# IN THE NATIONAL COMPANY LAW TRIBUNAL HYDERABAD BENCH – 1 VC AND PHYSCIAL (HYBRID) MODE

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON 12-11-2024 AT 10:30 AM

CP(IB) No. 663/7/HDB/2018 AND IA(IBC) 57/2021 & IA (IBC) (Dissolution) 15/2024 in CP(IB) No. 663/7/HDB/2018

**IN THE MATTER OF:** 

State Bank of India ...Financial Creditor

**AND** 

Mr. Umesh Purshottam Jethwani (M/s. Meena Jewellers Pvt Ltd)

...Corporate Debtor

u/s. 7 of IBC, 2016

#### **CORAM**:-

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

# ORDER

# IA(IBC) 57/ 2021

Orders pronounced. In the result, this application is partly allowed. No costs.

IA (IBC) (Dissolution) 15/2024

Heard. For orders on 28.11.2024.

Sd/MEMBER (T)

Sd/MEMBER (J)

# IN THE NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH-1, HYDERABAD

I.A. (IBC) No. 57 of 2021

IN

CP (IB) No.663/7/HDB/2018

Under Section 118, 128 & 213 of The Companies Act, 2013 and Section 66 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of The National Company Law Tribunal Rules, 2016

#### IN THE MATTER OF:

### Mr. Vamsi Kambhammettu

Liquidator of M/s. Meena Jewellers Exclusive Private Limited Rao and Rao Chartered Accountants,

A 85, #DX4, Level 2, Road No 11, Film Nagar, Jubilee Hills, Hyderabad - 500003

...APPLICANT

#### Versus

#### 1. Umesh Purushotam Jethwani

5-9-30/1, Chandana Bhavan, Road No.3, Palace Colony, Basheerbagh, Hyderabad – 500029

# 2. Sanjay Kumar Vada

6-4-84, Bholakpur, Musheerabad, Hyderabad – 500080

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#### 3. A.V. Jewels

Rep. by Mr. Palem Mahender Kumar

Shop No. 300B, 3<sup>rd</sup> Floor, Babukhan Estates,

Basheerbagh – 500001

# 4. Saikrupa Jewellers

Rep. by Mr. Palem Mahender Kumar,

Shop No.200/A, 2<sup>nd</sup> Floor, Babukhan Estates,

Basheerbagh - 500001

# 5. Shree Balaji Jewellers

Rep. by Mr. Palem Mahender Kumar,

Shop No.300/B, 3<sup>rd</sup> Floor, Babukhan Estates,

Basheer bagh-500001

#### 6. Yashi Jewellers

Rep. by Mr. Palem Mahender Kumar,

Shop No.200/A, 2<sup>nd</sup> Floor, Babukhan Estates,

Basheerbagh-500001

...RESPONDENTS

**Date of Order: 12.11.2024** 

# **Coram:**

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA

HON'BLE MEMBER (JUDICIAL)

SHRI CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

Date: 12.11.2024

# **Parties/Counsels present:**

For Applicant : Mr. VVSN Raju, Counsel along with

Mr. Vamshi Kambhammettu, Liquidator

For Respondent No.1 : Ms. Devangi Kariya, PCS

# **PER BENCH**

### **ORDER**

1. This application was originally filed by Mr. KV Srinivas, the

'Resolution Professional' (hereinafter referred as 'RP') of M/s.

'Meena Jewellers Exclusive Private Limited' (hereinafter referred as

'Corporate Debtor') under Sections 118,128 and 213 of 'The

Companies Act, 2013' (hereinafter referred as 'The Act') and Section

66(1) of 'The Insolvency and Bankruptcy Code, 2016' (hereinafter

referred as 'IBC') read with Rule 11 of The NCLT Rules, 2016. The

reliefs sought for in the present application are as follows:

"a. Order for the Recovery of amounts illegally paid to Respondent Nos 3

to 6 to the tune of Rs. 19,90,63,152/- and direct the Respondents /

Directors of the Corporate Debtor U/s. 66(2) to contribute the above funds

to the assets of the Corporate Debtor.

b. Order for the Recovery of the Stocks diverted to the extent of Rs.88.00

Crores by the Respondents / Directors of the Corporate Debtor and direct

the Respondents / Directors of the Corporate Debtor U/s. 66(2) to

contribute the above funds to the assets of the Corporate Debtor.

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c. Order a thorough investigation into the affairs of the Corporate Debtor

i.e., Meena Jewellers Exclusive Private Limited

d. Pass Orders for violation of provisions of Sec 118 by the Respondent

Nos 1 & 2 in accordance to the provisions of Sec. 118 (12) of Companies

Act, 2013

e. Pass Orders for violation of provisions of Sec. 128 by the Respondent

Nos 1 & 2 in accordance to the provisions of Sec. 128 (6) of Companies

Act, 2013"

2. The Corporate Debtor was admitted into 'Corporate Insolvency

Resolution Process' (hereinafter referred as 'CIRP') by this Tribunal

vide order dated 26.11.2019 in C.P.NO. 663/7/HDB/2018 and Mr. KV

Srinivas was appointed as the RP of the Corporate Debtor.

Subsequently, a Forensic Audit was conducted over the affairs of the

Corporate Debtor and a report was submitted to the RP by the Forensic

Auditor on 01.02.2021. This report pertains to the affairs of the

Corporate Debtor for the period 01.04.2015 to 26.11.2019. Basing on

this Forensic Audit Report and other available records of the

Corporate Debtor, the RP filed the present application seeking the

reliefs as prayed for.

3. Subsequent to the filing of this application, the Corporate Debtor was

put into Liquidation by an order dated 26.04.2021 in I.A. No. 673 of

2020 by appointing Mr. Vamsi Kambhammettu as the Liquidator of

the Corporate Debtor. On initiation of the Liquidation proceedings of

the Corporate Debtor, the RP was replaced by the Liquidator and the

Liquidator is pursuing the present application.

**Case of the Applicant** 

4. It was submitted that Respondent No.1 and 2, being the Directors of

the Corporate Debtor, siphoned off the funds of the Corporate Debtor

by transferring an amount of Rs.19,90,63,152/- to Respondents No.3

to 6. It was submitted that Respondent No.1 and 2 also diverted the

stock of Corporate Debtor amounting to Rs.88 crores to Respondents

No.3 to 6.

5. It was submitted that the Corporate Debtor availed financial facilities

from 'State Bank of India' ('SBI') (Annexure 1 of the Petition), but

defaulted in paying the same by illegally disposing off the inventory

charged to the Financial Creditor. That on account of not servicing the

financial facilities, SBI declared the account of the Corporate Debtor

as NPA on 27.09.2016.

6. It was submitted that as part of the statutory duties, when the RP

visited the Registered Office of the Corporate Debtor on 06.12.2019

to take control and custody of all the records and assets of the

Corporate Debtor after initiation of CIRP, it was found that there were

no records at the Registered Office of the Corporate Debtor. It was

submitted that the RP requested the suspended

management/Respondent No.1 and 2 herein to provide the information

regarding the business transactions and books of accounts of the

Corporate Debtor for a smooth conduct of CIRP, but that the

suspended management did not provide with any document as

requested by the RP. It was submitted that there was no cooperation

from the suspended management of the Corporate Debtor in

conducting the CIRP. It was further submitted that the Corporate

Debtor does not carry any business and was made a shell company

with no employees, business and assets (Audited Financial

**Statement - Annexure 4 of the Application).** 

7. It was submitted that by an order dated 10.02.2020 in IA No.51 of

2020 which was filed under Section 19(2) of IBC, this Tribunal

directed the suspended management (Respondents therein) as follows:

"the IRP shall be given free access to the books of accounts and permit

him to manage the corporate debtor company and provide all the

information required in para 7 of this application as far as possible to discharge his functions in accordance with the provisions of the Code."

It was further submitted that by an order dated 08.09.2020 in IA No.467 of 2020 which was filed under Section 19(2) of IBC, this Tribunal also directed the suspended management (Respondents

therein) as follows:

"further directing respondents no.1 and 2 to provide password for the accounts of the Corporate Debtor to enable the Resolution Professional to have access to the accounts" - (Annexure 2 of the Application).

8. It was submitted that the Respondents (the suspended management) did not obey the said orders of this Tribunal and did not provide any requisite information of the Corporate Debtor for a smooth conduct of CIRP. It was submitted that there were several requests from the RP seeking information from the Respondent No.1 and 2, but that these Respondents did not submit even a single document pertaining to the Corporate Debtor. It was submitted that the suspended management of the Corporate Debtor also failed to maintain the records of the Corporate Debtor and violated Sections 118, 128 of The Act. That the

same is evident from the panchnama recorded while handing over the

possession of the Corporate Debtor to the RP (Annexure 3 of the

Petition).

9. It was submitted that there was no single paper found at the registered

office of the Corporate Debtor so as to show that the business of the

Corporate Debtor was conducted in accordance with law. It was

submitted that the RP came to a conclusion that the business of the

Corporate Debtor was conducted with an intent to defraud creditors of

the Corporate Debtor and for fraudulent purpose attracting the

provisions of Section 66(1) of IBC. That in support of this contention,

reliance was placed on the Report of Forensic Audit Report of the

Corporate Debtor dated 01.02.2021 (Annexure 5 of the Application).

10. Basing on the Forensic Audit Report, it was submitted that the sale of

jewellery by the Corporate Debtor was not routed through the

designated Cash Credit Account of the Corporate Debtor maintained

with SBI, the Financial Creditor. It was alleged that out of Rs.884

crores of sales made by the Corporate Debor for the Financial Years

between 2016 to 2020, the Corporate Debtor reported negligible bank

receipts of worth Rs.70 crores in the said Cash Credit Account. That

this revenue was reflected neither in the receivables nor in the receipts

of the Corporate Debtor and an inference was drawn by the RP that

these revenues were routed into unknown accounts. It was submitted

that this act is in violation of the terms of the loan sanction document

dated 22.12.2012 and is an act done with an intent to defraud the

creditor i.e., SBI (Page 30 of the Forensic Audit Report).

11.It was submitted that the Inventory available with the Corporate

Debtor was not properly valued as per the established standards of

valuation. It was submitted that the Corporate Debtor availed loan

facility from SBI by over valuing the stock worth Rs.32 crores. It was

further submitted that the diamond stock available with the Corporate

Debtor was valued at 85% lower to the actual value since 28.02.2017.

It was also submitted that there is a mismatch in the stock statements

provided by the bank and the Corporate Debtor. It was further

submitted that there were discrepancies in the stock statement and

VAT returns of the Corporate Debtor. It was also submitted that there

were transactions made by the Corporate Debtor with 5 suspicious

creditors to a tune of Rs.19,90,63,152/-.

12. It was submitted that the Forensic Auditor concluded that the

accounts of the Corporate Debtor will fall within the meaning of fraud

as given in explanation to Section 447 of The Companies Act, 2013

and also as per Reserve Bank of India circular dated 07.05.2015

"Framework for dealing with loan frauds." It was stated that the

Respondent No.1 and 2 (suspended management) having taken large

amount of loans from State Bank of India and by wilfully submitting

audit reports with many discrepancies, committed a fraud against the

creditors of the Corporate Debtor.

13. It was submitted that the Respondents have not handed over any of

the original statutory records of the Corporate Debtor including the

books of accounts and also the assets as mentioned in the audited

Financial Statements other than the building belonging to Meena

Jewellers Exclusive Pvt. Ltd. situated at Basheerbagh, Punjagutta and

Begumpet respectively till 29.08.2020. It was submitted that in this

regard separate proceedings were also initiated against Respondent

No.1 and 2 as per Section 236 of IBC.

14. It was submitted that the Respondents concealed the books of accounts

with an intention of hurdling the CIRP of Corporate Debtor and

handed over a password protected CPU on 21.07.2020 stating that the

said CPU contains records of all the 3 companies. That the RP

requested the Respondent No. 1 & 2 to share the password of the said

CPU but that there was no response (**Annexure 6 of the Application**).

15.It was submitted that the Respondents acted hand in glove prior to the

commencement of CIRP of the Corporate Debtor and are collectively

responsible for defrauding the creditors i.e., SBI for an amount of

Rs.80 crores (Value of stock siphoned off as on 31.01.2017 - Page

58 of the Report).

16.In the above backdrop, the Applicant sought for the reliefs under

Section 213 of The Act and under Section 66 of IBC.

**Counter of Respondent No.1** 

17. Denying all the averments made in the Application, Respondent No.1

submitted that the present application is false and baseless and is

thereby liable to be dismissed.

18.It was submitted that the RP have filed various applications against

the Respondents for non-cooperation and that the Respondents

extended all cooperation by providing the documents and information

as required and requested by the RP. It was submitted that the

Respondents conducted the business of the Corporate Debtor in an

honest manner and acted only in the interests of the Corporate Debtor.

19.It was submitted that the RP conducted a forensic audit of the affairs

of the Corporate Debtor and that the forensic auditor during the time

of audit sought various clarifications from Respondent No.1. It was

submitted that Respondent No.1 received a questionnaire from the

Forensic Auditor vide email dated 27.01.2021 seeking certain

clarifications with a direction that the same be provided by the next

day. That the Respondent No.1 sought for a time of three weeks to

provide the clarifications as Respondent No.1 was tested Covid

positive. It was submitted that the Respondent No.1 provided the

required clarifications to the forensic auditor by way of an email dated

11.02.2021 (Annexure 1 of the Counter).

20. It was submitted that the forensic auditor submitted the report to the

RP without taking into consideration the information submitted by

Respondent No.1. Hence, it was submitted that the forensic audit

report is false and untrue and, in this regard, Respondent No.1 relied

on the disclaimer of the Forensic Audit Report which is as follows:

"Disclaimer on our conclusions in this report:

Our Conclusions are matters of professional opinion and judgment. Our

Conclusions are based on our identification and understanding of current

available and accessible information in the public domain and record, the

Legislations prevailing as of the date of this report and our past experience

with the statutory authorities, departments, regulators and bodies and the

like. However, there can be no assurance that we have identified every

conceivable source of information that may be currently available on

public domain or record or that the statutory authorities, departments,

regulators and bodies may not take a position contrary to our conclusions."

21.It was submitted that the Forensic Auditor considered only the

information available in the public domain and the information

submitted by Respondent No.1 was not taken into account. It was

further submitted that the Forensic Audit Report was submitted

without any proper evidence and hence, the present application which

was filed basing on the said forensic report is liable to be dismissed.

22.It was submitted that the trading of the Corporate Debtor was

conducted in a normal manner and that the allegation of the RP that

the Respondents siphoned off Rs.19,90,63,152/- of the Corporate

Debtor is without any proof. It was submitted that no such amount of

Rs.19,90,63,152/- was shown in the balance sheets or any other

documents of the Corporate Debtor and hence these averments are

false and baseless.

23. Denying the allegations of illegally disposing off the inventory of the

Corporate Debtor, it was submitted that these allegations were already

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answered in the Counter of the Corporate Debtor in Section 7 Petition

filed by SBI. Denying the allegation of making the Corporate Debtor

as a shell company, it was submitted that the Corporate Debtor was

carrying the business activities till 2018 even after declaration of the

Corporate Debtor as an NPA by SBI. It was submitted that due to the

downfall and losses of the business of the Corporate Debtor, the

employees left the Corporate Debtor.

24. It was submitted that the Corporate Debtor has 3 assets (jewellery

showrooms) situated at Basheerbagh, Punjagutta and Begumpet. It

was submitted that Respondent No.1 invited the RP to take the

possession of these buildings, but that the RP delayed in doing the

same. That the building at Basheerbagh, Begumpet and Punjagutta

were handed over to RP on 13.07.2020, 15.07.2020 and 29.08.2020

respectively (Panchnama at Annexure 2 of the Counter).

25. It was submitted that the delay in handing over possession of property

at Punjagutta was because of the unwarranted delay caused by the RP.

It was submitted that the RP refused the possession of this property

until the floof water accumulated was cleared and major repair works

of the property are completed by Respondent No.1 (Email of RP

confirming the receipt of Punjagutta Property at Annexure 3). It

was further submitted that the RP took the possession of property at

Punjagutta only after the direction of this Tribunal (Order dated

08.08.2020 and 17.08.2020 - Annexure 10 and Annexure 4

respectively).

26.It was submitted that the Respondent No.1 was always supportive in

providing the information of the Corporate Debtor and that

Respondent No.1 sent a series of emails to Mr. Bhavesh Vithlani,

Auditor and valuer of the Corporate Debtor appointed by the erstwhile

RP and that the same was brought to the notice of the erstwhile RP

(Annexure 5 of the Counter).

27. It was submitted that all the statutory records of the Corporate Debtor

including the audited and provisional balance sheets as required by the

erstwhile RP were already submitted through email (Annexure 5 of

the Counter) and that the IT records, annual returns, and other forms

filed by the Corporate Debtor with the statutory authorities are

available in public domain. It was also submitted that the passwords

relevant for obtaining information from the websites were also

submitted by Respondent No.1 to the erstwhile RP.

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28.It was submitted that as per the directions of this Tribunal, all the

required information and documents were submitted to the Resolution

Professional in the form of hard copies and emails dated 24.09.2020

and 27.10.2020 (Annexure 7 of the Counter). That as per the

directions of this Tribunal, the RP was handed over with the CPU of

the Corporate Debtor (Annexure 6 of the Counter). It was submitted

that the employee who was handling the accounts of the Corporate

Debtor left the organisation few years back and the efforts made by

the management of Corporate Debtor to trace the whereabouts of this

employee so as to recover the passwords went in vain and that the

same was informed to the RP and this Tribunal. It was submitted that

this Tribunal also directed the RP during the hearing in IA 467/2020

to take possession of the CPU and engage a cyber expert to unlock the

CPU and recover the documents from the CPU. That the RP failed to

comply with these directions and is now levelling allegations against

the Respondents.

29. It was submitted that the Respondents provided all the required details,

documents and information to the erstwhile RP. It was submitted that

the RP was given the reasons for the non-availability of records of

Corporate Debtor at the registered office which is as follows

(Annexure 8 of the Counter):

"Firstly, as your good self are aware of the very serious situation of global

pandemic of corona virus making whole of India and Hyderabad being no

exception, ever since it got intensified from mid March 2020, which

eventually resulted in a total lockdown and curfew, ever since 22nd March

2020 by the state and Central government, which as you know sir is still

continuing. Secondly, there was an income tax survey conducted by the

income tax department in the month of December in 2016 and the books

of accounts have been taken by them, then. Thirdly there was a fire

breakdown in the registered head office of the companies in the month of

october 2018 leading to damage & misplacement of our books of accounts.

We have been reconciling our books of accounts ever since then, and

recently, GHMC has sealed the corporate head office on 19-03-2020,

which had computers & the available books of accounts."

30. It was submitted that there was a fire breakdown at the registered

office of the Corporate Debtor in the year 2018 which led to the

destruction of the statutory registers, minutes, books of accounts and

other documents of the Corporate Debtor. That the Respondent No.1

was in the process of collecting and collating the information as

required under The Act. It was submitted that other than the minutes

of the Board Meetings, shareholders meetings, statutory registers, the

Respondent No.1 provided all the documents and information

including the handing over of the properties, provisional and audited

balance sheets of the Corporate Debtor to the erstwhile RP. It was

further submitted that the erstwhile RP was provided with all the login

credentials of the Corporate Debtor to access records maintained with

statutory authorities viz., RoC, Income Tax so as to enable the

erstwhile RP to download the required information from the websites.

31.It was submitted that the erstwhile RP levelled various allegations of

siphoning off funds without any proper proof or evidence, one among

those being siphoning of Rs.88 crores of the Corporate Debtor.

32.It was submitted that the Corporate Debtor complied with the terms

and conditions as mentioned in the SBI loan agreement dated

22.12.2012. It was submitted that the nature of business of Corporate

Debtor is such that the profit margin is very low. It was submitted that

the sales and purchases of gold and diamonds are mostly settled and

exchanged and hence, there are low cash/credit transactions except for

the amounts received by the Corporate Debtor. That the payments

received by the Corporate Debtor towards making charges are

comparatively very small and that the same were deposited by the

Corporate Debtor in the SBI CC Account. That the sales and purchases

of gold and diamonds be referred from the VAT returns filed by the

Corporate Debtor wherein corresponding Input Credit is claimed by

the Company against the said purchase and sales. That this

clarification was also given to the RP, forensic auditor and SBI in the

reply letter dated 11.02.2021.

33. It was further submitted that the receipts of Rs.884.27 crores and

payments of Rs.890.59 crores as stated by the Forensic Auditor at

Page 30 and 31 of the Forensic Audit report are the gold and diamonds

sold by the Corporate Debtor in exchange of gold and diamonds and

hence, there was no movement of money through these transactions

(VAT Return for the month of May, 2017 – Annexure 11).

34. Denying the allegations made in respect of Inventory, it was

submitted that the Corporate Debtor never availed any credit facility

by overvaluing the stock. It was submitted that the closing stock

includes the purchases and sales and also the opening stock, issues and

receipts brought forward from the previous months. It was submitted

that the price value of the opening stock and other purchases, receipts

and sales are also required to be considered to derive the effective

closing stock. The Respondent No.1 relied on the statement showing the calculation of valuation of stock (Annexure 13 of the Counter).

- 35. It was submitted that "Clause 13 Changes in Inventory" of the Financial Statement of the Corporate Debtor for the year 2016-17 mentions the calculation of inventory which includes opening stock, issues, closing stock and the increase/decrease in the inventory. It was submitted that the Corporate Debtor had sales of higher value diamonds during the month of February, 2017 and that hence, the balance closing stock of diamond price dropped subsequently from February, 2017. It was also submitted that the Forensic Auditor considered only the unit rate of stock-in and hence the undervalue reports are incorrect (Annexure 14 of the Counter).
- 36. It was submitted that the Respondent No.1 noticed the technical discrepancies in the stock statement submitted to SBI for the month of September, 2016 and that a revised stock statement was submitted to SBI. It was submitted that this information was given to the erstwhile RP and that on non-receipt of hardcopy by the erstwhile RP, the Respondent No.1 shared the scanned copy of the revised stock

statements by way of email dated 30.09.2020 (**Revised Stock**Statement – Annexure 12 of the Counter).

37. It was submitted that there are no suspicious transactions of the

Corporate Debtor as alleged in the application and that there is no

evidence to substantiate the same. It was submitted that the Forensic

Auditor opined that the corporate Debtor had suspicious transactions

with the Respondent No. 3 to 6 for the only reason of Mr. Palem

Mahender Kumar being the owner of all these entities and that all these

were located in the same premises.

38. It was submitted that the purchase and sales reported by the Corporate

Debtor in the monthly stock statement and in the VAT returns are

tallying. It was submitted that the stock statement submitted to SBI

includes purchase, sales, receipts & issues, the amount of stock defers

but that the VAT returns are calculated only on purchases and sales.

That the differences in the values are not intentional and are only

differences in calculation.

39. It was submitted that the provisional balance sheet as on 26.11.2019

and the audited financial statement as on 31.03.2020 were already sent

to the RP and that a perusal of the same would state that the Corporate

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Debtor do not have any assets other than those handed over to the RP

(Copy of email communication providing balance sheet -

Annexure 16 of the Counter).

40. The Applicant and the Respondent No.1 filed the written submissions

and relied on the rulings of judicial forums. In the light of the contest

put forth as above by both the parties, the points that emerge for the

consideration of this Tribunal are as follows:

1. Whether the Respondent No.1 and 2 carried on the

business of the Corporate Debtor with an intent to defraud the creditors of Corporate Debtor or for any fraudulent

purpose? If so, for what relief?

2. Whether the Applicant has made out a case for ordering an investigation into the affairs of the Corporate Debtor

under Section 213 of The Companies Act, 2013?

41. We have heard Mr. VVSN Raju, Ld. Counsel for the

Applicant/Liquidator and Ms. Devangi Kariya, Practicing Company

Secretary, for Respondent No.1, perused the record and the

submissions.

POINT 1:

Whether the Respondent No.1 and 2 carried on the business of the Corporate Debtor with an intent to defraud the creditors of Corporate Debtor or for any fraudulent

purpose? If so, to what relief?

**SUBMISSIONS** 

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42. Reiterating the contents of the application, the Applicant filed written

submissions. In support of the contentions raised, the applicant relied

on Mr. Lagadapati Ramesh vs. Mrs. Ramanathan Bhuvaneshwari,

Company Appeal (AT) (Insolvency) No.574 of 2019 dated 20.09.2019,

Hon'ble NCLAT, New Delhi which is as follows:

"40. In view of the aforesaid position of law also, the procedure laid down

under Section 213 of the Companies Act, 2013 can be exercised by the

Tribunal/ Adjudicating Authority, as held above.

41. Further, after the investigation by the Inspector, if case is made out and

the Central Government feels that the matter also requires investigation by

the 'Serious Fraud Investigation Office' under Section 212 of the

Companies Act, 2013, it is open to the Central Government to decide

whether in such case the matter may be referred to the 'Serious Fraud

Investigation Office' or not. This will depend on the gravity of charges as

may be found during the investigation by the Inspector.

42. In view of the aforesaid position of law, we are of the view that the

Adjudicating Authority was not competent to straight away direct any

investigation to be conducted by the 'Serious Fraud Investigation Office'.

However, the Adjudicating Authority (Tribunal) being competent to pass

order under Section 213 of the Companies Act, 2013, it was always open

to the Adjudicating Authority/Tribunal to give a notice with regard to the

aforesaid charges to the Promoters and others, including the Appellants

herein and after following the procedure as laid down in Section 213, if

prima facie case was made out, it could refer the matter to the Central

Government for investigation by the Inspector or Inspectors and on such

investigation, if any, actionable material is made out and if the Central

Government feels that the matter requires investigation through the

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'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'.

43. On behalf of Respondent No.1, written submissions were filed and reliance was placed on some of the judicial pronouncements which are as follow:

MD Sadique Islam and Ors. vs Niraj Kumar Agarwal and Ors., (2024) ibclaw.in 128 NCLAT

"7. When we look into the aforesaid paras, it is clear that the Adjudicating Authority has recorded only its conclusions and that too without considering the preferential, undervalued and fraudulent, each transaction separately and there is general observation that the transactions are undervalued transactions as well as preferential and fraudulent transactions. The ingredients of preferential, undervalued and fraudulent transaction are entirely different and there has to be application of mind to the ingredients of each transaction to come to conclusion that ingredients are satisfied and the transaction falls in the said category adverting to the given pleadings in the application. The Adjudicating Authority ought to have adverted to the said pleadings and returned the finding regarding the fulfilment of ingredients of each provision. The Adjudicating Authority has only in two paras i.e. 27 and 28 has recorded his conclusion without giving any reason and without adverting to any pleadings or materials on record."

Shalabh Kumar Daga, Liquidator of Silver Proteins Pvt Ltd vs Himanshu J Domadia, (2024) ibclaw.in 294 NCLT:

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Thus, applicant appears to have not applied his mind to the facts of alleged transactions. The applicant has only relied upon the report of financial auditor. The applicant has apprehension that there are probable chances that these transactions were entered fraudulently.

#### **OUR ANALYSIS & FINDINGS**

- 44. The RP of the Corporate Debtor conducted a Forensic Audit of the Corporate Debtor and basing on the said report, the following allegations were levelled in the present application against the Respondent No. 1 and 2:
  - Siphoning off an amount of Rs.19,90,63,152/- belonging to Corporate Debtor by transferring the same to Respondents No.3 to

4.

• Diversion of stock amounting to Rs.88 crores to Respondents No.3

to 4 in violation of loan sanction terms of SBI.

• Non-maintenance of books of records of the Corporate Debtor.

Sales of Corporate Debtor not being routed through designated

Cash Credit Account maintained with SBI.

• Improper valuation of Inventory of the Corporate Debtor

• Discrepancies in the stock statement and VAT returns.

45. In addition to these, it was also pleaded on behalf of the Applicant that

the Respondents did not cooperate with the RP in handing over the

records of Corporate Debtor and other information as sought for. It was

also stated that a CPU, protected with password was handed over to RP

stating that the records of the Corporate Debtor are in the said CPU. It

was stated that though the RP asked for the password of the CPU, the

same was not provided.

46. Refuting these allegations, it was stated on behalf of the Respondent

No.1 that the Respondents extended co-operation as sought by the RP and

provided with the required information.

47. Refuting the allegations of siphoning off funds, it was stated that the

forensic auditor did not consider the explanations of Respondent No.1

and prepared the forensic audit report based on the information available in the public domain. It was also stated that the allegations of siphoning

off funds of the Corporate Debtor is without any evidence or proof.

48. This Tribunal vide order dated 10.02.2020 in I.A. No. 51/2020 directed

the Respondents therein (Respondent No.1 and 2 herein) as follows:

"7. IRP shall be given free access to the books of accounts and permit him to

manage the corporate debtor company and provide all the information required in

para 7 of this application as far as possible to discharge his functions in accordance

with the provisions of the Code."

The information sought for in the said application i.e., I.A. No.

51/2020 is extracted at Para 2(e) of the said order dated 10.02.2020

and the same includes the books of accounts of CD maintained in

ERP or in any other format for the last 8 financial years as per

Companies Act. The allegations levelled in the present application

also includes that the Respondent No. 1 and 2 are not providing these

books of accounts of the Corporate Debtor to the RP.

49. Subsequently, on 08.09.2020, this Tribunal passed an order in I.A.

No. 467/2020, the operative portion is as follows:

"9. The Application is disposed of directing the respondents no.1 and 2 to

provide assistance to Resolution Professional in removing water from the

premises, open shutter of the premises and be present at the time of

preparing Panchanama/taking inventory and to sign in the same. We

<u>further direct respondents no.1 and 2 to provide password for the accounts</u>

of the Corporate Debtor to enable the Resolution Professional to have

access to the accounts."

The allegations levelled in the present application also includes

the same non-disclosure of password of the CPU in which the data of

the Corporate Debtor is stated to be present.

50. The defence set up by Respondent No.1 in respect of these allegations

is as follows which is evident from the pleadings and also the email

communications:

• That there was an income tax survey conducted by the income

tax department in the month of December, 2016 and the books

of accounts of the Corporate Debtor have been taken by them.

• There was a fire breakdown at the registered head office of the

Corporate Debtor in the month of October, 2018 leading to

damage and misplacement of books of accounts.

• The CPU which was protected with password was managed by

an employee who left the organisation few years back and the

whereabouts of the said employee is not known.

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51. It is pertinent to refer to the statements made in the Independent

Auditor Report of the Corporate Debtor for the years 2017, 2018 and

2019 which are as follows:

#### "Basis for Qualified Opinion

- All the information and explanations which to the best of my/our knowledge and belief were necessary for the purpose of my/our audit has not been provided by the assessee.
- Creditors under Micro, Small and Medium Enterprises Development Act, 2006 are not ascertainable.
- Prior period expenses are not ascertainable from books of account.
- Verification and Valuation of closing stock is done by the management in the stock register maintained by them.
- Yield/percentage of wastage is not ascertainable.

# Report on Other Legal and Regulatory

Requirements as required by Section 143(3) of the Act, we report that:
e. The matter described in the Basis for Qualified Opinion paragraph
above, in our opinion, may have an adverse effect on the functioning of
the Company.
g. The qualification relating to the maintenance o accounts and other
matters connected therewith are as stated in the Basis for Qualified

#### **Annexure to Independent Auditor's Report**

Opinion paragraph above.

The annexure referred in our Independent Auditors' Report to the members of the Company on the stand-alone financial statements for the year ended March 31, ....... We report that:

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1)

a) The Company has not maintained proper records showing full

particulars, including quantitative details and situation, of fixed

assets."

52. In addition to the above, it can be observed from FORM NO.3CA

annexed to the Independent Auditors' Report for the years 2017 and

2018 which states that the Corporate Debtor did not provide details in

respect of various matters as enumerated therein.

53. Though Respondent No.1 would contend that the allegation of

siphoning off of funds is without any evidence or proof, but on perusal

of the Audited balance Sheet of the Corporate Debtor for the year

ended on 31.03.2017 (**Page 102 of the Application**) and 31.03.2018

(**Page 133 of the Application**), we observe as follows:

• The value of inventory of the Corporate Debtor for the year

ended on 31.03.2016 is Rs.965,601,675 whereas the same for

the year ended on 31.03.2017 was shown as Rs.110,410,285

which is less by an amount of Rs.855,191,390 (approximately

Rs.86 crores) from the last financial year which indicates that

net inventory worth Rs.86 crores have been liquidated.

Similarly, we observe that the trade receivables in the year

ending on 31.03.2017 have gone down approximately by Rs.48 lakhs (from Rs.53.63 lakhs as on 31.03.2016 to Rs.5.27 lakhs as on 31.03.2017). Thus, we find that there is a total decline in the inventory and trade receivables to the tune of approximately Rs.86.5 crores without any corresponding decline in the balance outstanding in the Cash Credit hypothecation limit of Rs.65

crores sanctioned by SBI.

- Similarly, the value of inventory of the Corporate Debtor for the year ended on 31.03.2017 is Rs. 110,410,285 whereas the same for the year ended on 31.03.2018 was shown as NIL which is less by an amount of Rs. 110,410,285 (approximately Rs.11 crores) from the last financial year which indicates that net inventory worth Rs.11 crores have been liquidated. We observe that there is no decline in the balance outstanding in the Cash Credit hypothecation limit of Rs. 65 crores sanctioned by SBI.
- On careful perusal of the arrangement letter dated 20.12.2014 issued by SBI, we observe that a CC (hyp) limit of Rs.65 crores was sanctioned to the Corporate Debtor against the primary security of *entire current assets of the company including*

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stocks, receivables and other chargeable current assets both

• As per the sanction terms, if there is any liquidation/realization

from these primary security assets i.e., stocks, receivables etc.,

the amount should be used to liquidate/reduce the bank

borrowing limit. In this case, we observe that as on 31.03.2016,

the outstanding of the CC Limit was Rs.66.56 crores whereas

as on 31.03.2017, the balance outstanding in CC Limit was

Rs.65.31 crores, just showing a reduction of Rs.1 crore.

• Thus, it is clear that the inventory and trade receivables which

have been reduced to the tune of Rs.86.5 crores and Rs. 11

crores during the year ended on 31.03.2017 and 31.03.2018

respectively have not been used to pay the bank borrowing

outstanding in the CC Account for which these securities were

primarily secured. Therefore, it is as clear as crystal that the

management/Directors of the Corporate Debtor have

sold/realized these assets without routing these funds through

the CC Account of SBI.

present and future.

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• We also observe that in the balance sheet for the year ended on

31.03.2017, there are reductions in other current assets like cash

and cash equivalents have been reduced approximately by

Rs.76 lakhs and short-term loans & advances have been reduced

by Rs.10 lakhs. Basing on the above findings, we find merit in

the contention of the applicant that stocks of Corporate Debtor

amounting to Rs.88 crores were diverted by the management of

Corporate Debtor.

54. In view of the above factual aspects from the audited balance sheet of

the Corporate Debtor, this Tribunal does not require any other proof

or evidence as the balance sheet itself speaks of diversion of funds.

We further find that the Report of the Independent Auditor of the

Corporate Debtor also contains the above stated observations in

respect of the records of the Corporate Debtor. Moreover, the

Respondent No.1 also failed to show the compliance of the order of

this Tribunal dated 08.09.2020 in I.A. No.467/2020 as to the providing

of the passwords, especially that of the CPU where all the records of

the Corporate Debtor are available. The submission of Respondent

No.1 that the management of Corporate Debtor is unable to trace the

whereabouts of the employee who handled the said CPU is not a valid

and genuine one. It is the duty of the management of the Company to

make sure that there is access to the MIS data of the Company because

it is the management who runs the company with the help of

employees.

55. It is also observed that mere statement of Respondent No.1 that the

records of the Corporate Debtor are in the possession of IT

Department, and the newspaper report showing the fire breakdown at

the registered office of the Corporate Debtor does not absolve the

Respondent No.1 from providing information. It is to be noted that

there was no document provided by the Respondent No.1 to show that

the records of the Corporate Debtor are in the possession of the IT

Department. Also, no document was produced by the Respondent

No.1 issued by the concerned department or agency stating that there

was a breakdown of fire at the registered office of the Corporate

Debtor in which the records or any materials of the Corporate Debtor

were damaged. In the absence of these records, this Tribunal is unable

to accept the contentions of the Respondent No.1 in this regard.

56. Relying on the disclaimer of the Forensic Audit Report, it was submitted on behalf of Respondent No.1 that the Forensic Auditor did not consider the information given by Respondent No.1 and the Forensic Audit was done based on the information available in the public domain. But we also place reliance on the following statements of the same Forensic Audit Report which are as follows:

#### "Limitations on Procedures Performed

#### **Reliance on Clients Information and Documents**

Our report is based on the information, material and documents provided and the representations made to us by the Client and its members, directors and representatives and is given for a specific purpose. Our observations, findings, conclusions, comments, views, recommendations, advices, opinions, expressed and contained in our report ("our Conclusions"), are based on the completeness and accuracy of the information, material, documents and representations provided or made to us; which if not entirely complete or accurate, should be communicated to us immediately, as any inaccuracy or incompleteness could have a material impact on our Conclusions. All information, material and documents, that have been supplied to us and representations made by the Client and its members, directors and representatives have been accepted as being correct unless otherwise stated herein.

Our Conclusions may be subject to change, based upon any additional information and/or documents obtained or received by us from the concerned authorities or public records as well any additional information/documents provided to us by the Client."

This clearly states that the Forensic Audit Report was prepared

based on the information provided and available with the Corporate

Debtor. It also states that the information provided by the directors

was also taken into account.

57. Though it was submitted on behalf of Respondent No.1 that the

allegation of siphoning off of funds of the Corporate Debtor is not

substantiated, but as observed at Paragraph 53 of this order, the

financial statements of the Corporate Debtor itself prove that the

stocks, receivables and other current assets have been sold and the

money have been diverted to some unknown source without using the

same for reduction of bank borrowings. The Forensic Audit Report

also observes fraudulent transactions over the inventory and the same

is in violation of the terms of Loan entered with SBI.

58. In lieu of the above discussion, we observe that the explanation as

offered by the Respondent No.1 in this regard and the defence set up

thereby cannot be taken to be reasonable.

59. It is hereby concluded that Respondent No.1 and 2 have diverted the

stock, inventory and other current assets of the Corporate Debtor

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amounting to Rs. 88 crores and the same is liable to be returned to the

Corporate Debtor.

The point is answered accordingly.

POINT 2:

Whether the Applicant has made out a case for ordering an investigation into the affairs of the Corporate Debtor under

Section 213 of The Companies Act, 2013?

**OUR ANALYSIS & FINDINGS** 

60. In so far as the prayer of Applicant to direct for investigation into the

affairs of the Corporate Debtor in terms of Section 213 of The

Companies Act, 2013 is concerned, we found that no information or

record of the Corporate Debtor has been handed over to the RP by the

suspended management even after the directions of this Tribunal. In

that aspect, even as per the Forensic Audit Report, no relevant

information has been provided by the Respondent No.1 and 2. The

Respondent No.1 and 2 continuously took up the defence that the

registered office of Corporate Debtor "caught up" with fire and the

records were lost. Therefore, under these circumstances, we observe

that an investigation under Section 213 of The Companies Act, 2013,

even if ordered, will serve no positive purpose, benefitting the

Corporate Debtor. Moreover, an application for dissolution of the

Corporate Debtor is also pending. We find that no purpose would be

served if an investigation under Section 213 of The Act is ordered at

this stage of the proceedings.

61. Hence, we are not inclined to order any investigation into the affairs

of the Corporate Debtor under Section 213 of The Act.

The point is answered accordingly.

62. In light of the findings on the points above, we hereby hold that

• The Respondent No. 1 and 2 have carried on the business of the

Corporate Debtor with an intent to defraud the creditors of the

Corporate Debor. Hence, we hereby direct Respondent No. 1

and 2 to return a sum of **Rs.88 crores** to the Liquidation Estate

of the Corporate Debtor within 90 days from the date of this

order. In default, the Liquidator is at liberty to seek execution

of this order.

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• The relief in regard to the investigation of the affairs of Corporate Debtor under Section 213 of The Companies Act, 2013 is hereby rejected.

63. The application is therefore allowed in part, however with no costs.

Sd/-Dr. Venkata Ramakrishna Badarinath Nandula **Charan Singh** 

Member (Technical)

Member (Judicial)

Sd/-

Anil