INTERLOCUTORY APPLICATION NO. 3653 OF 2024 IN

COMPANY PETITION (IB) NO. 368 (MB)/2023

Application u/s 66, 74 and 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the N.C.L.T. Rules, 2016.

In the matter of:

Ssarvi Resolution Services LLP

Resolution Professional of Supreme Transport Organisation Private Limited, through its Partner and Authorised Signatory Mr. Prashant Jain, having his address at: A-501, Shanti Heights, Plot No.2,3, 9b/10, Sector 11, Koparkhairane, Navi Mumbai, Maharashtra-400709.

...Applicant

Vs.

- 1. Mr. Kamalkumar Agarwal
- 2. Mr. Ammeet Kumar Agarwal
- 3. Mr. Akash Kumar Agarwal

All of the above residing at: 901, Bikaner Bhuvan, Kanti Nagar Road, George Nagar, JB Nagar, Andheri East, Mumbai-400059.

4. Golden Gate Developers

504, Bhumi Landmark, Plot No.34, Sector-17, Khanda Colony, New Panvel-410206.

...Respondents

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In the matter between

Axis Bank Limited ...Financial Creditor v.

Supreme Transport Organisation Pvt. Ltd.
...Corporate Debtor

Order pronounced on 19.12.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (Hearing in Hybrid Mode)

For the Applicant: Adv. Himanshu Vidhani a/w Shloka Dikshit and Siddhesh Rajput i/b. Chandhiok and Mahajan.

For the Respondent: Adv. Gaurav Raj Shrawat appeared through VC.

<u>ORDER</u>

Per: Coram.

1. The instant Interlocutory Application is filed by the Applicant/Resolution Professional of the Corporate Debtor under Sections 66, 74 and 60(5) of the Insolvency and Bankruptcy Code, 2016 ('IB Code') read with Rule 11 of the N.C.L.T. Rules, 2016 seeking reimbursement of the amount withdrawn from the bank account of the Corporate Debtor during the subsistence of the moratorium. The Applicant has prayed, *inter-alia*, for the following reliefs:

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- i. Pass a direction to the Secretary/Joint Secretary of Ministry of Corporate Affairs or such other person to investigate the affairs more specifically the appropriation of INR 8,05,11,748/- amount by the Respondents in violation of moratorium u/s 14 of the Code;
- ii. Pass an order reversing the appropriation of the amount of INR 8,05,11,748/- by the Respondents and further direct the Respondents to contribute the above sum to the Corporate Debtor's bank account;
- iii. Pass an order directing the Respondents to provide details regarding the disbursal of the amount of INR 8,05,11,748/- that was withdrawn from the bank account.
- 2. The facts of the case as pleaded by the Applicant in its application are briefly stated as under:
- i. The Applicant is the Resolution Professional ('RP') of Supreme Transport Organization Private Limited i.e. the Corporate Debtor, who was appointed by the Order of this Tribunal dated 24.01.2024. Respondent Nos. 1, 2, and 3 are Shareholders/Directors of the Corporate Debtor and have been in charge of the affairs of the Corporate Debtor.
- ii. The Adjudicating Authority, vide Order dated 08th September, 2023, admitted the captioned Petition filed by Axis Bank Limited which led to the commencement of the corporate insolvency resolution process of the Corporate Debtor.
- iii. Around 15th September, 2023 the Respondent No.02 filed a Company Appeal (AT)(Insolvency) No. 1216 of 2023 before the Hon'ble NCLAT impugning the Admission Order. While the Hon'ble NCLAT directed that the Committee of Creditors ('CoC') of the Corporate Debtor shall not be constituted, it also directed the Respondent No.02 (i.e. the Appellant

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- therein) to deposit an amount of Rs. 10.49 crores in a Fixed Deposit in the name of Registrar, NCLAT.
- iv. As the Respondent No.02 needed funds to deposit the aforementioned amount, the Respondent No.02 moved an application bearing IA No. 4871 of 2023 during the pendency of the aforesaid appeal before the NCLAT seeking permission to dispose of the two properties of the Corporate Debtor so that out of the proceeds obtained from the sale of the two properties, the Respondent No. 02 can deposit the aforementioned amount with the Registrar, NCLAT. The Appellate Tribunal vide its Order dated 16th October, 2023 rejected the above-referred application on the ground that the prayers to sell unencumbered properties cannot be accepted as the CIRP had commenced. However, the Hon'ble NCLAT gave thirty days further time to make the deposit, failing which the interim order shall stand vacated.
- v. While on one hand, the Respondents did not hand over the custody of the Corporate Debtor's office and assets and also failed to provide the relevant information and details of the Corporate Debtor, as needed by the IRP u/s 19 of the Code, on the other hand, the Respondents continued to illegally operate the business, using monies from the bank accounts of the Corporate Debtor and also proceeded to sell the assets of the Corporate Debtor in teeth of the moratorium imposed under Section 14 of the Code.
- vi. It appears that the Respondents illegally and without any authority, sold one asset of the Corporate Debtor to Respondent No. 04, during the moratorium, for which an amount was received in the bank account of the Corporate Debtor maintained with Bank of Baroda. Thereafter, the Respondents made a fixed deposit of INR 7,59,26,262/- in the name of Registrar, NCLAT and by way of a new application sought additional time to deposit the remaining sum of INR 2.90 crores by December 03, 2023. Thus, it is apparent that

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Respondent No. 02 made a fixed deposit in favour of the Registrar, NCLAT from a bank account of the Corporate Debtor with Bank of Baroda, which is in complete violation of the moratorium-imposed u/s 14 of the Code.

- vii. The Applicant, upon becoming aware of the bank account of the Corporate Debtor and its illegal use by Respondent Nos. 01 to 03, immediately informed the Bank of Baroda about the passing of the Admission Order. Bank of Baroda informed by way of a letter that they have frozen two accounts of the Corporate Debtor which were being illegally used by Respondent Nos. 01 to 03 and also provided the Applicant with a copy of Bank Statement which clearly shows illegal use of monies of the Corporate Debtor.
- Pursuant to the hearing held on 01st December 2023, the Applicant was viii. informed that the fixed deposit submitted by Respondent No.02 before the Hon'ble NCLAT has been made from the monies received by Respondent No.02 from the sale of assets of the Corporate Debtor. The Applicant received an email from Respondent No.04 being the alleged purchaser of the properties of the Corporate Debtor. In the said email, certain documents have been shared, out of which three documents are sale deeds dated November 02, 2023 whereby certain land of the Corporate Debtor situated at Village: Khanvale, Taluka: Panvel, has been sold to Respondent No.04 by the Appellant/Respondent No.02 illegally acting in its capacity as the director of the Corporate Debtor. It is apparent that the said sale deed has been executed and registered after the insolvency commencement date i.e. 8th September, 2023 and that the monies have been also received on behalf of the Corporate Debtor. It is also not out of place to state that the land of the Corporate Debtor, which has been illegally sold, stood already

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mortgaged to Axis Bank Ltd and the Axis Bank has not been intimated of the sale.

ix. The exact details of the properties of the Corporate Debtor situated at Village: Khanvel, Taluka: Panvel, District: Raigad, which were illegally sold to Respondent No.04 by Respondent No.02, are as under:

<u>Sr.</u>	Description of the Property being	Admeasuring	Sale Amount
No.	Non-Agricultural Open Land	Square Meters	(in INR)
1.	Gat No. 101, Hissa No. 2/A	2220	5,81,00,000/-
2.	Gat No.103, Hissa No. 2	430	1,13,00,000/-
3.	Gat No.103, Hissa No. 1/2/ A	2810	7,06,00,000/-
		TOTAL	14,00,00,000/-

- x. Thus, it is seen that a sum of Rs. 14 crores collectively was deposited in the Bank of Baroda account of the Corporate Debtor, which was used to make a deposit in the Hon'ble NCLAT. The conduct of the Respondents is entirely unlawful, as they have engaged in sale of an encumbered property and utilized the sale proceeds to make deposits before the Hon'ble NCLAT.
- xi. The details of monies which were illegally withdrawn by the Respondents from the bank account of the Corporate Debtor after the insolvency commencement date have been given in Para 5.21 of the application. A sum of INR 8,05,11,748/- was illegally withdrawn by the Respondents from the bank account of the Corporate Debtor after the insolvency commencement date, which now needs to be brought back to the account of the Corporate Debtor and, therefore, it is necessary to give appropriate directions to the Respondents to contribute the aforesaid sum. Hence this application.

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3. Reply of the Respondent

The Respondent No.02 has filed his Affidavit-in-Reply dated 08th October, 2024. The reply of the Respondent is summarized as under:

- i. One of the principal contentions of the Applicant is that a property situated in Panvel was sold during the corporate insolvency resolution process and thus, provisions of Section 74 of the Code are attracted. In this regard, it is submitted that Section 74, being a penal provision, requires presence of mens rea/intention to defraud/criminal intent as a necessary ingredient for a person to be convicted. However, in the facts of the present case, it is clear that the proceeds from sale of the assets of the Corporate Debtor were not misappropriated but the same were deposited in favour of Registrar, NCLAT by way of a demand draft, thus, negating any malafide intent attributable to the Respondents.
- ii. The buyer of the property i.e. Golden Gate Developers (being Respondent No.04 herein) was aware of the CIRP and based on the assurances of the said buyer, the Respondent No.02 entered into the sale deed. However, the execution of sale deed does not establish any malafide or criminal intent of the Respondent No.02 inasmuch as the money received from sale was deposited with NCLAT and thus, there was no intention to defraud any creditor or stakeholder in the process.

FINDINGS

4. We have heard the learned Counsels for the Applicant and the Respondent and we have carefully gone through the pleadings and the documents and materials placed on record.

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- 5. The case of the Applicant is premised on bank transactions which show that monies were received in respect of the assets which were illegally sold by the Respondent No.02 and the payments too were illegally made by the Respondents from the Bank of Baroda account of the Corporate Debtor during CIRP in teeth of the statutory moratorium-imposed u/s 14 of the Code. With reference to the transactions mentioned in Para 5.21 of the application, the Respondent has pleaded that a fixed deposit of around Rs. 7.59 crore was deposited with Hon'ble NCLAT and the remaining transactions were towards payment of salaries to the employees of the Corporate Debtor and other trade payables to some other entities. The Respondent No.02 has taken a defence that though the assets were sold during the CIRP, there was no intention to defraud the creditors of the Corporate Debtor as the amounts were paid towards deposits with NCLAT, salaries of the employees and trade payables of the Corporate Debtor in the regular course of business. Thus, it is not at all in that the amounts aggregating to INR 8,05,11,748/- were withdrawn/paid by the Respondents from Bank of Baroda Account of the Corporate Debtor during the CIRP when the moratorium was in place.
- 6. It cannot be disputed that as per the provisions contained in Section 17 of the Code, when the Corporate Debtor is admitted into CIRP, the powers of the Board of Directors of the Corporate Debtor stand suspended and the management of the affairs of the Corporate Debtor vests in the IRP. Therefore, the defence taken by the Respondent that amounts were withdrawn from the bank account of the Corporate Debtor during the CIRP for depositing the same with the Hon'ble NCLAT and for making the payments to employees and other Operational Creditors of the Corporate Debtor in the regular course of the business so as to keep the Corporate Debtor as a going concern, cannot be

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accepted without a pinch of salt since the Respondents had absolutely no mandate or authority to conduct such transactions as their powers stood suspended and the management of the affairs of the Corporate Debtor vested in the Applicant. Even otherwise, the Respondents have brought nothing on record to show that the payments were actually made towards the salaries of the employees or some trade payables. Mere email correspondences between the Applicant and Respondent No.02, copies of which have been annexed as Annexure-1 to the reply, cannot be said to be sufficient to establish the bona fide of the Respondents.

7. On perusal of records, we further find that the Respondent No.02 was aggrieved by the Admission Order dated 08th September, 2023 u/s 7 of the Code passed in the captioned Petition filed by the Axis Bank against the Corporate Debtor and, therefore, the said Respondent preferred an appeal before the Hon'ble National Company Law Appellate Tribunal ('NCLAT' or 'the Appellate Tribunal') vide Company Appeal (AT)(Insolvency) No. 1216 of 2023. The Hon'ble NCLAT, vide its Order dated 15.09.2023, directed the Respondent No. 2 (Appellant in the said appeal) to deposit INR 10,49,26,262/- with the Registrar, NCLAT within 30 days and until then, the Hon'ble NCLAT was pleased to direct that the CoC should not be constituted. While the said appeal was pending, in order to arrange funds for depositing the aforementioned amount, Respondent No.02 moved an Interlocutory Application No. 4871 of 2023 before the Hon'ble NCLAT seeking permission to sell two unencumbered assets of the Corporate Debtor. However, the Hon'ble NCLAT in its Order dated 16.10.2023 in the above-referred IA declined such permission and, *inter*alia, held as follows:

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"2. By Order dated 15.09.2023, we allowed 30 days' time to the Appellant to deposit the amount Rs. 10,49,26,262/- now the Appellant has come up in this Application seeking permission to sell unencumbered assets of the Corporate Debtor. <u>CIRP having commenced, no permission to sell</u> any assets of the Corporate Debtor can be granted in this Appeal.

- 3. We thus are of the view that prayers made in the Application can not be accepted. **The Application is rejected.**
- 5. We however in the ends of justice allow 30 days further time to make the deposit. We make it clear that if deposit is not made, the interim order shall stand vacated."

 (Emphasis Supplied)
- 8. It is further note-worthy that despite the unequivocal order of the Hon'ble NCLAT passed on 16.10.2023, the assets of the Corporate Debtor were sold to Respondent No.04 vide Sale Deeds dated 02nd November, 2023. The aforementioned sales transactions have been impugned by the Applicant/RP in IA No. 2950/2024, which will be separately dealt with in the said IA and, therefore, it would not be appropriate for us to comment any further except that the said sale transaction was also in the teeth of mortarium and the Hon'ble NCLAT had declined to permit the Respondent to sell any property belonging to the Corporate Debtor.
- 9. Though the Applicant has levelled the allegations of fraudulent transactions against the Respondents u/s 66 of the Code, however, in the present application, this Tribunal is seized of the controversy of the withdrawal or payment of money from the bank account of the Corporate Debtor during the moratorium and the said fact has been satisfactorily established from the records and, in our considered view, the Respondents No. 01 to 03 can definitely be called upon to contribute the said sums which were illegally withdrawn or paid from the bank account of the Corporate Debtor. At this

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juncture, in our considered view, it is not necessary to go into the question as to whether or not the transaction in question falls within the definition of fraudulent transaction under Section 66 (1) or 66 (2) of the Code. Therefore, we confine ourselves to the violation of moratorium by the Respondents and call for contributions by them u/s 14 read with 60(5) of the Code.

- 10. Further, the Respondent No.02 has pleaded in his reply that the payments towards the salaries of the employees and the trade payables of the Corporate Debtor were made by cheques drawn prior to the insolvency commencement date. However, this part of the claim made by the Respondents remains unsubstantiated as no evidence has been brought on record of this Tribunal to prove or indicate that the cheques were drawn prior to the insolvency commencement date. Thus, Respondent No.02 has miserably failed to establish his defence and, therefore, an adverse inference is to be drawn against them for not producing the evidence available.
- 11. As a result of the foregoing discussion, it is held that the monies which were withdrawn or paid from the bank account of the Corporate Debtor by the Respondents during the CIRP, was undoubtedly in gross violation of the moratorium. Even otherwise, such an act on the part of the Respondents amounts to an offence under Section 74 of the IB Code, 2016 as the act of withdrawing money from the accounts of the Corporate Debtor was committed by the Respondents with impunity and it was in gross defiance of the orders of the Hon'ble NCLAT which had disallowed the request of the Respondents to sell any property of the Corporate Debtor to arrange for the money to be deposited with the Hon'ble NCLAT for the purposes of settlement with the Financial Creditor/Axis Bank Limited. Therefore, it is necessary not only to

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direct the Respondents No. 01 to 03, who were the directors in charge of the affairs of the Corporate Debtor at that time, to jointly and severally contribute the said amounts which were illegally withdrawn or paid from the bank account of the Corporate Debtor during the currency of the moratorium but keeping in view the audacity and temerity of the Respondents, we find it to be a fit case to refer the whole matter to the Insolvency and Bankruptcy Board of India (IBBI) and the Ministry of Corporate Affairs (MCA) to initiate necessary investigation and prosecute the Respondents under Section 74 of the IB Code, 2016.

12. Accordingly, **IA No. 3653/2024 is hereby allowed** in the following terms:

- i. Respondent Nos.01 to 03 are jointly and severally liable to contribute a sum of INR 8,05,11,748/- to the account of the Corporate Debtor within 30 days from the date of this order, failing which they shall be liable to pay the aforesaid sum with interest of 12% p.a. till the amount is actually deposited.
- ii. A copy of this order be sent to the Insolvency and Bankruptcy Board of India (IBBI) and Ministry of Corporate Affairs (MCA) for taking appropriate steps to prosecute the Respondents under Section 74 of the IB Code, 2016. There shall be, no order as to cost.
- iii. Accordingly, I.A. No. 3653 of 2024 stands disposed of in above terms.

Sd/-ANIL RAJ CHELLAN (MEMBER TECHNICAL) Sd/KULDIP KUMAR KAREER
(MEMBER JUDICIAL)