

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

IA No. 2048/MB/C-I/2019

In

C.P (IB) No.2295/MB/C-I/2018

An application under Section 66 of the Insolvency and Bankruptcy Code, 2016

Filed by

**Mr. Ashish Kumar Rathi,
Resolution Professional of
Sunil Hitech Engineers Limited**

...Applicant

Versus

Mr. Sunil Gutte and Ors.

...Respondents

Order Pronounced on: 13.08.2024

Coram:

| | | |
|----------------------------|---|----------------------------|
| Hon'ble Member (Judicial) | : | Justice V.G. Bisht (Retd.) |
| Hon'ble Member (Technical) | : | Mr. Prabhat Kumar |

Appearances:

| | | |
|--------------------------------|---|------------------------------|
| For the Applicant | : | Ms. Nandita Bajpai, Advocate |
| For the Respondent No. 1 and 2 | : | Mr. Pratik Pandey, Advocate |

ORDER

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

1. The Applicant has filed the present Application impugning certain transactions under Section 66 of the Insolvency and Bankruptcy Code, 2016 ('Code'). The

Applicant is seeking a direction that the Respondents contribute jointly and severally, to the assets of the Corporate Debtor for the amount equivalent to the funds transferred to the JV's amounting to Rs.35,84,30,960/- along with such interest. Mr. Sunil Gutte, (Respondent No. 1) is the suspended promoter/director of the company, Mr. Harshvardhan Kaushik, (Respondent No.2) was the Chief Financial Officer of the company at the relevant time. SHEL-RCM JV (Respondent No.3), SHEL-Varaha JV (Respondent No.4) and Varaha-SHEL JV (Respondent No.5) are the joint ventures.

2. CIRP commenced against the Corporate Debtor vide order dated 10.09.2018. Subsequently, the Corporate Debtor was Liquidated vide order dated 25.06.2019.
3. The Applicant appointed NV Dand and Associates ("NVD") as the forensic auditor to conduct forensic audit of the Corporate Debtor. The Auditor in the Forensic Audit Report dated 02.06.2019 reported that the Corporate Debtor has entered into several transactions under Section 66 of the Code.
4. The Applicant submits that Corporate Debtor transferred funds to Joint Ventures between April 2018 and September 2018. The Corporate Debtor had formed part of various unincorporated Joint Ventures to participate in various infrastructure projects. Various tenders were awarded by the National Highways Authority of India (NHAI) and Ministry of Road Transport & Highways (MORTH). The details of the said JV's are tabulated hereinbelow:

| Date of Joint Bidding Agreement | Name of JV | JV Partner | Project name | Contract Value (In Crores) | Stake of the Corporate Debtor | Stake of JV Partner |
|---------------------------------|------------|------------|--------------|----------------------------|-------------------------------|---------------------|
| | | | | | | |

| | | | | | | |
|------------|----------------|-----------------|------------------------------------|--------|-----|-----|
| 14.02.2017 | SHEL-RCM JV | Respondent No.3 | Parli-Pimpla Dahiguda Section | 134.45 | 70% | 30% |
| 14.02.2017 | SHEL-RCM JV | Respondent No.3 | Mehkar to Ajispur Section | 160.2 | 70% | 30% |
| 14.02.2017 | SHEL-Varaha JV | Respondent No.4 | Nanded-Kinwat-Mahur-Arni Section | 308.16 | 70% | 30% |
| 14.02.2017 | SHEL-Varaha JV | Respondent No.4 | Ajantha-Buldhana Section | 257.4 | 70% | 30% |
| 28.12.2016 | Varaha-SHEL JV | Respondent No.5 | Ranchi-Piska More-Bijupara Section | 235.9 | 30% | 70% |

5. The JV's sub-contracted the projects on back-to-back to various entities/sub-contractors. Through sub-contracts, the JV's have 100% sub-contracted all the projects awarded to them by NHAI and MORTH to the various subcontractors.

6. Further, VAG Builtech Ltd. is a subsidiary company of the Corporate Debtor, which has sub-contracted its portion of work back to the counterpart sub-contractor. The Corporate Debtor entered into various project management services agreements with all the aforementioned Respondent JV's on 11.04.2018. In terms of the said agreement, Corporate Debtor is entitled to receive an amount of 1.5% of the total contract price for reach project from the respective JV.
7. It is the Applicant's case that since the entire project work was carried out by the sub-contractors appointed, the JV's had no financial obligations to be carried out in terms of the said projects, there was no requirement for the Corporate Debtor to transfer any amount to the JV's. However, it is submitted that the Corporate Debtor through its various entities had transferred an amount of Rs.35.84/- Crores to the Joint Ventures. The details are tabulated hereinbelow:

| Particulars | Amount transferred (In Rs.) |
|--------------------------|-----------------------------|
| SHEL RCM JV | 21,05,86,205/- |
| SHEL Varaha JV | 4,10,44,755/- |
| Varaha SHEL JV | 10,68,00,000/- |
| Total (In Crores) | 35,84,30,960/- |

8. The Applicant submits that the aforesaid amounts were transferred by the Corporate Debtor without any justification and were transferred just months prior to commencement of Corporate Insolvency Resolution Process of the Corporate Debtor. It is also submitted that the Corporate Debtor has arranged bank guarantees amounting to Rs.99.94 Crores, at its own costs, i.e. by bearing bank commission. The impact of such arrangement was to put the company under financial distress

considering the fact the Corporate Debtor under the project management services agreements was entitled to 1.5% revenue.

Submissions advanced by Respondent No. 1

9. It is submitted that the present application has not furnished any particulars or details of the role played by the Respondents herein in the alleged fraudulent acts. The Resolution Professional has made bald allegations against the Respondents without attribution of any role played by them or particulars of actions which constitute the intent to commit fraud. The Resolution Professional has failed to set out any particulars which would demonstrate the intent of parties to commit fraud or the wrongful gain/profit made by any of such parties.
10. It is submitted that the transactions entered into by the Corporate Debtor pursuant to tender contracts are genuine. In order to meet technical criteria set out by various government authorities including the Ministry of Road and transport, the Corporate Debtor proposed to enter into various joint agreements with RCM infrastructure Ltd ("RCM") as well as Varaha Infra Limited ("VIL") (collectively as "consortium partners").
11. In view of the above, the Corporate Debtor has executed various joint bidding agreements ("JBA") with RCM and VIL for undertaking joint bidding of tender projects floated by MORT. Such bids were made in order to meet the technical specifications and financial parameters in the RFP document and other bid documents in respect of such projects.
12. The Corporate Debtor had entered into JBAs for the purpose of meeting the

technical as well as financial criteria set out in RFP issued by MORTH from time to time. The Corporate Debtor as solely responsible to carry out works under Main Agreements entered with MORTH. The consortium formed by the Corporate Debtor submitted its bids with MORTH and was found be the highest bidder with respect to 7 projects for which MORTH executed separate main agreements ("Main Agreements") with the respective consortium.

13. In view of the allegations made by the Resolution Professional in the present application, the following clauses of the Main Agreements are relevant to be noted in order to appreciate the scope of responsibility and conditions imposed upon the Corporate Debtor:

“3.2.1. The Contractor, whether Consortium/Joint Venture or sole, shall not sub-contract any works in more than 49% (forty nine per cent) of the total length of the Project Highway and shall carry out Works directly under its own supervision and through its own personnel and equipment in at least 51% (fifty one per cent) of the total length of the Project Highway. Provided, however, that in respect of the Works carried out directly by the Contractor, it may enter into contracts for the supply and installation of Materials, Plant, equipment, road furniture, safety devices and labour, as the case may be, for such Works. For the avoidance of doubt, the Parties agree that the Contractor may sub-divide the aforesaid length of 51% (fifty one per cent) in no more than 5 (five) sections of the Project Highway. The Parties further agree that all obligations and liabilities under this Agreement for the entire project Highway shall at all times remain with the Contractor.

7.1.1 The Contractor shall, for the performance of its obligations hereunder

during the Construction Period, provide to the Authority, within 10 (ten) days of the date of this Agreement, an irrevocable and unconditional guarantee from a Bank in the form set forth in Schedule-G (the "Performance Security") for an amount equal to 5% (five percent) of the Contract Price. The Performance Security shall be valid until 60 (sixty) days after the Defects Liability Period. Until such time the Performance Security is provided by the Contractor pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security, the Authority shall release the Bid Security to the Contractor."

14. It is stated that in terms of the above clauses in the Main Agreements evince that the Corporate Debtor (in its capacity as the 'Contractor') was responsible for carrying out all project works. Notably, even under the Main Agreements, the Corporate Debtor was entitled to subcontract and delegate the project works to other 3rd parties to the extent of 49-70% of the total project. Lastly, under Article 7 of the Main Agreement, the Corporate Debtor was obligated to provide an irrevocable and unconditional bank guarantee to MORTH for an amount equal to 5% of the Contract Price which was to remain valid until 60 days after the Defect Liability Period. Infact, as regards the Bank Guarantees (BGs) posted by the Corporate Debtor are concerned, most of such BGs are still uninvoked. Therefore, the above clauses of the Main Agreements clearly stipulated that the Corporate Debtor would be responsible for carrying out all the obligations and works under the Main Agreements and that such obligations could not be performed by any other party except the Corporate Debtor.
15. As is common in the business of project bidding and EPC works, the Corporate

Debtor had formed the respective consortium solely with a view to meet the financial and technical specification in order to be eligible for bidding. Furthermore, since under the main agreements as well as throughout the course of execution of project works, all responsibility as well as financial risks were required to be taken by the Corporate Debtor, it was an understood position with the consortium partners that the Corporate Debtor would be entitled to the lion's share in the profits arising out of the main agreements. To that end, the Corporate Debtor has entered into various profit sharing agreements with its consortium partners in the respective projects of MORTH which clearly set out that the Corporate Debtor would be entitled to 98.5% of the contract price in view of the fact that the role of Corporate Debtor in execution of the main agreement is far substantial than that of the consortium partner. In summary, the profit sharing ratio agreed by the consortium partners of the Corporate Debtor under respective profit-sharing agreements is tabulated hereinbelow:

| Sr. No. | Date of the Agreement | Party | Share of the Corporate Debtor | Share of Partner |
|---------|-----------------------|---|-------------------------------|------------------|
| 1. | 23.11.2015 | Sunil Hi-Tech – RCM Infrastructure Ltd. | 98% | 2% |
| 2. | 23.11.2015 | Sunil Hi-Tech – RCM Infrastructure Ltd. | 98% | 2% |
| 3. | 08.02.2017 | Sunil Hi-Tech – Varaha Infra Ltd. | 98.50% | 1.50% |
| 4. | 08.02.2017 | Sunil Hi-Tech – Varaha Infra Ltd. | 98.50% | 1.50% |

| | | | | |
|----|------------|---|--------|-------|
| 5. | 08.02.2017 | Sunil Hi-Tech – Varaha Infra Ltd. | 98.50% | 1.50% |
|----|------------|---|--------|-------|

16. Infact, in addition to the above, and in line with the understanding arrived between the parties, the Corporate Debtor had entered into the Project Management Consultancy Service Agreements (PMC Agreements) with the respective consortium partners under which an additional 1.5% of the Contract Price was agreed to be paid to the Corporate Debtor. Therefore, by entering into such PMC Agreements, the Corporate Debtor was practically in receipt of the entire sum of the Contract Price under each of the Main Agreements. Resolution Professional has misconstrued the entire structure of arrangements between the parties. More particularly, the Resolution Professional has misrepresented that the Corporate Debtor was entitled to receive only 1.5% of the Contract Price as under the PMC Agreements. Whereas, the PMC Agreements enabled the Corporate Debtor to receive an additional sum of 1.5% of Contract Price over and above the entitlement under the profit-sharing arrangement.

17. Under the Main Agreements, the Corporate Debtor was entitled to subcontract and delegate the project works to other 3rd parties to the extent of 70% of the total project works. However, even as regards works being subcontracted under the main agreements, all obligations and liabilities for the entire project at all times remained with the Corporate Debtor. MORTH through its various agencies and supervisory bodies had issued very show cause notices to the Corporate Debtor complaining about the slow progress of work. It is in this context and circumstances that the Corporate

Debtor along with its consortium partners subcontracted various segments of works to other 3rd parties by entering into separate subcontract agreements.

18. In view of the above, works were carried out by the subcontractors for which the Corporate Debtor and its consortium partners have raised invoices from time to time. Infact, under the respective Main Agreements, the two consortium/AOPs have raised invoices from time to time and have received/due to receive a sum of Rs. 1580 Crores towards bills/invoices certified by MORTH.

19. As stated above, given the slow progress of work, the Corporate Debtor had entered into various subcontract agreements to speed up the project works. The subcontractor agreements entered by Corporate Debtor provided for the following clauses:

clause 2 (a): Corporate Debtor and consortium partner will make payment of consideration price along with escalation, maintenance and all other payments as per the EPC contract as admissible under the main agreement with MORTH to the subcontractor;

clause 5 (v): Corporate Debtor and consortium partner will pay 93% on the gross bill value made by MORTH for subcontract works;

Clause 5(viii): the Corporate Debtor and the construction partner shall issue standing instructions to the designated bank to transfer the agreed payment to the subcontractor account after receiving the same from MORTH.

20. In summation, the Respondent submits that the payment of Rs. 35.84 Crores was pursuant to the sub-contract agreements entered in course of performance of the Main Agreement with MORTH. Therefore, no element of fraud can be attributed to the impugned transactions.

Submissions advanced by Respondent No.2

21. It is submitted that Respondent No. 2 was appointed as the Chief Financial Officer ("CFO") of the Company as on 08.02.2018 ("Date of Appointment"). It is worth noting that the Respondent No. 2 was subject to a probation period of 6 (six) months from date of appointment i.e. 08.02.2018 till 08.08.2018. The Applicant has bypassed the intrinsic fact that the Respondent No. 2 was never in charge of the business activities of the Corporate Debtor from FY 2017-2018, as the Respondent No. 2 was appointed as the Chief Financial Officer ("CFO") of the Corporate Debtor on 8th February, 2018, moreover, subject to probation period from 8th February, 2018 till 8th August, 2018.

22. It is submitted that the Respondent No. 2 is not liable for any of alleged acts executed by the Company prior to its appointment as the CFO, for the year end dates i.e. 31.03.2017 and 31.03.2016. The Respondent No. 2 was appointed as CFO of the Corporate Debtor on 8th February, 2018 and had shortly tendered his resignation in June 2018 itself due to certain personal reasons and difficulties. It is further argued that the Respondent No.2 was on probation period of 6 (six) months from the date of his appointment, and thus he was never in charge of the affairs of the Corporate Debtor, as the Respondent No. 2 had given his resignation during his probation period and as such no proceeding for the alleged acts of the company can be initiated against him.

Findings:

23. We have heard the submissions advanced by both sides and perused the record.

24. The Applicant has filed the present Application impugning the transfer of funds amounting to Rs.35,84,30,960/- by the Respondents to the Joint Ventures. The bone of contention is that the Joint Ventures had entered into back-to-back sub-contracting agreements thereby delegating 100% of the project work to the said sub-contractors. As a sequel to the above, the Applicant contends that there was no financial obligation cast on the Corporate Debtor necessitating transfer of funds in the Joint Venture. Further, the Applicant contends that the said funds were transferred just months prior to initiation of Corporate Insolvency Resolution Process of the Corporate Debtor.
25. The Applicant submits that under the arrangement the Corporate Debtor entitled to a meagre revenue of 1.5% of the contract value, therefore, the transfer of funds is disproportionate and done with a fraudulent intent to defraud the creditors of the Corporate Debtor.
26. Per contra, the Respondent No.1 submits that the Corporate Debtor under the main agreements was entitled to delegate/sub-contract the project to the extent of 49-51% for project length/project highway, as the case may be. Further, a reference is made to clause 7.1.1, wherein the Contractor being the Corporate Debtor herein was obligated to provide an irrevocable and unconditional bank guarantee for an amount equivalent to 5% of the Contract price. Further, Respondent No.1 submits that the Corporate Debtor entered into various profit sharing agreements with the consortium partners wherein it was agreed that the Corporate Debtor will be entitled to profit of 98%-98.5%. Moreover, it is submitted that under the said PMC agreements, the Corporate Debtor was entitled to an additional 1.5% of the Contract price. In addition to the above,

the Respondent No.1 states that payments have been made to the sub-contractors from time to time towards expenditure of gross bills raised by MORTH.

27. In summation, the Respondent No.1 states that the payment of Rs.35.84 Crores made by the Corporate Debtor was in accordance with sub-contract agreements entered in course of performance of main agreement.
28. We are of the considered view that, whilst examining an application filed under Section 66(1) of the Code, the twin conditions stipulated under the said section are to be met. The conditions being (i) the business of the Corporate Debtor has been conducted with an intent to defraud the its creditors or (ii) is conducted for any fraudulent purpose. From the facts before us, the Applicant has failed to establish the fact the monies transferred to the said JV's were conducted with an intend to defraud the creditors or for a fraudulent purpose. The Applicant has based the Application on the contract revenue and sub-contracting agreements arrived at the conclusion that the Corporate Debtor was not under an obligation to transfer the funds and execute bank guarantees for the projects. The Respondent has on the other hand demonstrated the fact that funds so transferred was in accordance with the Main agreement and sub-contracting agreement.
29. In the aforesaid factual backdrop, we are unable to hold that the funds so transferred by the Corporate Debtor were for a fraudulent purpose.

30. In view of the foregoing, **IA 2048 of 2019** is **dismissed** and disposed of accordingly.

Sd/-

PRABHAT KUMAR

MEMBER (TECHNICAL)

13.08.2024

Priyal

Sd/-

JUSTICE V.G. BISHT

MEMBER (JUDICIAL)