

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
DIVISION BENCH – II, CHENNAI**

**IA(IBC)/400(CHE)/2021 in IBA/1099/2019**

*(Filed under Section 49 read with Section 45(2) of the Insolvency and  
Bankruptcy Code, 2016 read with Rule 11 of the National Company Law  
Tribunal Rules, 2016)*

***In the matter of M/s. Regen Powertech Private Limited***

Ebenazar Inbaraj,  
Resolution Professional of M/s. Regen Powertech Pvt. Ltd.  
Sivanandam, 1<sup>st</sup> Floor,  
New No.1, Pulla Avenue,  
Shenoy Nagar,  
Chennai – 600 030

*.....Applicant*

**-Vs-**

1. Mr. Madhusudhan Khemka  
Suspended Board of Directors of  
Regen Powertech Private Limited  
And  
Regen Infrastructure and Services Private Limited  
Y-202 Anna Nagar,  
Chennai – 600 040
2. Mr. Sundaresh Ramanathan  
Suspended Board of Director of  
Regen Powertech Private Limited  
And  
Regen Infrastructure and Services Private Limited  
3, A&B Sarangapani Street,  
T. Nagar, Chennai – 600 017
3. M/s. Regen Infrastructure and Services Private Limited  
Represented by Resolution Professional  
Sivanandam, 1<sup>st</sup> Floor,  
New No.1, Pulla Avenue,  
Shenoy Nagar,  
Chennai – 600 030

*..... Respondent*

***Order Pronounced on 30<sup>th</sup> May 2022***

CORAM

**Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)**  
**ANIL KUMAR B, MEMBER (TECHNICAL)**

*For Applicant* : *S. R. Raghunathan, Senior Advocate*  
*A. G. Sathyanarayanan, Advocate*  
*B. Thilak Narayanan, Advocate*

*For Respondent* : *N.L. Raja, Senior Advocate*  
*For R1 & R2*  
*E. Om Prakash, Senior Advocate*  
*B. Dhanraj, Advocate for R3*

ORDER

**Per: ANIL KUMAR B, MEMBER (TECHNICAL)**

The application under consideration is filed under section 49 read with Section 45(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter called as IBC, 2016) read with Rule 11 of National Company Law Tribunal Rules, 2016 by the Resolution Professional in seeking following reliefs:

- (a) To declare that the alleged sale arrangement of plant and machinery of sub-stations as void and direct the property so transferred to be vested in the Corporate Debtor;
- (b) To declare that the working capital lenders of CD have the charge over the assets whose interest adversely affected by the above transaction;
- (c) To declare that the lease deeds executed by the CD without the consent of the lenders in favor of the 3<sup>rd</sup> Respondent before SRO Chinnamanur bearing Document No. 1447, SRO Malliya bearing Document No. 354 / 2017 and before SRO Morbi 6627/2017 as null and void and direct property so transferred vested in the Corporate Debtor.

(d) To pass such other orders or further orders this may be deemed to be fit and proper in the interest of justice.

2. The brief facts of the case is that upon filing of a Application under Section 9 of the Insolvency and Bankruptcy Code, 2016, by an Operational Creditor, the Corporate Insolvency Resolution Process in respect of the Corporate Debtor was initiated by this Tribunal vide order dated 13.12.2018 passed in IBA/1099/2019. It is also seen that the Applicant herein viz. Ebenezer Inbaraj was appointed as the Interim Resolution Professional. Thereafter, it was submitted that the Committee of Creditors in their 2<sup>nd</sup> meeting has confirmed the Interim Resolution Professional viz. Ebenezer Inbaraj, to act as the Resolution Professional in respect of the Corporate Debtor viz. Regen Powertech Private Limited. Accordingly, it is seen that the Committee of Creditors has moved an Application under Section 22(3) of the Insolvency and Bankruptcy Code, 2016 and this Tribunal vide its order dated 21.10.2020 passed in IA/620/IB/2020 has confirmed Mr. Ebenezer Inbaraj as the Resolution Professional in respect of the Corporate Debtor viz. Regen Powertech Private Limited.

3. It is also seen that the Resolution Plan in respect of the Corporate Debtor viz. Regen Powertech Private Limited was also approved by this Tribunal vide its order dated 01.02.2022 and

presently the affairs of the Corporate Debtor are being managed by the Monitoring Committee of the Corporate Debtor.

4. It was submitted that the Resolution Professional as per the provisions of IBC, 2016, after obtaining approval from the Committee of Creditor has appointed one M/s. Khicha and Prabhu Kesavan to perform Transaction Audit to look into the Preferential Transactions under Section 43 of IBC, 2016, Undervalued Transactions under Section 45 of IBC, 2016 and Wrongful Trading under Section 49 of IBC, 2016, if any.

5. Accordingly, it was submitted that the transaction auditor after detailed verification and scrutiny of the available records, Books and Accounts and SAP backup of the Corporate Debtor has made the several observations in their report. It was submitted that the said transaction auditor formed opinion that the sale of substation to the 3<sup>rd</sup> Respondent subsidiary company without knowing the fairness of sale consideration and diluting the securities of working capital lenders, without prior approval consent from the lenders falls within the ambit of Section 49 of the IBC, 2016. It was submitted that though there were valuation were found in the records of Corporate Debtor in respect of three substation in Tamil Nadu, but the value arrived, the basis and list

of plant and machinery details were not part of the valuation and the valuation report is vague and future revenue is not taken into consideration. The details of the valuation and actual PO value to establish that the sale was undervalued, for instance the Annalkadvu SS established for which Corporate Debtor PO value for establishing said Anaikadavu Substation is Rs.58.89 Crore whereas the sale value is Rs.42 Crore, which is significantly undervalued and further, the same was not paid till date and shown only as receivable in the book.

6. The Learned Counsel for the Applicant submitted that the Corporate Debtor has purchased certain lands and after purchasing the same, constructed building with a super built up area of 1983 sq.ft., 1952 sq.ft., 6365 sq. ft., 1740 sq. ft. and thereafter out of the bank finance the Corporate Debtor has built substation installing transformers and other machinery. It was submitted that the Corporate Debtor has executed loan document to the lender State Bank of India, Axis Bank, Canara Bank and Standard Chartered Bank charging all the assets present and future and in any by which the Corporate Debtor has created charge over the above assets with the lenders and the above asset is not free hold land. However, it was submitted that without consent of the lenders who have charge over the assets, the Corporate Debtor

has illegally executed three lease deeds in favour of the 3<sup>rd</sup> Respondent for a long period of 25 years for a paltry sum without considering the revenue generated through the substation and the same was registered at Sub - Registrar office. It was submitted that through a registered lease deed vide Document No. 1447 of 2017 registered at SRO Chinnamanur, the substation lands and building in Annaikadavu, Kamatchipuram and Kandamanur, without the consent of the lenders, were illegally transferred in favour of the 3<sup>rd</sup> Respondent. It was submitted that through illegal lease deed document bearing Nos 354/2017 at SRO Maliya Gujarat and Document No 6627/2017 executed at SRO Morbi executed without the consent of the lenders transferred interest in the land.

7. It was submitted that as far as the Kherada substation which is still under the possession of Applicant, the 3<sup>rd</sup> Respondent has not paid any rent as stated in the illegal lease deeds till date to the Corporate Debtor and thereby freely enjoying the property of the Corporate Debtor along with the income accrues from the substation whereby the Respondents kept away the assets created out of banks finance and its income by fraudulently executing lease deeds in favour of the 3<sup>rd</sup> Respondent and lenders securities were diluted without the consent of the creditors. Hence, it was submitted that these lease deeds have to be declared as void and

set aside. It was further submitted that the terms of the lease deed are one sided and rent value arrived at is much lower than the PWD rate of calculation of rent.

8. Further, it was submitted that upon verification of the books of the Corporate Debtor it was found that Corporate Debtor has sold 5 substations plant and machinery to its wholly owned subsidiary, M/s. Regen Infrastructure and Services Pvt. Ltd (RISPL), the 3<sup>rd</sup> Respondent herein during the Financial Year 2016-17 for Rs. 123.08 Crore by raising three invoices.

9. It was submitted that these substations were part of plant, properties & equipment (Fixed assets) of the Corporate Debtor up to 31<sup>st</sup> March 2016. It was submitted that these sub stations are built up using cash credit facilities from the working capital lenders and the cash credit facilities from banks were secured against 1<sup>st</sup> charge on inventories, book debts present and future and 2<sup>nd</sup> charge on the fixed assets of the Company which is present and future. It was submitted that these substations had been also used by the 3<sup>rd</sup> Respondent since 01.04.2014, for providing Operation and Maintenance services to its customers.



10. It was submitted that based on the invoices raised in favour of the 3<sup>rd</sup> Respondent, the sale of these assets was made after converting the same into stock-in-trade and the cost of the assets sold has been taken at the written down value of the fixed assets at Rs.5394.86 lakh and has been added to the material cost and the sale consideration realized over and above such cost has been booked as profit. However, it was submitted that there is no actual payment made except book entries and no proper invoices raised with tax implication and it is only to keep away the asset from the creditors who have charge over it.

11. It was submitted that out of the above five substations, the land and building are owned by the Corporate Debtor and simultaneously, a long lease has been entered into between the 3<sup>rd</sup> Respondent and the Corporate Debtor which was also registered at respective Sub Registrar office. It was submitted that the possession of the Kherada substation was not officially handed over to the 3<sup>rd</sup> Respondent and Applicant still continue to deploy the security for the said substation and keeps it under the control and custody of the Corporate Debtor. However, all other substations land and building standing in the name of Corporate Debtor are under lease executed in favour of the 3<sup>rd</sup> Respondent

and no payment of rent as per the agreement has not been made by the 3<sup>rd</sup> Respondent to the Corporate Debtor.

12. It was submitted that as per note 24 of the Audited Financial Statements of the Corporate Debtor as on 31.03.2017 the revenue from operations includes Rs.12,308.78 lakh being sale proceeds on sale of sub-stations to Wholly-Owned Subsidiary M/s. Regen Infrastructure and Services Private Limited, the 3<sup>rd</sup> Respondent herein. It was submitted that the cost of Rs 5,394.86 Lakh is included under cost of materials. Consequent to the sale of the Operations and Maintenance Business to Wholly Owned Subsidiary with effect from 31.03.2014, as a part of the management of the complete business and to maximize the returns by using the substations, the management, based on the decision taken in the Board meeting held on 20<sup>th</sup> July, 2016, decided to transfer these assets to 3<sup>rd</sup> Respondent by converting them in to "Stock-in-Trade". It was submitted that the Board of Directors of the Corporate Debtor has neither registered the existing charge on the assets proposed for sale nor has obtained No Objection Certificate (NOC) from the lenders. Further, it was submitted that the statutory auditors of the Company have given their qualification on accounting of the transaction and observed that there was a diversion from the Ind As.



13. It was submitted that the transaction auditor has observed that the sub-stations sold under this transaction were part of the securities charged for cash credit facilities from Banks. It was submitted that by sale of these assets, the securities of the Banks were diluted to that extent, however, the Auditor has submitted that he did not find during their audit, any permission/approval from the corresponding Banks for carrying out the transaction. Further, it was submitted that as reported in the audited balance sheets of the 3<sup>rd</sup> Respondent for the years ended 31.03.2017, 31.03.2018 and 31.03.2019, the amount payable to the Corporate Debtor were Rs.194.66 crore, Rs.238.23 crore and Rs.220.10 crore respectively. It was submitted that the outstanding as on the Insolvency commencement date i.e. 09.12.2019 was Rs.160.83 crores that is more than the consideration of sub-stations. Since both the transactions i.e. the payment and receipts from / to 3<sup>rd</sup> Respondent - are of running current account nature; the receipt of the sale consideration is not directly identifiable. In addition to the above, it was submitted that these sub-stations were sold for Rs.123.08 crore in 2016-17 and were generating significant revenue from Operation & Maintenance Services. It was submitted that the revenue for these assets were accrued to the 3<sup>rd</sup>

Respondent also, with effect from 01.04.2014, thereby causing loss to the Corporate Debtor, to such extent.

14. It was submitted that there is no proper valuation carried out from the Independent Valuers properly assessing the actual value including the future revenue possibilities from the assets. It was submitted that even of minimum of Rs.2,00,000/- charged for the shared services per machine per year, the total income for the 261 machines would accrue to Rs.5.22 Crores per year and further the life of machine if maintained properly, may be of 20 years and thereby the value of the Plant and Machinery along with income needs to be arrived before selling the same. However, it was submitted that the value arrived at was only based on stock in trade instead of plant and machinery and revenue from the same is also significant which was not considered.

15. Under the said circumstances, it was submitted that the transfer of sale of substation is undervalue transaction within the meaning of Section 45(2) of IBC, 2016 as the same was executed through a sham invoice without even a tax invoice and the same was not taken place in the ordinary course of the business. Further, it was submitted that no consent or NOC obtained for the said transfer from the lenders who had charge over the said



substation assets. It was submitted that the said transaction substation assets had been kept away from the working capital lenders who have charge over those assets and the said transaction adversely affected interest of the working capital lenders and the same is carried out with intent to defraud the creditors which could be seen from the conduct of parties from the audit observation and sale Invoices. etc. Hence, it was submitted that the said transaction squarely falls within the four walls of the requirement of Section 49 of IBC, 2016.

16. The 3<sup>rd</sup> Respondent has filed counter and it was submitted at the outset that the present application is not maintainable under Section 49 read with Section 45 (2) and Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 as the transactions mentioned in the aforementioned application are not only false and frivolous but, also made during the ordinary course of business. Furthermore, the impugned transactions in the present matter do not fall within the purview of the time limit prescribed under Section 46 (1) of the Insolvency and Bankruptcy Code, 2016.

17. It was submitted that Section 45 (2) of the Insolvency and Bankruptcy Code, 2016 is only applied to transactions made by the Corporate Debtor which are within the purview of Section 46 (1) of



IBC, 2016 which provides for "Relevant period for avoidable transactions".

18. It was submitted that the Applicant has raised three major disputes in the present application:

a. The First dispute seeks the declaration of the alleged sale arrangement of plant and machinery of sub-station as void and direct the property so transferred to be vested in the Corporate Debtor.

b. The Second dispute seeks the transfer of charge over the assets owned by the Corporate Debtor to the working capital lenders in aforementioned transaction.

c. The Third dispute seeks the declaration of the lease deeds executed in favour of Respondent No.3 bearing Document No. 3665/2011, 2318/2011, and 1553/2011 before the SRO Chinnamanur bearing Document No. 1447, SRO Malliya bearing Document No. 354/2017 and before SRO Morbi bearing Document No. 6627/2017 for a term of 25 years as null and void.

19. It was submitted that in so far as the sales related to 5 substations, in specific, the plant and machinery attached to the substation by the Corporate Debtor to the 3<sup>rd</sup> Respondent, the 3<sup>rd</sup> Respondent submitted that the sale with respect to the impugned sub-stations were made in the ordinary course of business of the Corporate Debtor and the transferee. Furthermore, the transaction in question may not be termed as an "Undervalued Asset" under Section 45 (2) of the Insolvency and Bankruptcy Code, 2016 as it

does not fall within the 2-year time limit stipulated in Section 46 (1) (ii) of the code. It was submitted that the invoices executed for the sales related to the impugned sub-stations show that the sale of the assets was made on 01.03.2017 which is more than two years prior to the initiation of the Corporate Insolvency Resolution Process which was started on 13.02.2019. Therefore, it was submitted that the sale and transfer of the plant and machinery in the sub-station may not be classified as an undervalued transaction and does not attract the provisions of Section 45 (2) of IBC, 2016.

20. It was submitted that the allegations in respect of three lease deeds bearing Doc. No. 3665/2011, 2318/2011 and 1553/2011 before the Sub Registrar Office, Chinnamanur bearing Doc. No. 1447, SRO Malliya bearing Doc No. 354/2017 and before SRO Morbi bearing Doc. No. 6627/2017 executed in favour of the 3<sup>rd</sup> Respondent for a term of 25 years, it was submitted that as per clause 3 and 4 of the Lease deed dated 28.03.2017 the lease amount payable on an yearly basis at the issue of proper invoice by the Lessor i.e. the Applicant and as per the Lease Deed the Respondent was supposed to pay a sum of Rs.9,00,000/- per annum to retain the rights prescribed under the deed and the 3<sup>rd</sup> Respondent has been paying the lease amount as stipulated by the

Lease Deed. Thus, it was submitted that from the 3<sup>rd</sup> Respondent's Balance Sheet for the Financial Year 2017 – 2018 wherein the Respondent has paid a sum of Rs.14,00,000/- to the Applicant herein which appears as substation lease rent. Further it was submitted that the aforementioned lease amount includes the lease claimed for Kherada Sub-station and Vejalpur substation as well.

21. It was submitted that the lease deed is a general agreement giving the Respondent a complete right over the property from 20.03.2017 to 20.03.2042 and on the contrary, the Applicant in the current matter is behaving in hostile and illegal manner by occupying the Kherada Substation property and barring the entry of the Respondent after payment of the Lease amount as agreed between the parties. It was submitted that the occupation of the Kherada substation by the Applicant is in violation of the Lease Deed dated 06.06.2017 and the Business Transfer Agreement signed between the Respondent and the Applicant dated 05.03.2014. It was submitted that the Business Transfer Agreement establishes the fact that the entire Operations and Management of the supply and power evacuation business through which all the assets are transferred to the respondent for the cost of Rs.310 Crore.



22. It was submitted that the impugned transactions made by the Corporate Debtor in the present matter are well beyond the term stipulated in Section 46 (1) (ii) of the IBC, 2016 and therefore it bars the applications of Section 45(2) of IBC, 2016 in the present matter. On the contrary it was submitted that the lease deeds executed by the Corporate Debtor will be considered as transactions that have taken place during the ordinary course of business as the execution of such lease deed was a normal and ordinary feature of the business and dealing of the Corporate Debtor and the Respondent. It was submitted that the Corporate Debtor, at the point of entering into the lease was facing a financial crunch and was unable to generate income from the impugned properties. Therefore, the Corporate Debtor chose to resolve the financial issue by leasing the property to its wholly owned subsidiary, making this current transaction an ordinary course of business. Hence, it was submitted that the present transactions may not be considered undervalued transactions as per Section 45 (2) of IBC, 2016 and consequently the transactions made by the Corporate Debtor with the 3<sup>rd</sup> Respondent may not be considered null and void.

23. The Applicant has filed rejoinder and it was submitted that both Sections 45(1) of IBC, 2016 and 49 of IBC, 2016 pertain to

avoidance of undervalued transaction and the only difference being that Section 49 of IBC, 2016 deals with undervalued transactions undertaken with malafide or wrongful intent, while for Section 45(1), the presence of any motive is not required. It was submitted that while a look back period has been provided for the undervalued transactions under Section 46(1) of IBC, 2016 there is no limitation period for fraudulent transactions covered under Section 49 and 66 of IBC, 2016.

24. The Learned Counsel for the Applicant submitted that Section 49 of IBC, 2016 was inserted specifically for defrauding creditors for which the limitation of time, mentioned in Section 46(1) of IBC, 2016 cannot be relevant at all. It was further submitted that the impugned transactions with regard to the sale of substations to the tune of Rs.920.31 Lakh to the 3<sup>rd</sup> Respondent was not carried over in the ordinary course of business transaction as alleged by the 3<sup>rd</sup> Respondent. It was submitted that the Corporate Debtor was never engaged in the business of sale of substations at any point of time before. Further, it was submitted that the impugned transaction was an isolated transaction of sale of sub-station by the Corporate Debtor and the Corporate Debtor was not a dealer in the sale of sub-station at all, so as to say that the conversion of Capital asset

into stock in trade was as part of its business and no enabling clause in the memorandum of association till date.

25. The Learned Counsel for the Applicant submitted that the Board Resolution reveals that the impugned sub-stations were transferred to the 3<sup>rd</sup> Respondent at the book value and not by way of sale and the said line of business and impugned sale of the substation was entered into in contraventions of Clause 43(C) of the Loan Agreement dated 29.12.2011, wherein prior consent of the lenders is required before commencing new line of business activities.

26. The Learned Counsel for the Applicant submitted that no consideration was paid by the 3<sup>rd</sup> Respondent as on date and enjoying the same at the cost of the lenders of the Corporate Debtor. It was submitted that the 3<sup>rd</sup> Respondent claims that the impugned lease deeds were entered into when the Corporate Debtor was facing a financial crunch and was unable to generate the income from the impugned properties and in order to resolve the financial issue the Corporate Debtor leased out the properties to the 3<sup>rd</sup> Respondent. It was submitted that assuming that the impugned lease deeds were entered into to in order resolve the financial issue and in the normal course of business then why there



was no lease amount having been paid so far even though the same was paltry and thus the statement made by the 3<sup>rd</sup> Respondent lacks common sense. Thus, in a nutshell it was contended that the lease deed without consideration is nothing but a gift to the 3<sup>rd</sup> Respondent.

27. Heard the submissions made by the Learned Counsel for both the parties. From the submissions made by them, it is seen that the issue which is required to be adjudicated is that whether the impugned sale of substation to the 3<sup>rd</sup> Respondent would constitute fraudulent transaction as envisaged under Section 49 of IBC, 2016 read with Section 45(2) of IBC, 2016. In order to better address the issue, it is necessary to examine the scope of Preferential, Undervalued, Fraudulent and Extortionate Transaction (PUFE) which are enumerated under the provisions of IBC, 2016. For the sake of clarity and brevity, the provisions of the said transactions are extracted hereunder;

**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 given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (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.

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.

**45. Avoidance of undervalued transactions. –**

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor–

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor

**49. Transactions defrauding creditors. –**

(1) Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor –

(a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or

(b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order–

(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and

(ii) protecting the interests of persons who are victims of such transactions:

Provided that an order under this section –

- (a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and
- (b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

#### **50. Extortionate credit transactions. –**

(1) Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

(2) The Board may specify the circumstances in which a transactions which shall be covered under sub-section (1).

*Explanation.* - For the purpose of this section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction

#### **66. Fraudulent trading or wrongful trading. –**

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in

such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-

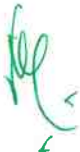
(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. 2

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

*Explanation.* – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

28. In so far as the present case is concerned, it is required to be noted that allegations pertain to the sale of the following 5 substations to the 3<sup>rd</sup> Respondent, which are as follows;



S. No.	PARTICULARS	DATE OF SALE	SALE AMOUNT OF PLANT AND MACHINERY
1	Anaikadavu Sub-Station	01.03.2017	42,00,00,000
2	Kamatchipuram Sub-station	01.03.2017	28,00,00,000

3	Kandanapur Sub - Station	01.03.2017	33,00,00,000
4	Vejalpur Sub-station	01.03.2017	11,85,00,000
5	Kherada Sub-station	01.03.2017	8,23,00,000

29. The Respondent has contended that the above sale was made during the ordinary course of business and that the look back period in the present case is more than 2 years. However, at this juncture, when an Application is filed under Section 49 and 66 of IBC, 2016 in respect of fraudulent transactions, there is no look back period. Hence the said contention raised by the Learned Counsel for the 3<sup>rd</sup> Respondent is henceforth negated.

30. Next coming on to the merits of the present case, this Tribunal feels that it is necessary to refer to Clause 43(C) of the Loan Agreement dated 29.12.2011 which is a pre-emptive clause wherein prior consent of the lenders are required before commencing any new line of business activity, which is extracted hereunder;

43. The Borrower shall not during the subsistence of the liability of the Borrower to the Bank under or in respect of any of the aforesaid credit facilities without the written consent of the Bank;

- (a) .....
- (b) .....
- (c) implement a new scheme of expansion or take up an allied line of business or manufacture.

31. Thus, it could be seen that prior consent of the creditors is required before commencing any new line of business activity and

that the activity made by the Corporate Debtor cannot be termed as done in the 'ordinary course of business'. Further clause 11 of the Loan Agreement also makes a stipulation in relation to the lease, which is as follows;

11. The Borrower declares and assures that all immovable properties to be mortgaged and all goods, book-debts, movables and other assets to be hypothecated and/or pledged to the Bank are the absolute properties of the Borrower at the sole disposal of the Borrower and free from any prior charge, lien or encumbrance except such charge lien or encumbrance as have been notified to the Bank and accepted by it as having priority over its charge and that all the future immovable properties and goods book-debts movables and other assets to be given as security to the Bank, shall be likewise the unencumbered, absolute and disposeable property of the Borrower and the Borrower shall not without the Bank's prior written permission lease or sell or exchange or create any mortgage, charge, lien or encumbrance of any kind upon or over the same or on its undertaking and assets (including uncalled share capital or any part thereof) except to the Bank nor suffer any such mortgage, charge lien or encumbrance to affect the same or any part thereof nor do or allow anything that may prejudice the security while the Borrower remains indebted or liable to the Bank in any manner.

32. It is also required to be noted that for the transfer of the aforesaid substations to the 3<sup>rd</sup> Respondent no consideration was paid by the 3<sup>rd</sup> Respondent as on date and the impugned substations were transferred to the 3<sup>rd</sup> Respondent at the book value and not by way of sale.

33. Further, upon perusal of the transaction audit, it is seen that the transaction auditor has observed that the sub- stations sold

under this transactions were part of the securities charged for cash credit facilities from the Bank and by sale of these assets, the securities of the Banks were diluted to that extent. The observation and findings of the Transactions auditor in his report are captured hereunder;

The sub stations sold under this transaction were part of the securities charged for cash credit facilities from Banks. By sale of these assets, the securities of the Banks were diluted to that extent & we did not find during our audit, permission / approval from the corresponding Banks for carrying out the transaction.

As reported in the Audited Balance sheets of the RISPL (transferee company) for the years ended 31.03.2017, 31.03.2018 and 31.03.2019, the amount payable to RPPL were Rs. 194.66 Crores, Rs.238.23 Crores and Rs.220.10 Crores respectively. The outstanding as on the Insolvency commencement date i.e. 09.12.2019 was Rs 160.83 Crores that is more than the consideration of sub stations. Since the transactions both, payment and receipts from/to RISPL are of running current - account nature; the receipt of the sales consideration is not directly identifiable. Valuation reports from independent valuers, if any, were not available for our verification during the course of audit. Hence, we are unable to comment upon the fairness of the consideration of the assets/ transaction.

These sub stations (5 nos.) were sold for 123.08 Crores in 2016-17 & were generating significant revenue from O & M services. The revenue for these assets were accrued to RISPL also, with effect from 01.04.2014, thereby a loss of revenue caused to RPPL, to that extent.

### **Conclusion;**

In the light of all the evidences reviewed, discussions held with the RP, observations / findings arising from the review, we are of the view that the transaction of sale of substations without knowing the fairness of the sales consideration & diluting the securities of the working capital lenders, without their prior approval / consent, in our view, falls under u/s 49. Also, the transaction of accruing O & M revenue from utilising these sub stations w.e.f 01.04.2014 till the transfer of these assets to RISPL, is an undervalued transaction under section 49 of the IBC, to the extent of the loss to RPPL, however we are unable

to quantify the loss caused to RPPL in absence of relevant details on O & M revenue from these sub stations.

34. Thus, it is crystal clear from the Report of the Transaction Auditor that the impugned transaction has not happened during the ordinary course of business and that such transaction was deliberately entered into by such corporate debtor in order to adversely affect the interests of such a person in relation to the claim, Under the said circumstances, we are of the view that the working capital lenders of the Corporate Debtor had a charge over the assets; and accordingly we pass the following order;

- (i) The impugned sale arrangement of plant and machinery of sub-station is void and we hereby direct the property so transferred to be vested in the Corporate Debtor
- (ii) The Lease Deeds executed by the Corporate Debtor without the consent of the lenders in favour of the 3<sup>rd</sup> Respondent before the SRO Chinnamanur bearing Doc. No. 1447, SRO Malliya bearing Document No.354/2017 and before SRO Morbi 6627/2017 as null and void; and we direct that the said property so transferred be vested with the Corporate Debtor.

35. With the above said directions, this Application stands **disposed of.**

-Sd-  
**B. ANIL KUMAR**  
MEMBER (TECHNICAL)

-Sd-  
**Justice (Retd.) S. RAMATHILAGAM**  
MEMBER (JUDICIAL)

Raymond