the finances. In the audited financial statements also, the same was shown as a net of both the ledgers. The same was also circulated to the Financial Creditors who never raised objection to the same.

39. It is manifest from the record that the short term loans used to be given by the directors to the CD since the inception of the CD to meet the short falls in the operational cash flows. There advances used to be repaid partially when there was a short term surplus with the

company. This happens in hotel industries as it always faces ups and downs in the business. There is no denial of the fact that there was Covid-19 pandemic in 2020 and 2021 and the hotel business was completely shut down. We are of the view that the Respondents have given a satisfactory reply that the directors had infused money in the company as short term loans which was repaid when the company happened to have surplus. The said transactions cannot be said to be the preferential transactions or to be in violation of the loans / advances taken by the CD from the financial institutions / creditors. It is pertinent to mention that the directors / CD were not knowing that the CIRP would be initiated against the CD being the Corporate Guarantor as its accounts was never the NPA. It is seen that the directors even before the CIRP had infused money in the company. After effecting the above entries under “loans and advances” and “Advances receivable “ ledgers, the CD owes Rs. 85.0 Lakhs to R1, Rs. 3.60 Lakhs to R2 and Rs. 2.44 Lakhs to R3. These infusions were made in the normal course of business to make the company running with bonafide intentions. The documents filed by the Respondents duly support the bonafides of the Respondents as to the above transactions.

40. As to the **transaction with UHPL**, it is not in dispute that CD had designed the hotel property for UHPL vide agreement entered in 2006. It also entered into a management agreement with UHPL. It was under those agreements, UHPL gave the trade advances to the CD during the period from 2006 to 2010 as an ongoing trade account. The excess payment was repayable / adjustable under free billing under the agreement. Due to GST implication, the fee payment was taken instead of adjusting and was paid towards the advances. It was simply an accounting treatment and has nothing to do with the preferential transaction. It was merely a business arrangement. The record rather shows that as on 31.02.2021, CD owes Rs. 8.48 crores to UHPL towards the construction advances received. It was therefore a regular business transaction and cannot said to be a repayment of loan. The Respondents have duly explained the above transactions by referring to the above documents.

41. As to the **transaction with Star Logistics Pvt Ltd (SLPL)**, there is no denial of the fact that the SLPL was the service provider as it used to give the cars on hire. The CD was bound to make payments for the

services availed. It was also bound to pay the invoices raised by the SLPL for the period from 30.04.2021 to 31.10.2021. It had relationship with SLPL since 2011 and had regular business transactions. No inference can be drawn that the above transactions were the preferential transactions rather these transactions were purely made in the usual course of business. The reasons given by the Respondent are also supported by the documents as referred above.

42. As regards **Auromatrix Holding Pvt Ltd**, the CD owed Rs. 1.2 Crores to AHPL as on 31.03.2021 which it had received as advances. Respondents have explained that the group companies consolidated the finances for which audit fees were paid by the CD during the look back period, however, the said payment was wrongly captured as return of loans. This was a regular business transaction and not as paying back of the unsecured loan.

43. The Hon'ble Supreme Court in the case of *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. –vs- Axis Bank Ltd., etc. in Civil Appeal No. 8512-8527 of 2019*, has dealt in detail as to how

the Resolution Professional is required to approach the transaction as preferential before filing an application before the Tribunal. The following has been culled out to ascertain a transaction as preferential which reads as under:

28.1. Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor.

These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.

4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of Section 43.

5. In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of Section 43.

6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of Section 43. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

44. An analysis of the above discussions clearly brings forth to the light that the transactions made by the Respondents were in the ordinary course of business or the financial affairs of the Corporate Debtor and were not the preferential transactions. These transactions do not in any manner prejudice the interest of the creditors.

45. In the light of what has been stated above, we are of the view that the Applicant has not made a case of preferential transactions on the part of the Respondents except making sweeping allegations and hence Section 43 of IBC, 2016 cannot be invoked under such circumstances. The present Application being sans merit is liable to be dismissed.

46. Accordingly IA(IBC)/883(CHE)/2022 stands **dismissed**. No orders as to costs.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)