

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

I.A. 300 OF 2021

Under Section 43 of Insolvency &
Bankruptcy Code, 2016 r/w Regulation
35A of IBBI (Insolvency Resolution
Process for Corporate Persons) 2016

Mr. Girish Juneja
Resolution Professional

...Applicant

V/s

Mr. Kailas Ramlal Pawar & Others

...Respondents

In the matter of

C.P.(IB) No. 1587/MB/2019

IDBI Bank Limited

.... Financial Creditor

Vs.

Pawar Electro Systems Pvt. Ltd.

...Corporate Debtor

Order delivered on: 01/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. P.S. Thakre, PCS

For the Respondent : None

ORDER

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

1. This is an Interlocutory application No. 300/2021 filed by Sh. Girish Juneja, (“Resolution Professional”) in the matter of M/s Power Electro Systems Pvt. Ltd (“Corporate Debtor”) under section 43 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as “IB Code” for short) seeking Order against (i) Sh. Kailas Ramlal Pawar; (ii) Hemant Balkrishna Sonje; and (iii) Sh. Ramesh Jain Prop. Of Chintamani Paraswanath Enterprises (“Respondent No. 1, 2 & 3 respectively and cumulatively “Respondents”) in the Corporate Insolvency Resolution Process (“CIRP” for short) and has sought condonation of delay of a period of 359 days in filing the present application. The following prayers have been made in the application –

- a) Consider the present application for preferential transactions under Section 43 of the Insolvency & Bankruptcy Code, 2016 read with regulation 35A of the IBBI (Corporate Insolvency Resolution Process) Regulations 2016 ("CIRP Regulations") and pass necessary directions.*
- b) Require the persons as detailed in this above application to pay such sums as stated above in respect of benefits received by them from the Corporate Debtor as the Hon'ble Tribunal may direct.*
- c) Adjudicate the preferential transactions, under relevant provisions of Sections 43 of the Code as mentioned in the application and impose necessary penalties upon the Respondents as this Hon'ble Tribunal may deem fit and other necessary directions.*

2. This Tribunal, in C.P. (IB) No.1587/MB of 2019, admitted the Application filed by Financial Creditor IDBI Bank Limited for

initiating Corporate Insolvency Resolution Process in the matter of M/s. Pawar Electro Systems Private Limited. The said order is stated to have been communicated to the Interim Resolution Professional by this Tribunal's Registry by email on 12th October 2019, whereupon, the IRP has published the public announcement in FORM A in terms of Section 13 and Section 15 of the Insolvency & Bankruptcy Code ("IBC") in 2 newspapers.

2.1. The Expression of Interest ("EOI") in FORM G was published was published in 3 (three) newspapers. The CoC members approved to extend the last date for submitting the expression of interest till 23rd January 2020. The corrigendum for extension of the last date of submitting the expression of interest was published on 09th January, 2020.

2.2. That after publication of the EOI in FORM G the resolution professional was approached by 4 potential resolution applicants The Applicant Resolution Professional ("RP") states that M/s PVR & Associates was engaged as Forensic cum Transaction Auditor, who performed Forensic cum Transaction audit of the Corporate Debtor for the period starting from 1st April, 2014 to 24th September, 2019, and the Auditor's report mentions that as per the information, documentation and explanation provided by the Applicant RP, the Corporate Debtor and banks, the Auditor found a transaction that falls under section 43 of the IBC from 01.04.2014 to 24.09.2019.

3. The facts pertaining to the transactions and the case of the applicant is as under –

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- 3.1. Sh. Ramesh Jain Prop. Of Chintamani Paraswanath Enterprises was paid a sum of Rs. 91 lacs towards Sales Commission and that sum has been classified as Preferential Transaction by the Auditor. It further states that M/s Intec Capital had financed machineries amounting to Rs. 3.51 Cr (including taxes) to the Corporate Debtor and were informed by the Resolution Professional that on verification of the Fixed Assets, some of the machineries were not available. The Applicant has prayed for appropriate orders with respect to the missing machines.
- 3.2. The Corporate Debtor is a company which is engaged in the business of manufacturing Laboratory I Magnetic Stirrers & Centrifuges & Blood Bank Refrigerators/ Freezers.
- 3.3. The Applicant RP states that as informed by Intec Capital Limited, their team conducted a 2nd visit on 29-08-2020 with assistance from Mr. Ashok Sonawane an ex -employee of the Corporate Debtor to help identify the assets. The team noted its remarks regarding the missing items of machinery on the purchase invoices of the machinery. The remarks regarding the verification were noted by the Intec team on the invoice for the items supplied. Transaction cum Forensic auditor has stated in their report that the Corporate Debtor did not provide updated fixed asset register for physical verification of purchase of Plant & Machinery. Further, the Transaction cum Forensic Auditor on pg. no. 130 of their report states that they have verified the documents provided by the PESPL for the missing machineries and they did not find any anomaly in the documents and/or explanations provided by the PESPL i.e. by Mr. Kailash Pawar.

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- 3.4. Further, the Applicant has provided the details of transactions as alleged to be Preferential in nature in table form which states that a sum of Rs. 91 lac was paid to M/s Chintamani Parawanath Enterprises towards Sales Commission and is preferential in nature.
- 3.5. As per the discussion held in the 7th , 8th and 9th CoC meeting, it was decided to file an application before NCLT for necessary directions regarding the missing machineries.
4. The Respondent No. 1 filed his Reply dated 9.9.2021 stating that *“With respect to the statement as to the Transaction of INR 91 Lakhs being preferential in nature, no averment as to how same is preferential is pleaded..... On the contrary, the forensic report at Pages 18, 66 and 78 states that the alleged party, i.e. M/s Chintamani Parawanath Enterprises is not a related party and payments made to them are “an accounting error”*. It is further pleaded that *“the minutes of the COC meeting 02 January 2021 at item No. 4-A, at internal page 5 (Page 179 of the Application) is silent as to how is the transaction considered to preferential though the findings explicitly cover the transaction under Section 43(3)(a) Insolvency and Bankruptcy Code, 2016”*. It is further pleaded that the facts pertaining to missing machineries are irrelevant for the purpose of present application and the statements made in this relation makes the application itself as vague and unsupported.
5. We have heard the Counsel and perused the material on record.
- 5.1. On perusal of the application, we find that the present application merely contains the provisions of section 43 of the Code; basic facts pertaining to missing machineries, and one transaction pertaining to payments made to Respondent No. 3.

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- 5.2. On perusal of the the Forensic Cum Transaction Audit Report, we find that it states that “*Payments made to M/s Chintamani Parawanath Enterprises was a sales commission, which was pertaining to the sales of the financial year 2014-15, 2015-16 and 2016-17 and PESPL did not account for commission expense, due to this reason the same is reflected in the books of PESPL as an advance, hence, it is an accounting error.*” The Report further states in the next Para that “*Payments made to M/s Chintamani Parawanath Enterprises of Rs. 0.91 Crores comes within one year from the date of commencement of CIRP (i.e. from 06.09.2018 to 06.09.2019). These payments shall be considered as preference payment to M/s Chintamani Parawanath Enterprises under section 43 of the IBC.*”
- 5.3. From the statements made in the Forensic cum Transaction Audit Report, we feel that even the findings of the Auditor are at variance, while on one hand the auditor concludes that the Respondent no. 3 was paid towards Sales Commission and the Sales Commission expenses got omitted to be accounted for, which has been characterised by the Auditor as ‘Accounting error’, and on the other hand in next para, the Auditor holds that the payment of Rs. 91 Lakhs made within look back period can be classified as Preferential Transaction. We are left with no option but to agree with the Respondent No. 1 that the application as well as Audit Report does not demonstrate as to how this Transaction falls within the four corners of Section 43 of the Code so as to warrant an Order u/s 44 of the Code.
- 5.4. We also find that the facts pertaining to missing machineries are irrelevant, as neither any prayer in that relation has been made nor any case has been attempted to be made out by the

applicant in the application. It seems that the applicant himself is not aware what case he is making before us.

5.5. In view of the above, we dismiss the present application as not maintainable.

5.6. Before we part with, we deplore the approach of the Resolution professional, the Applicant, as well as the Forensic and Transaction Auditor in dealing with such important aspect of CIRP so casually and without application of mind to the facts of the case.

5.7. The IBBI may look into the qualitative aspect of Forensic and Transaction Auditor's Report and may consider to hold one training session so as to equip them with the basic nuances of provisions relation to Avoidance Transactions contained in the Code and the expectation of the stake-holders from them in this regard.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)