

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH AT BENGALURU

(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)
 (Through Physical/Video – Conferencing/Hybrid Mode)

IA No.258 of 2024 in
CP (IB) No.197/BB/2022
U/s 66 of Insolvency & Bankruptcy Code, 2016

IN THE MATTER OF:

Ritesh R. Mahajan

B-203 Devgiri, Ganeshmala, Sinhagad Road,
 Pune – 411030, Maharashtra

...Applicant / RP

Versus

1. Mr. Shivkumar Malaghan

(Suspended Director of CD)

...Respondent No.1

2. Mr. Gurappa Reddi

(Suspended Director of CD)

...Respondent No.2

3. Mr. Basavraj Ningappa Arakeri

(Suspended Director of CD)

...Respondent No.3

4. Lokapur Cements Limited

(Related Company of CD)
 Lokapur Mmualhal Bijapur
 Bagalkot, Karnataka – 587313

...Respondent No.4

5. Ningappa Tippanna Huggi

(Additional Director of Respondent No.4)

...Respondent No.5

6. Sateesh Malaghan

(Additional Director of Respondent No.4)

...Respondent No.6

7. Nirmala Malaghan

(Additional Director of Respondent No.4)

...Respondent No.7

8. SLV Cements Limited

(Related Company of CD)
 No.4026/A/125, Triveni Tower,
 Ranna Circle Yadawad Road,
 Mudhol, Bagalkot, Karnataka 587313

...Respondent No.8

9. Basavraj Huggi

(Director of Respondent No.8)

...Respondent No.9

10. Sreenivas Subash Yaragatti

(Director of Respondent No.8)

...Respondent No.10

11. Shirish Malaghan

(Additional Director of Respondent No.8)

...Respondent No.11

12. Hemanth Koraddi Sudeer

(Additional Director of Respondent No.8)

...Respondent No.12

Order pronounced on: 01st January, 2025**CORAM:**

1. Hon'ble Shri K. Biswal, Member (Judicial)

2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Applicant : Shri Rohit Gupta, Shri Raghuram Cadambi,
Shri Theerthesh B.S., Advs.

For the R-1 to R-3 : Shri Abhishek Anand and Shri Madhur, Advs.

O R D E R**Per: Manoj Kumar Dubey, Member (Technical)**

1. This application filed by Mr. Ritesh Mahajan, the Resolution Professional of Corporate Debtor i.e., M/s Sovereign Industries Limited on 17.11.2023 against the Respondents under Section 66 of the Insolvency & Bankruptcy Code, 2016, praying for the following reliefs:

(a) *Declare the transactions entered into by the Respondents during the years 2021 to 2023, amounting to Rs.29,48,05,000/- as stated in the Paragraph No.13 above, as fraudulent transactions.*

(b) *Direct the Respondents to transfer an amount of Rs. 29,48,05,000/-, to the account of the Corporate Debtor;*

(c) *Award costs; and*

(d) *Pass such other and further orders as may be deemed fit and proper, under the facts and circumstances of the case, in the interest of justice and equity.*

2. The facts and circumstances leading to the present application are stated briefly as follows:

- (a) It is submitted that the CD was incorporated under the Companies Act, 1956 on 05.01.2009 for the purpose of manufacturing sugar. An application under Section 7 of the Code bearing CP (IB) No. 197/2022 was filed by Triveni Education Society, the Financial Creditor against the CD which was admitted by the Hon'ble NCLT, Bengaluru Bench on 28.03.2023. Vide the same admission order, this Tribunal appointed Mr. Konduru Prasanth Raju as the Interim Resolution Professional of the Corporate Debtor ("CD").
- (b) After the constitution of the Committee of Creditors ("CoC"), the 1st CoC meeting took place on 15.05.2023 during which it was resolved with a majority vote that Mr. Ritesh R. Mahajan will be appointed as the Resolution Professional for the CD. On 06.06.2023, this Bench approved this application for appointment of Mr. Ritesh R. Mahajan as the RP.
- (c) The Applicant upon taking the possession of the CD had very limited records and documents available from the site visit to the factory as well as from the RP. The RP then convened the 2nd CoC meeting on 22.06.2023 and included an agenda item for the approval of Transaction Auditors' fees. During the meeting, the applicant apprised the CoC members that the CD's factory had been inactive since February 2019, and financial transactions had been minimal from February, 2019 to March 2023. It is noteworthy that the retrospective examination period for transactions categorized as preferential, undervalued and extortionate according to the respective sections of the IBC is two years.
- (d) Subsequent to obtaining the approval for the transaction auditors' fees, the Applicant appointed Mr. Rajkumar Rathod of Shambhu & Gupta Co., Chartered Accountant as the Transaction Auditor on 18.07.2023, to assess and provide an opinion on the PUFEE (Preferential, Undervalued, Fraudulent & Extortionate Transactions).
- (e) In accordance with Regulation 35-A (2) of the CIRP Regulations, 2016 the Applicant was required to formulate an opinion regarding whether the corporate debtor had engaged in any transactions falling under

Sections 43, 45, 50 or 66 on or before the one hundred and fifteenth day from the insolvency commencement date.

- (f) Consequently, given the very limited records, information and documentation available to the Applicant regarding the CD, an opinion was formed concerning the Preferential, Undervalued, Fraudulent and Extortionate (PUFE) transactions. It was observed that certain transactions qualified as fraudulent under Section 66 of the IBC, 2016 while no preferential, undervalued, or extortionate credit transactions were identified during the relevant period.
- (g) The RP submits that the CIRP commencement date was 28.03.2023. A few days before this date, a sum of Rs.24,00,00,000/- was received in the CD's Account from Ugar Sugar Works Ltd. After a meticulous examination of the CD's financial records, it came to the attention of the Applicant that an amount of Rs.29,48,05,000/- was transferred to SLV Cements Ltd., (Respondent No. 8), Lokapur Cements Ltd. (Respondent No. 4) and as a Lease Deposit by the CD shortly before the admission of the Company Petition; after receiving the amount of Rs.24 crores as stated above.
- (h) The date wise summary of these transactions which were identified as Fraudulent Transactions u/s 66 of IBC, 2016 are given below:

Name of the Party	Date	Type of transaction	Amount (in Rs.)	Remarks
SLV Cements Ltd.	01.09.2021	Advances	1,25,000	No material or goods or services rendered. Further these are identified as related party transactions.
	24.06.2022	Advances	1,36,80,000	
	14.12.2022	Advances	10,00,000	
	07.03.2023	Advances	4,00,00,000	
	16.03.2023	Advances	10,00,00,000	
	TOTAL		15,48,05,000	
Lokapur Cements Ltd.	15.03.2023	Advances	5,00,00,000	No material or goods or services rendered. Further, these are identified as Related Party transactions.
	16.03.2023	Advances	5,00,00,000	
	TOTAL		10,00,00,000	

Lease Deposit		Lease Deposit	4,00,00,000	Long Advances, no name is appearing in the financial statements
	TOTAL		29,48,05,000	

- (i) The Applicant conducted a thorough due diligence checks and discovered that SLV Cements Ltd. (R-8) and Lokapur Cements Ltd (R-4) are related parties to the CD. The Suspended Directors of the CD and the aforementioned Companies share a common director on their respective boards. This is further supported by records from the Ministry of Corporate Affairs (MCA) which clearly illustrate the shared directorships of Mr. Shivakumar Malagan in the CD and in Lokapur Cements Ltd, alongside, his wife, Mrs. Nirmala Malaghan. Additionally, Mr. Shishir Malaghan, who is the son of Mr. Shivkumar serves as a director in SLV Cements Ltd.
- (j) The details of the related parties, based on the MCA Master Data of the Companies as follows:-

*Signatory Details of **Sovereign Industries Limited:***

Sr. No.	DIN	Name of Director	Designation	Date of Appointment
1	01737558	Shivakumar Malagan	Director	01.01.2012
2	06859456	Gurappa Reddi	Director	05.05.2014
3	07074833	Basavaraj Ningappa Arakeri	Director	15.09.2017

*Signatory Details of **Lokapur Cements Limited:***

Sr. No.	DIN	Name of Director	Designation	Date of Appointment
1	01651105	Ningappa Tippanna Huggi	Additional Director	30.06.2007
2	01651314	Sateesh Malaghan	Additional Director	30.06.2007
3	01725209	Nirmala Malaghan	Additional Director	30.06.2007
4	01737558	Shivakumar Malagan	Additional Director	30.06.2007

*Signatory Details of **SLV Cements Limited:***

Sr. No.	DIN	Name of Director	Designation	Date of Appointment
1.	07074841	Basavaraj Huggi	Director	13.04.2015
2.	07074849	Sreenivas Subash Yaragatti	Director	13.04.2015
3.	08629503	Shirish Malaghan	Additional Director	04.12.2019
4.	08139795	Hemanth Koraddi Sudeer	Additional Director	04.12.2019

- (k)** Hence, the RP submits that based on the aforementioned transactions, the RP issued recovery notices to SLV Cements Ltd. on 25.07.2023 and to Lokapur Cements Ltd on 24.07.2023, the same date. These notices directed them to promptly deposit the Outstanding Dues into the CIRP account of the CD. These transfers had been executed shortly before the admission of the Company Petition and lacked specific documentary agreements. Furthermore, no Outstanding Dues payable to SLV Cements Ltd. on 24.07.2023 and to Lokapur Cements Ltd. were evident in the Financial Documents or any other records.
- (l)** Furthermore, the Applicant has also sent an email dt.16.08.2023 to the Suspended Management/Directors of the Corporate Debtor, requesting detailed explanations regarding the nature of transactions, reasons and supporting documentary evidence for the transactions with SLV Cements Ltd, Lokapur Cements Ltd. and the matter concerning the Lease Deposit. It was conveyed that any deviation or lack of cooperation from the management of employees, staff, and officers of the Corporate Debtor could result in serious legal consequences before the appropriate forums and authorities.
- (m)** It is pertinent to note that, as of the current date, no response has been received from SLV Cements Ltd. regarding the notice issues on 25.07.2023 and from Lokapur Cements Ltd. regarding the notice issues on 24.07.2023. Furthermore, as of the present date, no response has been received from the suspended directors of the CD regarding email dated 16.08.2023.

- (n) On 02.09.2023, the Transaction Auditor requested specific documents to facilitate the Transaction Audit, to which the Applicant provided certain documents. The Transaction Auditor was informed by the Applicant that other pertinent information, which was not available with the Applicant had been requested from the suspended directors of the CD. However, as of the present date, this requested information has not been provided. Consequently, due to the unavailability of sufficient data the Transaction Auditor is encountering challenges in completing its Transaction Audit Report within the specified timeline.
- (o) Despite the impediments, the Transaction Audit Report from the appointed Transaction Auditor is still pending, and once it is received should there be other transaction falling within the Scope of Sections 43, 45 50 or 66 of the IBC, the applicant will present the said report from the Transaction Auditor as a part of the Additional Affidavit which will be incorporated into the current Application.
- (p) The Applicant states that the transactions unequivocally meet the criteria outlined under section 66 of the Code. This is primarily because no Outstanding Dues were owed or payable by the Corporate Debtor to SLV Cements and Lokapur Cements. Furthermore, these transactions cannot be considered as ordinary course of business dealings, especially considering the CD's factory had been inactive since February 2019. It is evident that these transactions were intended to benefit the Respondents.
- 3.** Respondent No. 1 Mr. Shivakumar Malaghan, Respondent No. 2 Mr. Guruappa Reddy and Respondent No. 3 Basavaraj Ningappa Arakeri have filed Objections *vide* Diary No.5719 and 5716 dated 07.10.2024, whereby, the Respondent have submitted the Applicant is in violation of the CIRP Regulation 35-A which mandates the RP to form an opinion within 75 days from the commencement of the CIRP on whether the Corporate Debtor has been subjected to any transaction covered under Sections 43, 45, 50 or 66 of the Code. The RP is required to make a determination within 115 days and file an application before the Adjudicating Authority within 135 days.

However, the Applicant has filed the captioned Application as a mere formality without first obtaining TAR from the Auditor. The application was filed without any report or input from the Auditor and with a preconceived notion that the Respondent has committed the alleged fraud. In-fact subsequent filing of the TAR in April 2024 after six months from the captioned application exemplifies the misuse of the provisions of the Code.

4. The second objection taken by the Respondent is that the TAR submitted by M/s. Shambhu Gupta & Co., Chartered Accountants, lacks credibility and conclusiveness due to significant disclaimers, limitations and caveats which evince that the said report and its findings cannot be relied upon by this Tribunal or the RP. The following are some of the Clauses from the TAR that the Respondents mentioned for substantiating their contentions:

“2. Whilst we have taken reasonable steps to corroborate the information obtained, however, we cannot reply on the completeness of information made us available for the review.

3. We have received information/data only from the RP and we have relied on the copy of the documents.....we have not independently verified the accuracy and correctness of the information.

4....Neither Firm, nor any of its partners, directors, employees undertake responsibility in any way whatsoever to any person in respect of error in this report...”

5. It was contended that these clauses from the TAR establish that such an inconclusive report holds no value in the eyes of the law for establishing any transactions under the Code. The disclaimers and limitations admitted by the Transaction Auditor indicate that the findings are based on incomplete, inaccurate information and judgemental sampling. Consequently, the report’s conclusions cannot be deemed definitive or reliable for legal scrutiny or the determination of preferential transactions.

6. It was further averred by the Respondent that the TAR's conclusion regarding fraudulent transaction is baseless and erroneous as the Transaction Auditor himself has admitted to significant shortcomings. The Transaction Auditors has himself stated that he cannot vouch for his conclusions as the analysis may not represent all possibilities. Thus, the conclusions in TAR at best can be described as "suspicion" that fails to be conclusive.
7. Therefore, the Respondent states that analyses in TAR is based on incomplete information and cannot be relied upon as the Transaction Auditor has not received all relevant documents such as necessary financial documents, Tally Data, Bank Statements, Secretarial Records and ledgers.
8. Heard the learned Counsel for the Applicant and learned Counsel for the Respondents and perused the documents placed on record. The Counsel for the Applicant has also submitted the Transaction Audit Report dated 06.12.2023 with Additional Affidavit *vide* Diary No.2151 on 04.04.2024. The extracts from the TAR related to transactions under Section 66 of the Code are reproduced hereunder [Page 28 of TAR]:

“Observation:

During the audit period, it has come to attention that CD has disbursed a total payment of INR 28.82 Crores to its affiliated entities, with corresponding receipts from these related entities totalling INR 1.36 Crores. Consequently, the net payment to these entities amounts to INR 27.45 Crores.

It was observed that during the month of March 2023, CD engaged in a transaction wherein it sold the 'license' to The Ugar Sugar Works Ltd (not a related party) for a total consideration of INR 24 Crores (as per discussion with RP, however, such sale agreement was not provided to us by CD. Furthermore, out of the amount received from sale of license, an advance of INR 14 Crores was remitted to M/s SLV Cements Limited (a related party of the CD), while the remaining INR 10 Crores was advanced to M/s Lokapur Cements Limited (a

related party of the CD). It is important to highlight that this series of transactions unfolded merely 23 days prior to the initiation of CIRP and after the application for commencement of CIRP was filed on November 29th 2022.

Following transactions paint a picture that, CD has siphoned or diverted the funds received from the sale of the 'license' to Ugar Sugar to related parties before the commencement of CIRP. Additionally, no visible transactional history existed between the CD and The Ugar Sugar Works Limited prior to the aforementioned license sale as per books of accounts.

Our team tried to verify whether such financial advances were duly reflected in the balance sheets of SLV Cements and Lokapur Cements. However, as per MCA records, the last filed balance sheet for these companies pertains to FY 2021-22 (Screenshot attached on Page No. 23), rendering verification impossible.

It is observed that CD has transferred amount of INR 24 Crores, received on account of sale of license (as per RP to Ugar Sugar) to entities affiliated with CD or its related parties. It is crucial to note that these transactions transpired subsequent to the filing of the application for initiation CIRP and were completed prior to initiation of CIRP.

Each of these transactions, were executed within a timeframe of 23-day preceding to initiation of the CIRP. The circumstances surrounding these financial maneuvers strongly suggest a premediated scheme or an afterthought by CD, reflective of a deliberate and calculated effort to divert funds from the corporate entity in question.

Considering the available documents, lack of evidence & explanation from CD and circumstances under which these transactions with related parties occurred paint a picture of fraudulent transaction u/s 66 of IBC, 2016.

Furthermore, during audit period, no vouchers, details and supporting documents for these advances made to related person/entities were produced before us by Corporate Debtor. And hence in absence of any information, we cannot rule out possibility of these transactions falls under ambit of Section 66 of IBC, 2016. As per Section 66, if before the insolvency commencement date, such director or partner know 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 Such director or partner did not exercise due diligence to minimizing the potential loss to the creditor of the corporate debtor.

Fraudulent Transactions

In absence of any information, we cannot rule out possibility of these transactions falls under ambit of Section 66(2) of IBC-2016. Section 66(2) spells about that before the insolvency commencement date, such director or partner know 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 such director or partner did not exercise due diligence in minimizing the potential loss to the creditor of the corporate debtor.”

9. The RP has based its opinion of fraudulent transactions prima facie by perusing the documents of the CD. The RP in its observation has identified an amount of Rs.29,48,05,000/- which falls under the ambit of “fraudulent transaction” as per the definition given u/s 66 of the Code. The RP has based its deduction while relying on the very limited quantity of records and documents which notes that the money received by the CD from a third party Ugar Sugar Works Ltd. amounting to Rs.24 crores which was immediately siphoned off to the related parties of the CD, namely, SLV Cements Ltd. and Lokapur Cements Ltd., merely 23 days prior to the initiation of CIRP and after the application for commencement of CIRP was filed on 07.11.2022. The RP has also based the opinion by obtaining a Transaction Audit Report which states that such financial advances were

duly reflected in the Balance Sheets of the related parties. It is also contended that as per the MCA records, the last filed balance sheet for these companies pertain only to FY 2021-22, rendering the verification impossible for the impugned period. It is averred that by the Transaction Auditor that the tally records don't have the details relating to advances such as PAN No., GST No., contact details and other necessary information. This absence of these pivotal records not only made the findings difficult for the Auditor, but raised questions on the genuineness of the parties; with which the CD has entered into transactions. However, the RP has communicated to the auditor that the records were not made available by the CD explaining that the same were damaged during the floods at the factory, as was communicated to the RP by Mr. Shishir Malagan, the General Manager of the Corporate Debtor. When the RP visited the site of the Corporate Debtor to take possession of the records, documents etc. this person explained that due to flooding in the factory area, the documents have been misplaced. However, it is pertinent to mention here that no evidence has been furnished for the same, and in case of important documents of the Company or factory being destroyed due to floods, the secondary evidences like F.I.R./Insurance claim etc., as may be required by the relevant Regulations was a necessity. Another such limitation pointed out in the audit report is regarding the details of the parties which could not be verified from the Bank Statements and books of accounts of the CD; as the CD is booking purchases as a generic descriptions like "Cane Supplier 17-18" and "Cane Supplier 18-19"; without giving the name and address etc.

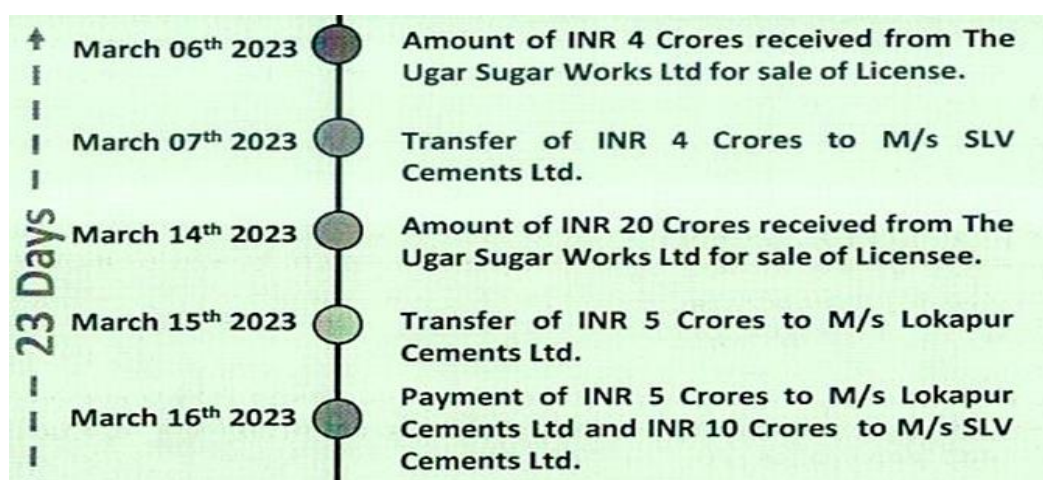
10. With regards to the transactions in question, the Auditor's Report state that the transaction which transpired subsequent to the filing of the application for initiation of CIRP were completed prior to the initiation of CIRP and each of these transactions were executed within a timeframe of 23 days preceding the initiation of the CIRP. The Auditor's Report has stated that ***"the circumstances surrounding these financial maneuvers strongly suggest a premediated scheme or an afterthought by the CD, reflective of a deliberate and calculated***

effort to divert funds from the corporate entity in question.” The Report conclusively state that ***“considering the available documents, lack of evidence & explanation from CD and circumstances under which these transactions with related party occurred paint a picture of fraudulent transaction u/s 66 of IBC.”***

11. The primary objection of the Respondent is that the RP has not filed this application u/s 66 of the Code within a period of 135 days as prescribed under Regulation 35-A of the IBBI (CIRP) Regulations, 2016. In this connection, reliance is placed on the Judgments of the **Hon’ble NCLAT in the case of *Aditya Kumar Tibrewal RP v. Om Prakash Pandey* reported at (2022) ibclaw.in 278 NCLAT in Order dated 06.04.2022**, according to which the Regulation 35-A is not mandatory and is only directory in nature. Subsequently, a similar decision was rendered in the ***Prasant Chandra Rath (Suspended Director of Corporate Debtor) v. Surya Kanta Satapathy (RP) and Ors.* reported at (2022) ibclaw.in 789 NCLAT in Order dated 30.09.2022**, in which, the reliance was placed on this earlier order in the case of *Aditya Kumar* (supra) and the same Judgment was delivered. It is also important to note here that in the latter Judgment, it was elaborately discussed and underlined that the delay in completing the report on the part of the RP for the purposes of Section 66 of the Code was caused primarily due to non-cooperation on the part of suspended Directors, as documents and registers was not handed over in time in that case. It was further noted that there was a delay on the part of suspended Directors to furnish documents, registers to the Transaction Auditor to complete the Transaction Audit for the purposes of Section 66. Therefore, these facts are identical to the case herein; here also there was absolute non-cooperation by the suspended Directors in handing over the documents and registers on the pretext that the same had been destroyed on account of floods, for which there is no evidence whatsoever. Hence, relying on the above mentioned Judgments of the Hon’ble NCLAT, the objection regarding non-submission of the RP’s report for the fraudulent transaction u/s 66 within the time is rejected as the timeline given under Regulation 35-A has been held to be directory and not mandatory.

- 12.** The second objection is that the Transaction Audit Report submitted by M/s. Shambhu Gupta & Co., Chartered Accountants, lacks credibility due to significant disclaimers and caveats which have been mentioned in Para 4 above. Therefore, the Respondents have observed in their objection that such an inconclusive report holds no value in the eyes of Law for establishing the fraudulent transactions. In this connection, it is pertinent to mention here that the RP had constantly pursued with the suspended management to provide the documents and cooperate for the conduct of the Transaction Audit and Due Diligence for determining whether the transactions attract the provisions of Section 66 of the Code. It is reiterated by the RP that considering that the CIRP commencement date of 28.03.2023, the transfer of funds to the related parties (M/s. SLV Cements Ltd. and M/s. Lokapur Cements Ltd.) was done in the month of March 2023 itself i.e. in the immediately preceding period, which amounts to fraudulent transaction, since the suspended Directors refused to explain the nature of these transactions and give any details whatsoever. There was no documentary evidence nor any outstanding dues payable to these parties, which would justify these payments to the tune of Rs.29.48 crores as mentioned above at Para 2(h). On 16.08.2023, the Applicant sent an e-mail to the suspended Directors of the Corporate Debtor requesting for a detailed explanation regarding the nature of these transactions, reasons and the supporting documentary evidence. The same was also asked in respect of the Lease deposit of Rs.4 crores, for which also no documents, date of transactions etc. was furnished. The details in respect of all these transactions have been mentioned above in the facts at Para 2(h); and the total amount is Rs.29.48 crores.
- 13.** The RP had also issued separate notices dated 24.07.2023 and 25.07.2023 to the two related parties mentioned above for repayment of the outstanding dues with the Corporate Debtor, to which also they have not responded; without any explanation. Accordingly, we are of the opinion that with this conduct of the suspended management / Directors of Corporate Debtor, they cannot raise the objections and observations in respect of the disclaimers made by the Transaction Auditor in his report.

- 14.** It is noticed from the TAR, that the Auditor has clearly placed on record the link of the Corporate Debtor receiving an amount of Rs.24 crores in March 2023 from Ugar Sugar Works Ltd; and immediately within a day or two, transferred the same to the related party. The Banking Transactions have established a direct nexus or link between the receipt from Ugar Sugar Works Ltd. and transfer to the related parties; as is shown below:



- 15.** Therefore, considering the dates of these transactions when the money which has been received from M/s. Ugar Sugar Works Ltd. by the Corporate Debtor had been transferred immediately within a day or two as reflected above to the related parties, namely, M/s. SLV Cements Ltd. and M/s.Lokapur Cements Ltd., it was all the more necessary for the Corporate Debtor or suspended management to respond to the queries raised by the Auditor or the RP for explaining the nature and basis along with the documentary evidence of these transactions, which was not done in spite of repeated opportunities.
- 16.** In such a case, the person responsible (the Respondents in this case) being part of the suspended management of the Corporate Debtor would be liable to make appropriate contribution to the assets of the Corporate Debtor. Sub-Section (2) of Section 66 of the IBC 2016 also specifies that such a Director or Partner of the Corporate Debtor is liable to make such contribution to the Corporate Debtor if they did not exercise the due diligence in minimising the potential loss to the Creditors of the Corporate Debtor.

17. In this case there is a clear cut pattern established which shows that instead of exercising due diligence in minimising the potential loss to the creditors, the Respondents herein were in fact actively involved in facilitating to carry out the above referred fraudulent transactions, and causing grave losses to the Creditors of the Corporate Debtor as well as to the Corporate Debtor itself.
18. Therefore, it was logical on the part of the Transaction Auditor to look into the nature and purpose of such huge transfer and withdrawal from the CD's account just before the commencement of CIRP. In fact, the suspended Directors of CD also failed to provide the requisite details along with documentary evidence to the Auditor and explain to the Auditor as to why the huge withdrawals / transfers immediately after receipt of the money were made. It was only made known by the study of banking transactions of the CD that the money was taken from a third party, and immediately transferred to the related parties. Therefore, such transaction would be squarely covered within the scope and meaning of the provisions of Section 66 of IBC and the Respondents would be liable to make contributions to the assets of the Corporate Debtor as provided in that Section. There is no doubt in this case that the Respondents were 'knowingly parties' in carrying out such fraudulent transactions and instead of exercising due diligence as provided in sub-section (2) (b) of the said Section 66 in minimising the potential loss to the Creditors of the Corporate Debtor; they actually actively indulged in and contributed to causing such losses to the Creditors.
19. On questioning about the documents, the Corporate Debtor has shrugged off the responsibility of providing the same by stating that the documents were missing due to the floods at the CD's site. In light of this, it is necessary to peruse the decision of the **Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.454 of 2022 in Mr. Nitin Bharal Ex-Director/Promoter and others v. Stockflow Express Private Limited through Liquidator Mr. Sanjay Gupta vide order dated 04.05.2022 reported in (2022) ibclaw.in 333 NCLAT**, in which, it was held that that

if the IRP/RP has *prima facie* suspicion of any fraudulent transactions, as defined under the Code, it has the recourse to approach the Adjudicating Authority for necessary action. **Further, relying on *Stockflow (supra)*, this Tribunal holds that in the event of non-cooperation in giving the information to the RP, the CD cannot question the completeness of the Transaction Audit Report.**

20. In this case also, though the Transaction Audit was duly carried on, the final conclusion could not be arrived at as discussed above due to the lack of cooperation on the part of the suspended Board of Directors. Therefore, the Transaction Auditor was been just able to flag the huge encashment amounting to Rs. 24 crores and immediately after receipt of the money from a third party, M/s. Ugar Sugar Works Ltd.; thus a direct nexus has been established, by transferring it to the related parties in the immediately subsequent period, to the tune of Rs. 29,48,05,000/-. Thus, this is a fit case where there is a siphoning-off of funds by the Promoters/ Respondents and therefore, Section 66 of the IBC, 2016 is squarely applicable for “Fraudulent Transaction”. Relying upon the ratio in judgement of Hon’ble NCLAT (*supra*), the reports of the RP along with the CA are considered sufficient to establish that the provisions of Section 66 of the IBC, 2016 are clearly attracted in this case.
21. It is thus a case where the Respondents have raised objections regarding the RP having delayed in filing the IA for fraudulent transaction u/s 66 of the Code and also for the Transaction Auditor giving a qualified and report with some caveats, whereas, it is the suspended management itself that is fully responsible for the delaying tactics by not providing any information under the excuse of floods having destroyed the documents etc., in view of the Judgments noted above. Therefore, the objections of the Respondents are liable to be rejected in toto as they are held to be fully responsible for such delay and the qualified report on the part of the Auditor. However, as has been held in the above decisions rendered by the Hon’ble NCLAT, in such situations the Transaction Auditor as well as the RP is justified in preparing the report on the basis of the Bank Statements which clearly

reflects the immediate withdrawal and transfer of funds to the related parties after receipt of the same from M/s. Ugar Sugar to the tune of Rs.24 crores during March, 2023. The Respondents cannot be allowed to have both, “to have the cake and eat it to”, as it is stated, and the General Manager of the Corporate Debtor Mr. Shishir Malagan who was on the site when the RP visited to take over the possession of the records and documents, giving the explanation of those having been destroyed by the flood, was also acting on the instructions of the suspended Directors.

22. In this regard it is relevant to note the provisions of Section 66 of the IBC, 2016 which provide that:

“66. Fraudulent trading or wrong trading. –

(1) *If during the corporate insolvency resolution process or a liquidation process, it is found that any business 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.”

- 23.** Sub-Section (1) of Section 66 of the Code provides the ‘Intent to Default creditors of the Corporate Debtor’ or for any ‘Fraudulent Purpose’, and in case the persons who are knowingly parties to carrying on of the business in such manner will be hit by the provisions of Section 66. In such cases, the person responsible (the Respondents in this case) being part of the suspended management of the Corporate Debtor would be liable to make appropriate contribution to the assets of the Corporate Debtor. Sub-Section (2) of Section 66 of the IBC, 2016 also specifies that such a Director or Partner of the Corporate Debtor is liable to make such contribution to the Corporate Debtor if they did not exercise the due diligence in minimising the potential loss to the creditors of the Corporate Debtor.
- 24.** For arriving at the conclusion of the applicability of Section 66(2) of the Code in this case, specifically Section 66(2)(a), that 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 CIRP in respect of such a Corporate Debtor, it is seen that the provision of Section 66(2) is clearly applicable in this case. The sequence of the events reveals that the application for admission u/s 7 of the Code was filed on 07.11.2022 and was reserved for orders on 06.02.2023. Subsequently, the admission order of Section 7 of the Code was passed by this Tribunal on 28.03.2023. It is further noticed that all the above transactions were carried out in March 2023 i.e. after this Petition u/s 7 of the Code was reserved for orders on 06.02.2023 itself. Not only that, another glaring fact is that, though the matter for admission u/s 7 of the Code was reserved for orders on 06.02.2023; during the course of the proceedings before this Adjudicating Authority, the Corporate Debtor itself *vide* Diary No.5214 dated 02.12.2022, has admitted the default as under:

“...11. The Corporate Debtor hereby signifies its willingness to admit the instant Application and directions as to initiation of

Corporate Insolvency Resolution Process, as the Company has been facing many difficulties due to financial stress it is under.”

- 25.** Therefore, on 02.12.2022 itself the ex-management of the Corporate Debtor was conscious of the fact that the Corporate Debtor was going to be admitted under CIRP; since the Corporate Debtor had itself submitted a categorical admission of the debt and default and had conveyed the willingness for the admission of the Petition u/s 7 of the Code for the purposes of the CIRP. This was done by the above mentioned letter filed by Corporate Debtor *vide* Diary No.5214 dated 02.12.2022. **Therefore, the provision of Section 66(2)(a), as mentioned above, will be clearly attracted in the case, since the suspended Directors were absolutely aware of the fact that the CIRP proceedings u/s 7 of the Code was going to be commenced against the Corporate Debtor since they had themselves expressed their willingness for the same. Accordingly, it is apparent that the whole sequence of the transactions mentioned above were carried out in a planned way to siphon off the assets / funds of the Corporate Debtor by the suspended Directors by transferring huge funds to the related parties, just prior to its admission of the CIRP u/s 7 of the Code. Instead of exercising due diligence as provided u/s 66(2)(b) of the Code for minimizing the potential loss to the Creditors of the Corporate Debtor, in fact they have actively colluded by siphoning off the funds immediately within a day or two of its receipt, and thereby adding to the loss to the Creditors of the Corporate Debtor. Thus, it is held that the provisions of Section 66(2)(a) and (b) are clearly attracted.**
- 26.** In this connection, considering the above sequence of events and the facts showing the conduct of the suspended Directors of the Corporate Debtor, who have constantly obstructed the CIRP processes under IBC, 2016, it would be relevant to point out the underlining principles and objectives behind the enactment of the Code which are explained by the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India***

and Ors. reported at **(2019) ibclaw.in 03 SC**, Order dated 25.01.2019, wherein, it was held that:

“12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor’s assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”

(Emphasis supplied)

- 27.** It is further pertinent to point out the order passed by this Tribunal in **IA No.167 of 2024** in CP (IB) No.197/BB/2022, which was filed by one of the suspended Directors, and was dismissed by this Tribunal *vide* Order dated 22.10.2024. In this I.A. also the matter reflected the conduct of the suspended Director with a view to put obstacles in the smooth progress of the CIRP under the IBC, 2016 in the same matter. This Order dated 22.10.2024 passed by this Tribunal in above matter also has been upheld

by the Hon'ble NCLAT at Chennai in **Company Appeal (AT) (CH) (Ins.) No.394 of 2024** vide Judgment dated 21.11.2024.

- 28.** Accordingly, in this case, we have seen that the conduct of the suspended Directors has been through out with a view to put obstacles in the CIRP process, along with non-cooperation with the RP and Transaction Auditor in handing over the documents and registers and at the same time objecting to the Application filed herein u/s 66 of the Code on various pretexts, with a view to somehow prolong the smooth progress of the CIRP process by filing repeated litigation and objections which cannot be permitted in view of the underlined principles as mentioned in the above Judgment of the Hon'ble Supreme Court.
- 29.** Therefore, the prayers (a) and (b) sought by the Applicant in the Application at (a) and (b) of para 6 are hereby **allowed** with a direction to the Respondents to make payment of the entire amount of Rs. 29,48,05,000/- (Rupees Twenty-Nine Crores Forty-Eight Lakhs and Five Thousand only) to the Bank Account of the Corporate Debtor within a period of 30 days from the date of receipt of copy of this Order.
- 30.** In the result, **IA No.258 of 2024 in CP (IB) No.197/BB/2022 is disposed of** on the above lines.

Sd/-

MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

jsr

Sd/-

K.BISWAL
MEMBER (JUDICIAL)