I.A. 5341 OF 2023

Under Section 43 & 44 r/w Section 60 (5) Insolvency & Bankruptcy Code, 2016

Nirav Anupam Tarkas, The Liquidator

...Applicant

Vs.

EMV Infra Project Limited & Others
...Respondents

In the matter of

C.P.(IB) No. 66/MB/2018

Anchor Leasing Private Limited

...Financial Creditor

Vs.

Euro Ceramics Limited

...Corporate Debtor

Order delivered on: 28.08.2024

Coram:

Shri Prabhat Kumar Justice V.G. Bisht (Retd.)
Hon'ble Member (Technical) Hon'ble Member (Judicial)

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Appearances:

For the Applicant : ------

For the Respondent No. 13 : Adv. Abhay Wadhwa i/b

Yachiha Jain

ORDER

Per: Prabhat Kumar, Member (Technical)

- This Application IA 5341/2023 is filed by Mr. Nirav Anupam Tarkas, Liquidator in the Corporate Insolvency Resolution Process ("CIRP") of Euro Ceramics Limited ("Corporate Debtor") under Section 43 r/w Section 44 r/w Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("IBC" "Code")
 - a. Declare that transactions mentioned in Paragraph 5 and 7 of the application are preferential transactions and fraudulent and/or wrongful transactions under Sections 43 to 67 of Insolvency and Bankruptcy Code, 2016;
 - b. Call upon Respondent Nos. 1 to 21 to contribute to the assets of the Corporate Debtor, the respective amounts specified in respect of each of the transactions;
 - c. Pending the final hearing of the present Application, this Tribunal be pleased to direct Respondent Nos. 1 to 4 to maintain status quo with respect to the assets and, in particular, be pleased restrain Respondent Nos. 1 to 4 by an Order of Injunction from transferring, encumbering, creating third party rights or otherwise dealing with

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the assets sold by the suspended management as mentioned in the Transactional Audit Report.

- 2. The Financial Creditor had filed the Insolvency Petition under section 7 of the Insolvency and Bankruptcy Code 2016 (the "Code") against the Corporate Debtor, which was admitted vide an order of this Tribunal dated 25th February 2019 and the Corporate Insolvency Resolution Process ("CIRP") in respect of the Corporate Debtor was duly commenced. Mr Arun Kapoor was appointed as the Interim Resolution Professional. However, the COC at its first meeting resolved to appoint CA Nirav Tarkas, the Applicant herein, to replace Mr Arun Kapoor and was appointed as the Resolution Professional ("IRP").
 - 2.1. Immediately upon receipt of the order, the Applicant, who was the Resolution Professional at such time, took steps under the Code for inviting Expression(s) of Interest ("EOI") in respect of the Corporate Debtor, however, the Applicant did not receive any EOIs, except one offer for acquisition of one of the units of the Respondent situated at Bhachau, Kutch.
 - 2.2. On 15th November 2019, in absence of any resolution plan, the COC, by majority, resolved to proceed with the liquidation of the Respondent. This Tribunal passed an Order of Liquidation on 2nd December, 2020 and the Resolution Professional was appointed as the Liquidator of the Corporate Debtor.
 - 2.3. In the meantime, the Applicant had taken charge of the books of accounts and other assets of the Corporate Debtor. Upon reviewing the books of accounts of the Corporate Debtor, the Applicant came across certain dubious related party transactions entered into by the

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- suspended management of the Corporate Debtor in the period between 25th February 2017 to 25th February 2019.
- 2.4. The suspended management of the Corporate Debtor had also entered into certain transactions with persons other than related parties in the period between 25th February 2018 to 25th February 2019 which transactions the Liquidator Believed were preferential in nature. The details of such transactions are as follows:
 - a. The Corporate Debtor had sold its Factory Land, factory building, plant, and machinery (collectively, the "Factory Premises") on various dates viz. 31 March 2017, 14th February 2018, 30th November 2017, 18th December 2017, 6th August 2018 to: (i) EMV Infra Project Ltd, (ii) Jaguar and A S Metals Jaipur and (iii) Neelam Corporation. The Applicant had sought details of the valuation report and Agreement for Sale in respect of the aforesaid Factory Premises, however, no such documents have been provided by the suspended management of the Corporate Debtor.
 - b. In the period between 25th February 2017 to 25th February 2019, an amount aggregating to Rs. 19,59.61.186/ (Rupees Nineteen Crores Fifty-Nine Lakhs Sixty One Thousand One Hundred and Eighty Six only) was paid to Mr. Nenshi Shah, Mr. Paresh Shah, Ms. Urmi P. Shah, Mr. Pratik Shah, Ms. Kasturben Nandu, Mr. Nitesh. P. Shah, Mr. Kumar Shah, Pink Rose Chemicals Pvt. Ltd and Shubanen Ply Pvt. Ltd, all of whom are related parties within the meaning of Section 5(24) of the Code.
 - c. Ego Furniture Pvt. Ltd had given an unsecured loan amounting to Rs. 2,10,00,000 (Rupees Two Crores and Ten

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Lakhs only) and the same was repaid during the same period. It is pertinent to note that the repayment of this unsecured loan was prioritised over the dues of other secured creditors during the same period.

- d. In FY 2018-19, the Corporate Debtor also took an unsecured loan from Master Clock Watch Works Pvt. Ltd., aggregating to Rs. 85,00,000/ (Rupees Eighty-Five Lakhs only). The said unsecured loan was repaid by the Corporate Debtor during FY 2018-19. The Applicant submits that the repayment of this unsecured loan was also prioritized over the dues of other secured creditors during the same period. The Applicant submits that the repayment of unsecured loans as referred to in paragraphs 5(c) and (d) hereto, tantamount to preferential treatment of transactions with the said Ego Furniture Pvt. Ltd & Master Clock Watch Works Pvt. Ltd.
- e. The account of National Laminate Corporation had payable opening balance of Rs. 17,00,000 (Rupees Seventeen Lacs only) and was classified as "Sundry Debtors" in the books of accounts of the Corporate Debtor. The total amount was repaid during the EY 2018-19. Rs. 15,00,000/- (Rupees Fifteen Lacs only) was paid during relevant period and the remaining amount of Rs. 2,00,000/- (Rupees Two Lacs only) was repaid on 27th February 2019. The Applicant has observed that National Laminate Corporation was not only a related entity prior to the period referred in hereinabove, but its registered office was also adjacent to the registered office of the corporate debtor

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- f. An amount of Rs. 33,01,000 / (Rupees Thirty-Three Lacs and One Thousand only) was repaid to Reinoz IT Solutions Pvt. Ltd during FY 2017- 18 and FY 2018-19. The account was originally classified as an "unsecured loan" having an opening balance payable of Rs. 33,25,000/ (Rupees Thirty-Three Lakhs and Twenty-Five Thousand only). The closing balance payable now stands at Rs. 24,000(Rupees Twenty-Four Thousand only). Thirty-Three Lakhs and Twenty-Five Thousand only). The closing balance payable now stands at Rs. 24,000 /- (Rupees Twenty-Four Thousand only).
- g. Whilst the books of accounts of the Corporate Debtor indicated that there were many creditors, all having an opening balance, not all of them were repaid the amounts due to them during FY 2017-18 and FY 2018-19. However, four creditors viz. Haresh Petrochem Pvt. Ltd., Rite Print Box Division, Classic Marble Company Pvt. Ltd. and Elegant Sales Corporation were paid an aggregate amount of Rs. 89,32,496 / (Rupees Eighty-Nine Lakhs Thirty-Two Thousand Four Hundred and Ninety-Six only). The Applicant submits that the entities / creditors referred to hereinabove and repayment of the borrowings from such entities / creditors have been given preferential treatment over all other creditors, who also had outstanding balances during the same period.
- 2.5. Having regard to the above, the Applicant submits that an amount of Rs. 23,91,94,000/- (Rupees Twenty-Three Crores Ninety-One Lacs and Ninety-Four Thousand only) ought to be classified as 'preferential transactions' as per the provisions of Section 43 (2) of

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the Code. For ease of reference, the break-up of the preferential transactions is as follows:

- i. An amount of Rs. 19,59,61,000 (Rupees Nineteen Crores Fifty-Nine Lacs and Sixty-One Thousand only) was repaid to related parties, under the garb of repayment of unsecured loans (during the period of two years preceding the insolvency commencement date);
- ii. An amount of Rs. 3,43,01,000/- (Rupees Three Crores Forty-Three Lacs One Thousand only) was repaid to non-related parties, also under the garb of repayment of unsecured loans during the period of one year preceding the insolvency commencement date; and
- iii. An amount of Rs. 89,32,000 / (Rupees Eighty-Nine Lacs and Thirty-Two Thousand only) was repaid to un-related parties with whom the Corporate Debtor was not having business transactions but who received preferential treatment over the other secured creditors.
- 2.6. Upon discovery of the preferential transactions as set out above, the Applicant sought clarifications/ explanations from the suspended management of the Corporate Debtor in respect of the preferential transactions as aforesaid. The Applicant had addressed two letters both calling upon the suspended management of the Corporate Debtor to provide explanation / cogent reasons for the transactions as referred to above, however, the suspended management has been unable to provide any cogent reason and or explanation whether in writing or otherwise.

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- 2.7. The Applicant being a Chartered Accountant, inspected the books of accounts of the Corporate Debtor and discovered the dubious transactions as enumerated above, which required further investigation and therefore, the Applicant proposed the appointment of a Transactional Auditor. Raj Niranjan Associates were appointed as the Transactional Auditor.
- 2.8. On bare perusal of the Transactional Audit Report, it is prima facie evident that the Corporate Debtor has entered into several transactions with related parties and non-related parties, with a view to defraud the creditors and stakeholders of the Corporate Debtor and it would be just and reasonable for this Tribunal to pass appropriate orders setting aside such preferential and/or fraudulent transactions and recovering the assets of the Corporate Debtor from the concerned Respondents, in terms of Sections 47, 66 and other applicable provisions of the code.
- 2.9. It is submitted that Respondents herein have entered into preferential and fraudulent transactions with the intent of defrauding the creditors of the Corporate Debtor by intentionally circumventing the provisions of Section 43 of the Act and the Applicant is therefore filing this Application, in his capacity as the Liquidator of the Corporate Debtor praying to direct the reversal of the preferential transactions and fraudulent transactions.
- 3. None of the Respondent, except Respondent No. 13 filed the reply. The Respondent No.13 have filed written submissions as well as reply stating that during the year 2013-14, they have supplied goods to the Corporate Debtor and the payment terms were also there. However, Applicant has merely made an averment and allegation that the transactions which are in nature of preferential in nature. However, it

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is settled provision of Law that while making an allegation of preferential; one need to establish before the Court about existence of any of the elements of preferential as specified in the terms of Law. The Transaction which was done between the parties, was done with the proper business terms. Hence the allegations made thereon in the application cannot be sustained in the eyes of law. Despite the period for payment terms have been exhausted the Corporate Debtor made the payment during the year 2018 - 19. Therefore, for payment of these past dues it cannot be stated that the preference has been made by the Corporate Debtor.

- 3.1. No supporting documents have been annexed with the application except the bare allegations made in the Transaction Audit Report which do not discloses the origin of the fraud which is essential to set out in any circumstances.
- 3.2. The Applicant has miserably failed to prove that what fraud has been committed by the Corporate Debtor and / or by the R13 over the Stakeholders of the Corporate Debtor by entering into the transactions in question. No element of fraud has been established by the Applicant in the present Application. The Applicant has also failed to prove that the R13 has knowledge of fraud being played in the transactions in question which is pertinent qua the provisions of S. 43 and other relevant provisions of the Code.
- 4. Heard learned counsel and perused the materials available on record.
 - 4.1. Section 43 of the Code deals with preferential transactions and relevant time. Section 43 of the Code is as follows:

"43: Preferential transactions and relevant time.-

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time

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given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in subsection (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

- (2) A corporate debtor shall be deemed to have given a preference, if—
- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
- (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.
- (3) For the purposes of sub-section (2), a preference shall not include the following transfers —
- (a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
- (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—
- (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and
- (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

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

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

- (4) A preference shall be deemed to be given at a relevant time, if—
- (a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or
- (b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date."
- 4.2. In the present case, the Corporate Debtor owed money to the Respondents prior to commencement of Insolvency resolution date and had paid some money towards repayment of such debt within the look back period of two years in case of related parties and within one year in case of unrelated parties. It is undisputed fact that there existed antecedent debt and the same has been repaid within the look back period. The money is property of the Corporate Debtor. Though there is no specific averment that the Respondents were put in beneficial position in what they would have been in case such amounts were to be distributed in accordance with Section 53 of the Code, however, the payment to these parties in the circumstances enumerated in the application clearly suggests that the payee Respondents have been put in beneficial position. Accordingly, the transaction in question satisfies the basic ingredients contained in section 43(2) & (4). Hence, the transaction in question, to the extent it falls within the look back period, is a preferential transaction. However, the section 43(3) of the Code

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provides certain exceptions, whereby even a transaction falling within the mischief of Section 43(2) read with Section 43(4) of the Code are excluded from the scope of section 43 calling for orders u/s 44 of the Code.

- 4.3. None of the Respondent, except Respondent No. 13, has filed reply taking defence that the said transactions were in Ordinary Course of Business. Hence, we have no hesitation to hold that the transactions with Respondents, except transactions with Ego Furniture Pvt. Ltd. (Respondent No. 7), Master Clock Watch Works Pvt. Ltd. (Respondent No. 8), National Laminate Corporation (Respondent No. 9), and Reinoz IT Solutions Private Limited (Respondent No. 10), are preferential transactions. Having said so, we find that some of Respondents have paid the amounts to the Corporate Debtor after payments made by Corporate Debtor to them, accordingly, in our considered view, only net payments made to such Respondents can be considered as preferential payments. Hence, the amount of Preferential payment made to Nency L. Shah (Respondent No. 15) would be Rs. 9,22,06,346/- as reduced by Rs. 2,13,17,340/-. Similarly, in case of Pink Rose Chemicals Pvt. Ltd. (Respondent No. 5), the amount of preferential transactions would be Rs. 26.00 lacs and not Rs. 36.00 lacs.
- 4.4. As regards transactions with Ego Furniture Pvt. Ltd. (Respondent No. 7) and Master Clock Watch Works Pvt. Ltd. (Respondent No. 8), we note that transactions with these two parties were in nature of short terms loans taken in September, 2018 and repaid within couple of months, hence does not qualify as preferential transactions as saved by Section 43(4) of the Code being in ordinary course of business of borrower as well as lender.
- 4.5. As regards transactions with National Laminate Corporation (Respondent No. 9), and Reinoz IT Solutions Private Limited (Respondent No. 10), there is no antecedent debt and the amount paid to

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them is reflecting as amount recoverable from them. Accordingly, these transactions cannot be held to be preferential in nature. However, the money paid to them are recoverable and the Applicant shall be at liberty to take appropriate action calling them to pay back these amounts to the Corporate Debtor.

4.6. As regards transactions with Respondent No. 11 to 14 who are stated to be creditors of corporate debtor, the applicant has alleged the transaction of payment to these parties as preferential in nature only on the ground that there was no transaction with these parties in two years preceding the CIRP commencement date. The transaction auditor has noted that "Generally, the creditors with whom the CD was having transactions related to purchase or expense were paid during the period under review. This can be considered to be part of an exception as provided under Section 43(3)(a) – transfer made in the ordinary course of business. From the data available from the books of accounts of the CD, it was observed that there were four creditors, who just had the opening balance, were paid during the period under review. It was also noted that the CD didn't had any transactions in the last two years from the date of ICD, other than that of payments made to them, with the mentioned four creditors during the same period. The book of accounts exhibited that there were many creditors, other than the above mentioned creditors, which had opening balance but were not paid at all during the review period." These observations have led the auditor to conclude that the transaction of payment to these four creditors is preferential in nature and he has isolated these parties from the rest of creditors transactions, which the auditor has himself opined to be in ordinary course of business. We note that Respondent No. 11, 12 & 14 have not filed any reply. Respondent No. 13 has pleaded that the payments were made during the year 2018-19 by the Corporate Debtor despite the period for payment terms have been exhausted. After

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taking into consideration these facts, we are of considered view that in the absence of regular transaction with these parties i.e. Respondent No. 11 to 14 since longer period, we find no infirmity in the conclusion of applicant to hold these transactions as preferential in nature.

- 4.7. As regards sale of factory land, building and Plant & machinery to Respondent No. 1 to 4 made by the Corporate Debtor in tranches, the applicant has stated that no document has been provided by the erstwhile management so as to arrive at any conclusion in relation to these transaction. The transaction auditor has also stated that the valuation report, sale deed and agreement to sale was not provided to them. We note that the transaction auditor has placed an analysis of sale price and book value of each of property sold by Corporate Debtor and has noted that Corporate Debtor has made substantial profit on such sale. However, in the absence of fair market value of those properties available to Transaction Auditor or the Applicant, no case could be made out for undervalued transaction. The erstwhile management is under obligation to provide all the information and documents to the Resolution Professional or Liquidator, as the case may be. We note that non-provision of information has caused failure on part of the applicant as well as transaction auditor to reach out a conclusion in relation to these sale transaction. Accordingly, we consider it appropriate to direct the Applicant to inform IBBI for taking necessary action against them in terms of section 70 of IBC.
- 4.8. In view of the foregoing, the transactions with Respondent No. 5, 6, 11 to 21 are held to be in preferential nature to the extent as described in the preceding para(s) and these parties are directed to pay back the monies paid to them in preference over other creditors within 30 days.

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5. In view of the foregoing, IA 5341 of 2023 is partly allowed and disposed of accordingly.

Sd/Prabhat Kumar
Member (Technical)

Sd/Justice V.G. Bisht
Member (Judicial)