

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

(IB)-409(PB)/2017

IN THE MATTER OF:

Edelweiss Asset Reconstruction Company Ltd.....Petitioner

v.

Net 4 India Limited

.....Respondent

SECTION : UNDER SECTION 19, 43, 45, 49 & 66 OF IBC, 2016

ORDER DELIVERED ON 07.05.2021

CORAM:

SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant: Ms. Pooja Mahajan, Ms. Mohana Nijwahan, Mr. Gaurav Arora, Advs. for Resolution Professional

For the Respondents: Mr. Rajshekhar Rao, Sr. Adv., Mr. Raghav Kacker, Ms. Anuradha Agnihotri, Manasa Sundarraman, Ms. Spoorthi Cotha, Tanvi Pillai, Advocates, for (ICANN)

Mr. Rakesh Kumar, Mr. Prashant Mehta, Ms. Neha Tanwar and Mr. Ankit Sharma, Advocates for the Ex-Management

Mr. RP Agarwal, Ms. Pragati Agarwal, Ms. Manisha Agarwal, Advocates

Ms. Pallavi Mishra, Ms. Charchika Yadav, Advocates

Mr. Gauhar Mirza, Mr. Nishant Doshi, Advs. for R-5 & 6

ORDER

PRONOUNCED ON 29.04.2021

PER: SH. B.S.V. PRAKASH KUMAR, HON'BLE ACTG. PRESIDENT

CA 1140/2019 AND 1756/2019

During the progress of CIRP against the Corporate Debtor namely Net4 India Ltd (herein after referred as Net4 India or the Corporate Debtor); the Resolution Professional (RP) filed two Company Applications against a promoter director and other companies which continued as subsidiaries, an associate company of the Corporate Debtor.

2. CA1140/2019 (Dairy Number: 0710102094832019) is filed u/s19 of **Insolvency and Bankruptcy Code (the Code)** against the Promoter-Director Jasjit Singh Sawhney (Sawhney) because Mr. Sawhney and Mr. Sumit Gupta failed to provide information to the RP for discharging his functions during the CIRP.

3. CA 1756/2019 is filed u/s. 43 (**Preferential transactions**), 45 (**Avoidance of undervalued transactions**), 49 (**Transactions defrauding creditors**), 66 (**Fraudulent trading or wrongful trading**) of the Code for avoidance of preferential transactions, undervalued transactions and fraudulent and wrongful trading and diversion of the business of the Corporate Debtor by Jasjit Singh Sawhney (R1) for the benefit of R1, R2 and R4.

Modus Operandi of the corporate debtor business:

4. Net4 India is a leading Data Centre dealing with Cloud Hosting and Network Services Provider; focuses on providing services to businesses (small, medium and large) and its offerings include Data Centre & Cloud Hosting Solutions, Enterprise Internet Services, VoIP Solutions, Enterprise Messaging & Hosting Solutions and Domain name registration.

5. Until before Insolvency Petition was admitted against this Corporate Debtor, it was amongst the largest provider of hosting email, web hosting and domain name registration (www.net4.in) in Asia-Pacific region. It has the distinction of being the first Internet services company ISO 27001 certified, for Information Security standards adopted at its Data Centers. It is also ISO 9001:2000 certified, a Microsoft Gold Partner and an ICANN & .IN accredited Domain Name Registrar. It is an accredited Registrar of Internet Corporation for assigning domain names and numbers from (ICANN) and National Internet Exchange of India and such other Registries.

6. The Corporate Debtor carried this business through websites namely **net4.in** and **net4.com**. Domain name net4.in was registered by the Corporate Debtor on 16.02.2005 and domain name net4.com was purchased

by the Corporate Debtor in March 2011 from Sedo.com for USD14068. The Trade Mark **net.4** (name and label) was registered in the name of Corporate Debtor. The “about us” page on the website of the Corporate Debtor carried the name and particulars of the Corporate Debtor; billing was done to the customers in the name of the Corporate Debtor, by this business, the Corporate Debtor in the past, generated income from its customers.

7. To get conversant with the mode of business a little detail is put forward. Network domain is an administrative grouping of multiple Private Computer Networks or hosts within the same infrastructure. Domains can be identified by using a domain name; domains which are not accessible from the Public Internet can be assigned a globally unique name within the Domain Name System (DNS). Domain controller is a Server that automates the logins, user groups and architecture of a domain, rather than manually coding this information on each host in the domain. The registered name holder of a domain is called the Registrant. A Registrant holds the rights to the domain for the duration of the registered period. It can be renewed indefinitely (up to 10 years at a time). A Registrar is an organization that acts as an interface between a registrant and a registry. The Registry is a database that contains registrant information for 2nd level domains beneath a given top-level domain. Registration is a process whereby a registrant registers a domain with the registrar, whenever this registration expires, the registrant can renew or extend the registration. Registrar sells domain names that provide registration service and offer other value-added services applicable to domains.

8. In this case, ICANN and other organizations like ICANN have registered domain licence with Net4 India/ Corporate Debtor acting as Registrar. Since this registration remains for a specified period, as and when the specified period expires, the Registrar shall renew its registration, if that registration is not renewed, then the registrant who in turn receives this domain services from the registrars will be put to inconvenience.

9. If any interruption comes to the services the customers getting from the registrars such as Net4 India, the end user i.e. public getting services from the registrants will be put to sufferance. Functioning of registrants is always dependent upon the functioning of registrars, such as Net4 India. Nowadays, public browses these web sites, avail internet services, making online payments and getting services, and access to various Government Service Providers. Net access has become inevitable part of the life of human being. At times directly, at times indirectly, but without which, the people remain disconnected from the rest of the world. Their day to day life will get paralyzed in case registrar fails to provide services to its customers. Here, in this case, the registrar/corporate debtor having failed to make payments to the registries, the customers getting services through Net4 India have started making complaints against this Registrar (CD) for they are unable to avail services from the registrar.

Admission of company petition filed u/s 7 of the Code.

10. For the CD failed to repay the dues outstanding to Edelweiss Asset Reconstruction Company Limited (EARCL), it has on 19.01.2017 issued notice to the Corporate Debtor calling for payment of dues from the Corporate Debtor; failing which, the proceedings under the Code shall be initiated against the Corporate Debtor.

11. For EARCL issued notice on 19.01.2017 stating that it would take action under the Code in the event the Corporate Debtor failed to repay its loan, it could be understood that the Corporate Debtor or its Promoter-Directors **for the first-time could have noticed that there would be likelihood of initiating insolvency proceedings against the Corporate Debtor for the dues payable to the said creditor having not been paid.** When the Corporate Debtor failed to pay EARCL debts, it has on 05.10.2017, filed Section 7 Petition, wherein the Corporate Debtor sought adjournment after adjournment in between 28.02.2018 and 18.09.2018 on the ground settlement was likely to be arrived at with EARCL. When no such settlement happened, this Bench heard this matter and posted for Orders on

03.12.2018, thereafter Admission order was passed on 08.03.2019 and an IRP was appointed.

CA 1140/2021 in brief in relation to non-cooperation from the promoter director and his men

12. Initially, the Resolution Professional/the applicant sent emails dated 14.03.2019, 18.03.2019 to its promoter director (R1-Sahweny) seeking information of the corporate debtor, to which Mr. Sawhney on 19.03.2019 replied seeking time to provide information, subsequent to it, one of the employees of the Corporate Debtor namely Mr. Sumit Gupta sent an email on 31.03.2019 along with some information. As that information was not sufficient to discharge CIRP functions, this Applicant had mailed on 02.04.2019, 15.04.2019, 16.04.2019, 23.04.2019 and 07.05.2019 requesting Mr Sawhney and Mr. Sumit Gupta to provide information, but whereas Mr Sumit Gupta wrote back on 13.05.2019 seeking time to provide pending documents as Mr Sawhney was not feeling well. In this application, R1 has filed reply for the first time disclosing that the shares of Pipetel Communications Private Limited (Pipetel) and Net4 Network Services Limited (Net4 Network) held by the CD were transferred to Trak Online Net India Private Limited (Trak Online), the business of the CD was transferred to Net4 Network through Master Reseller Agreement (MSA) and Trade Marks of the CD were assigned to the promoter director Mr. Sawhney.

13. For this applicant has filed this application, this Bench also directed Mr. Sawhney to provide information on passing various orders 03.07.2019, 22.07.2019, 02.09.2019, 27.10.2019 and 20.12.2019, but till date no progress, except providing piece meal information, which is not enough to figure out the transactions of the Corporate Debtor. The information to initiate proper course of action has not been provided by the Respondents, which is as follows:

a. Minutes of all the Board/Committee/Shareholder meetings;

- b. Respondents submitted all information related to current and past business of domain registration can be found from logging into reports from registries. However, login details provided by the Respondent are incorrect;
- c. Financial Statements/Documents/Tally Data for the FY 2016-17 not provided. In that financial year, the business of the Corporate Debtor was diverted to Net4 Network Services Limited;
- d. Accounts data for the period prior to 01 April 2017 not provided. For which, the respondents replied that data for the period prior to 2016 was lost in Chennai Floods. But as per Registrar of companies, the accounts of the company are maintained at NOIDA Office of Corporate Debtor;
- e. Agreements with related parties are not provided. Further, no documents relating to related party transactions were provided in relation to approvals alleged to have been taken from the Board of Directors.
- f. Original copy of the Master Reseller Agreement dated 20 October 2016 @ Page No.122 of the Reply), Share Transfer Agreements dated 20 September 2016 @ Page No.330-339 of the Reply) and Right to use Agreement dated 01 September 2000 @ Page No.69 of the Reply in CA No.1756/2019) not provided;
- g. Cash in hand of ₹19.90lac reflecting in the balance sheet as on 31 March 2019 not handed over. The Respondent admitted to cash position of ₹1.90lac, however the same has also not been handed over.

CA 1756/2019 assailing the impugned preferential transactions, undervalued transactions and fraudulent and wrongful trading and diversion of the business of the Corporate Debtor by Jasjit Singh Sawhney (R1) for the benefit of R1, R2 and R4.

The applicant's averments:

14. The RP has noted that Audited Accounts of the Corporate Debtor were filed only up to 2015-2016; thereafter the accounts of the Corporate Debtor have not been audited. The Promoter has not provided even the Provisional

Financial Statements or any other accounting data of the Corporate Debtor for the year 2016-2017. With regard to the data before 2016, it was stated that they were washed away in Chennai floods; it is incredibly unbelievable because as per MCA records the accounts were maintained at NOIDA. The Promoter-Director having set up a case that several transactions were held during the ordinary course of business of the corporate debtor before admission of the company petition, the RP says, duty is cast upon the directors especially Mr. Sawhney to prove that transfer of shareholdings, issuance of preference shares, diversion of the corporate debtor business to Net4 Network Services Limited, assignment of trade marks to Mr. Sawhney himself are not hit by the provisions dealing with avoidance transactions, undervalued transactions and fraudulent transactions. For which, the RP has asked for the originals of them, but they are so far not provided. In view thereof, the Applicant, based on the photo copies the Promoter-Directors relied upon, has filed CA1756/2019 against the parties involved in the purported transactions to say that all these transactions led to infer that the Promoter Directors wantonly set up these transactions and diverted the wealth of the corporate debtor so that they could conveniently avoid payments to the creditors of the corporate debtor.

15. The Respondents in this case are - R1 is Mr. Jasjit Singh Sawhney (Promoter Director of the Corporate Debtor). He is also a director of Net4 Network, Trak Online and Pipetel; R2 is Net4 Network; R3 is Mr. Sumit Gupta (an employee of the Corporate Debtor); R4 is Trak Online; R5 is Madison India Capital HC (Madison); R6 is Mr. Surya Chadha.

16. The case of the RP in this application is Mr. Sawhney (R1) has, in order to defraud the corporate debtor creditors, fraudulently transferred the shareholding of the corporate debtor in Pipetel and Net4 Network (R2) to another company belonging to him i.e., Trak Online (R4) through two share transfer deeds executed on 26.05.2016 and on 20.09.2016 on the pretext the corporate debtor owed to Trak Online; fraudulently issued preference shares to others in Net4 Network so as to reduce the corporate debtor shareholding in Net4 Network from 100% to 18.40%. Before execution of these transfer

deeds and allotment, Net4 Network was wholly owned subsidiary of the corporate debtor; to make Net4 India empty bowl, R1 got executed Master Reselling Agreement by the corporate debtor on 20.10.2016 in favor of Net4Network on the premise the corporate debtor turned into a loss making company, by which whole business of the corporate debtor has gone to Net4 Network. As if it is not sufficient, “trade mark **Net4**” upon which entire business of the corporate debtor grew, is shown as assigned to R1 by the board of corporate debtor comprising his father as signatory through an assignment for a consideration of one thousand rupees. The RP says Sawhney (R1) has meticulously programmed diversion of the whole value of the corporate debtor to other entities by defrauding its creditors.

17. Until before this Corporate Debtor stopped doing filings before RoC, Pipetel was a subsidiary of the Corporate Debtor holding 51% shares, Net4 Network was wholly owned subsidiary of the Corporate Debtor. And until before the financial creditor issued notice demanding repayment of money borrowed by the Corporate Debtor, on record, no information was available in public domain reflecting that the corporate debtor transferred its shareholding in Pipetel and Net4 Network to Trak Online, the CD transferred its business to Net4 Network through Master Reseller Agreement, the CD transferred trademarks **net4 and net4 with different suffixes** to Mr. Sawhney and dilution of the shareholding parties. All this has come out only when the RP filed application asking for supply of material papers of the CD to the RP.

18. The alleged transactions reflecting diversion of the valuable asset of the corporate debtor as a whole are reflected in the table below:

| Date | Name of the Agreement |
|-------------|--|
| 01.09.2000 | <i>Right to Use Trademark and Domain Names Agreement alleged (by Promoter) between Jasjit Singh Sawhney, Net India Limited (“Corporate Debtor”/“CD”) and Trak Online Net India Private Limited (“Trak Online”) where purportedly Jasjit Singh Sawhney allowed use of the</i> |

| | |
|------------|---|
| | <i>Trademarks to Corporate Debtor.</i> |
| 26.05.2016 | <i>Corporate Debtor entered into Debt Settlement Agreement with Trak Online to clear its dues of ₹2,00,00,000 by transferring its 38,000 shares of Pipetel Communications Private Limited and balance to be paid in monthly installments.</i> |
| 26.05.2016 | <i>Share Transfer Agreement/Deed executed between Corporate Debtor and Trak Online for transferring Corporate Debtor shares in Pipetel Communications Private Limited to Trak Online.</i> <i>Share Transfer Forms (SH4) have not been provided to the RP in respect of the above transfer of shares.</i> |
| 26.09.2016 | <i>Corporate Debtor entered into Debt Settlement Agreement with Trak Online to clear its dues of ₹1,00,00,000 by transferring its 35,000 shares of Net4 Network Services Limited ("Net4 Network") and balance to be paid in monthly instalments.</i> |
| 26.09.2016 | <i>Share Transfer Agreement/Deed executed between the Corporate Debtor and Trak Online for transferring Corporate Debtor's shares in Net4 Network to Trak Online.</i> <i>Share Transfer Forms (SH4) have not been provided to the RP in respect of the above transfer of shares.</i> |
| 20.10.2016 | <i>Master Reseller Agreement ("MSA") purportedly executed between Corporate Debtor and Net4 Network. As per the MSA, Net4 Network was appointed as the Master Reseller due to huge losses suffered by the Corporate Debtor for last few years.</i> |
| 10.01.2017 | <i>Assignment Deed executed between Corporate Debtor and Jasjit Singh Sawhney under which the Trademarks owned</i> |

| | |
|--|--|
| | <i>by the Corporate Debtor were assigned by Corporate Debtor to Jasjit Singh Sawhney for mere consideration of ₹1,000.</i> |
|--|--|

19. So as to change bill payments to R2, R1 has set up transfer of customer database to Net4.COM from the website Net4.IN. To set up a foundation for transfer of shareholding of the corporate debtor in Pipetel and Net4 Network, it was stated that the corporate debtor was indebted to Trak Online.

20. Indeed the Corporate Debtor had 51% of Pipetel shareholding, out of that shareholding; it is shown as the CD on 01.04.2017 transferred 38000 shares to R4 in consideration of certain antecedent liabilities alleged to be owed by the Corporate Debtor to R4.

21. As per the version of R1, the RP Counsel says, the shareholding of the Corporate Debtor in Pipetel has been reduced to 17.98% from 51%. Though transfer is recorded in the ledger of the Corporate Debtor on 01.04.2017, no share transfer forms have been provided by R1 to show that the shares have been transferred in the name of R4.

22. The RP counsel submits that R2 was a wholly owned subsidiary of the Corporate Debtor, as per the ledger of R4 provided by the Corporate Debtor, on 25.01.2018, 35000 shares of R2 were shown as transferred by the Corporate Debtor to R4 in consideration of certain of antecedent liability allegedly owed by the Corporate Debtor to R4. Though the ledger of the Corporate Debtor as on 25.01.2018 reflects transfer of the shares, no share transfer forms have been provided reflecting that these transfers have been done. It has been further shown that preference shares were issued to one Mr. Mohit Jain and Ms. Neha Gandhi Dua reducing the shareholding of the Corporate Debtor in R2 to 18.40%.

23. In between Dec'2018 and Mar'2019, though the Corporate Debtor is an accredited Registrar, www.net4.com, www.net4.in, www.net4domains.in,

www.net4domains.com were transferred to another registrar Name.Com and “About Us” Page of Net4 now reflects the name of Net4 Network and not the name of the Corporate Debtor.

24. The RP Counsel says, the effect of all these alleged transactions is the revenue that was coming to the CD from two lac customers, has started going to R2. Now the entire technology, infrastructure and business operations of the CD are in the control of R2.

25. A large number of customers’ complaints were received by ICANN and Public Interest Registry (PIR). These problems have put renewal of accreditation of the Corporate Debtor with ICANN in question and led to loss of customers.

26. When the RP has brought all these issues to the attention of the Adjudicating Authority in IA-4012 of 2020, this Bench vide its order 25.09.2020 disposed of the said application with a direction to R1 to make payments to the Registries and address all compliance issues as on October 2020. Despite several directions from this Bench, R2 has failed to clear the dues. Till date, the RP has not been given access to any systems of the Corporate Debtor, the password provided by the Promoter after directions of this Bench are all incorrect. The turnover of the Corporate Debtor for the year ending 31.03.2016 was ₹33Crore, but now the current revenue of the Corporate Debtor is NIL. On that basis, the RP says that the minimum annual diversion of revenue of the CD would be approximately ₹33Crore for each year, for the financial years 2017-18, 2018-19 having already passed after alleged diversion of the business, the minimum diversion of the revenue from the company up to July 2019 was estimated at ₹78Crore, if it is calculated up to Nov’2020, it would be ₹123Crore.

27. The RP has no access to records for the revenue generated by R2 by diversion of the business of the Corporate Debtor and has thus estimated the diversion based on the past performance of the Corporate Debtor, which in all fairness is the minimum opportunity loss to the CD.

28. As per the purported Master Reseller Agreement, R2 was to incur all costs and to share 25% of profits from the business with the Corporate Debtor. However, from the books of the accounts, it is observed that the Corporate Debtor made payments for domain purchases. Further the books of the accounts reflect an amount of ₹3.48Crore was payable to R2 in Apr'2017 and it was increased to ₹8.45Crore on CIRP commencement date, therefore instead of the Corporate Debtor receiving the profits as mentioned in the alleged Reseller Agreement, the Corporate Debtor is shown as indebted to R2.

Respondents side averments:

29. As against the submissions of the Applicant, the Respondents side submits that Pipetel not being made as a party to the proceedings, the relief seeking cancellation of shareholding Trak Online (R4) acquired in Pipetel shall be dismissed. The Respondents side says the transactions entered into by the Corporate Debtor with R4 are all part of ordinary course of business because R1 owed an amount of ₹4.67Crore which had been owed to R4 since 2008, but the Corporate Debtor had repeatedly broken the assurances to repay, therefore to set off the same, the shares of R2 and Pipetel held by the Corporate Debtor were transferred to R4.

30. The Respondents side further submits that by the time of transfer of Pipetel shares to Trak Online by the Corporate Debtor, Pipetel had negative valuation, therefore looking at acquisition of loss making company shares, an opinion cannot be formed that R4 is in a better position than the other creditors falling within the ambit of Sec. 53 of the Code. Moreover, the RP has not placed valuation of the shares of Pipetel reflecting that those shares have some economic value and they were transferred to R4 so as to cause unlawful gain to R4, thereby no relief could be passed under Sec.43 & 45 of the Code. Moreover, the share transfer transactions were not carried in the look back period of two years.

31. As to trademark issue, R1 Counsel submits that it is R1 who has coined the term **net4**. Though the first registration of domain name Net4

India.com was originally owned by R1, subsequently it was changed in the name of the Corporate Debtor. He says that the international trademark for **net4** was registered in the name of R1. In any event, he says, since Sec.57 of the Trademark Act, 1999 governs jurisdiction to rectification and correction of the register under Trademark Registrar, if any party wishes to challenge it, the same has to be done before Trademark Authority but not before this Bench. He further says that the Trademark Assignment Deed was executed in the month of Jan'2017 itself, whereas CIRP order was passed on 08.03.2019.

32. With regard to the estimated loss of ₹78Crore to the Corporate Debtor calculated by the applicant, the Respondent side says that when it is admitted as revenue to the Company, such revenue purportedly come into R4 cannot be straight away treated as profit to R4. Revenue as it is will not become profit, expenses and other costs shall be deducted from the revenue. In view thereof, he says, how such revenue could be held out as estimated profit to the corporate debtor incurring significant losses for 5 to 6 years before admission of the company petition.

33. R2 says that in the CoC meeting, Resolution Plan was approved for ₹2.5Crore, out of which, the Resolution Applicant has deposited only ₹50Lakhs. With regard to the remaining amount, the Resolution Applicant has proposed to raise the debt for the Resolution Plan. From one side, the RP says that the estimated revenue generation is around ₹78Crore since 2016, then how the CD could be sold to the Resolution Applicant for only ₹2.5Crore. The respondents' side says that it is nothing but reflecting that the RP in connivance with the Resolution Applicant decimated the value of the CD. When Net.4 Network (R2) has taken over the business of the Corporate Debtor, the Corporate Debtor was financially in bad shape, and its infrastructure was 7 to 10 years old, its employees already left the company. The Authority had sealed its Bank Account. After Master Reseller Agreement was executed in favour of R2, R4 has set up new infrastructure, hired new people, developed new modern software to keep the business running.

Discussion over the issues in between the parties

Trade mark Issue

34. As per the version of the Respondents, it appears that R1 entered into Right to Use Trademark and Domain Names Agreement with the Corporate Debtor on 01.09.2000, by which, the Corporate Debtor was using the Trademark **net4** as its name until before it was alleged to have been assigned back to R1 for a consideration of ₹1,000. By this agreement, at least this could be understood that this trade name **net4** was allowed to be used by the Corporate Debtor until it was assigned back to R1. It is not known as to whether any business was there in the Year 2000 when this trade mark was alleged to have been used by the Corporate Debtor. But over a period of time, the Corporate Debtor has been known to everybody with this name and it has done all its business through this trade name only. The story of R1 is, R1 is the person envisioned internet related businesses/services and therefore coined the names NET4, NET4 INTERNET, NET4 INDIA and various other names with **net4** as prefix from 1999 till date i.e., 01.09.2000. Therefore, R1 is the rightful owner of all the intellectual property rights, or any future registration of trademarks, trade names or domain names with net4 as a prefix or **net4** on its own. For this reason alone, he says, he allowed the Corporate Debtor to use these names and domain names for its web services business through Right to Use Agreement dated 01.09.2000. Thereafter, the Corporate Debtor registered this trademark "**net4**" in its name with Trademark Authority on 16.05.2001 ever since, this trademark was used by the Corporate Debtor. The Respondents Counsel says, since R1 is the original rightful owner of this trademark "**net4**", the Corporate Debtor assigned this trademark "**net4**" to R1 through an Assignment Deed dated 10.01.2017 for a consideration of ₹1,000. Based on that document, this Assignment Deed was registered reflecting transfer of Trademark "**net4**" to R1.

35. The story held out by the promoter director (R1) lacks merit for the reasons mentioned below:

- a) To support that R1 is the rightful owner of this trademark **net4** before 16.05.2001, R1 has not placed any trademark registrations of **net4** in the name of him.
- b) If the so called Right to Use Trademark and Domain Names Agreement dated 01.09.2000 said to have been executed in favour of the Corporate Debtor is examined, it is evident that the stamp paper used for writing this agreement is not reflecting either the Purchaser's name or the date of purchase of the said stamp paper.
- c) In the Trademark Registration Certification dated 16.05.2001, it has not disclosed anywhere that this trademark was earlier owned by R1.
- e) When this Assignment Deed dated 10.01.2017 is examined, it appears that it is evident that R1's father Mr. Amarjith Sawhney (related party) executed this Assignment Deed in favour of R1 on behalf of the Corporate Debtor.
- f) No Board Resolution of the Corporate Debtor has been annexed to show that Board approved transfer of this trademark or assignment of this trademark to R1. There is no proof reflecting that his father is permitted to execute the Assignment Deed in favour of R1. Now his father is no more, even if execution of the assignment deed executed on behalf of the Board is taken as genuine document, it is not supported by a Board Resolution.
- g) For the stamp paper used is showing as issued on 02.02.2016 with a description of document as "Article Others" with zero consideration, it is doubtful whether the certified stamp paper was taken for this purpose or for some other purpose.
- h) The original of Right to Use Trademark and Domain Names Agreement dated 01.09.2000 has not been provided.
- i) The original Assignment Deed has also not been provided.

36. It is the assertion of R1 that he is the original owner of this trademark; therefore it was assigned back by the Corporate Debtor to him in the year 2017. None of the original documents are produced, no material is placed to

believe that this trademark was originally owned by R1, therefore his assertion that it was assigned to him because it was originally belonged to him cannot be given any credence without any proof; hence we cannot believe any of his statements.

37. Since R1 is supposed to be in the custody of all these documents and in the know of all these facts, duty is cast upon him to produce all evidence to make this Tribunal to believe that this trademark originally belonged to him.

38. Like we said earlier, though **net4** trademark is a valuable asset of the Corporate Debtor, the value assigned to it is only one thousand rupees. It is pertinent to mention that since R1 has categorically asserted that it is not a valuable asset, it has to be proved that it is not valuable for more than one thousand rupees. When specific assertion is made that this transaction is not fraudulent in nature and it is not an effort to siphon out the valuable asset of the debtor company so as to defraud its creditors, for all this information is understood to have been in the special knowledge of R1, duty is cast upon R1 to prove that **net4** trade mark originally belonged to him and it was legally and as per the procedure assigned to him before look back period. Since R1 in this case has failed prove any of the facts ascertained by him, it is to be believed that action of R1 clearly falls within the ambit of Sec.66 r/w section 45 of the Code. It cannot be said that burden lies upon the RP to prove all these aspects, because the RP has no knowledge about any of the facts aforementioned, he is authorised to take the stock of the situation as provided to him, form an opinion and report it to this Bench and the CoC. Since the company records accrue over a period of time, when supporting documents are not present to an action asserted by the company management and when such actions are doubtful and not taken place as per the procedure laid under the Companies Act and the Code, it is then obvious that the RP will report that such actions will fall under the transactions as mentioned under the Code. It is exactly what the RP has done in this case. It may be said here, since the RP has asserted that the management indulged in avoidable transactions, undervalued transactions and fraudulent

transactions, he shall adduce evidence to that effect. It is true if the RP is part of any of the transactions, and he is in know of any of the facts aforementioned, it is understandable that duty is cast upon him to prove his case. But that is not the case here. RP is a person authorised to set the record in place and correlate the information provided, and to draw inferences, and accordingly from one side to run the company, from other side to take necessary actions against the pitfalls evident from the presence of record or absence of record. But when no information is available to correlate actions set forth before him, and when it is showing that company record is not available, when the management thrust some actions upon the company which led to emptying out the assets, business and even shareholding it has in other companies, he can only report that such actions will fall under the section of law mentioned in the Code. It cannot be expected that RP is required to prove all those actions. The reason is simple, he is not a party to those actions, and he is only an authority to report the actions apparent on record. At times missing information will also lead to prove the complicity of the parties responsible to provide information. Providing photocopies of those actions will only lead to admission of prima facie proof of complicity. The photocopies or originals of various actions cannot be an answer to say that those actions will not fall within the ambit of avoidance transactions, undervalued transactions and fraudulent transaction; indeed they can be helpful to the RP to prove such actions will fall within the ambit of the sections mentioned above. Here for R1 himself admitted actions, the burden has shifted upon R1 to prove that they do not fall within the ambit of avoidance, undervalued and fraudulent transactions. That R1 failed to establish. Notwithstanding as to whether this transaction is in ordinary course of action or not, notwithstanding whether it is fraudulent transaction to defraud creditors or not, if the affidavit sent by the father of R1 from UK to India is seen, it is evident it is dated 28th March 2017, of course it is not known on what date it has come to India, at least this date 28th March 2017 is within the look back period of two years from the date of admission of company petition, i.e., on 08.03.2019. Indeed trade mark

registration is appeared to have been done in the month of October 2017. We are unable to pin point the date in October 2017, because it is not clear in the photocopy provided. We also hold that it is not only an undervalued transaction; it is in fact a fraudulent transaction to ensure that the business of the corporate debtor in lock, stock and barrel is diverted to Net4 Network.

TRANSFER OF SHAREHOLDING AND CERTAIN PAYMENTS MADE BY THE CORPORATE DEBTOR TO TRAK ONLINE

39. The RP says R1 has stated that the CD owed to pay ₹4.60Core to Trak online, R1 says to settle the said account, the CD transferred 38,000 shares of Pipetel held by the CD to Trak Online as an adjustment against part of the debt alleged to be payable by the CD to Trak Online. The RP is provided secretarial audit report for the financial year ended 31st March 2017 reflecting the CD entering into a debt settlement agreement dated 26.05.2016 with Trak Online to clear its dues of ₹2Crore by transferring 38,000 shares of ₹10 each of Pipetel and balance amount of ₹2.60crore to be paid in monthly instalments. For the CD having failed to make payment as per the agreement dated 26.05.2016, R1 says, the CD entered into another agreement dated 20.09.2016 with Trak Online to clear its dues of ₹1crore by transferring its 35,000 shares of ₹10 each of Net4 Network (R2) to Trak Online. And with regard to the balance amount of ₹1.67crore, the respondents' side says, it was to be paid in monthly instalments. After these two share transfers, the CD shareholding in Net4 Network was reduced from 100% to 18.40% and the shareholding of the CD in Pipetel was reduced to 17.98% from 51%.

40. The Respondents side says that in view of the Hon'ble Supreme Court judgment in Anuj Jain, IRP for **JP Infratec v. Axis Bank, 2020 SCC Online SC 237**, Pipetel shall be made as necessary party to this application, Pipetel has not been joined as respondent in this application. He further says notwithstanding as to whether this transaction falls within the ambit Section 43 and 44 of the Code, the RP shall ask for declaration requiring rectification of the records of R2 and Pipetel under Section 59 of the Companies Act,

2013. R1 says that this transaction will not fall within the look back period of two years preceding admission, apart from it, R1 says that since the CD has suffered huge losses, it could not repay the debt of ₹4.6crore to TrakOnline, therefore the CD was left with no option but to sell/transfer its shareholding in the two companies as a set-off against the dues payable to TrakOnline.

41. After examining who has done what, it is found that R1 is the author of all these transactions, therefore duty is cast upon him to establish that these transactions have been done during the times he has mentioned and complied with the procedure set out under the Companies Act and other Regulatory laws because the Corporate Debtor is a listed company. We shall also mention that if these transactions have timely been shown as entered in the records of the Regulatory Bodies and the corporate debtor records on accrual basis, may be then it could be said that burden is shifted to the person (RP) asserting that these transactions are fraudulent in nature. Here in this case, the Corporate Debtor failed to upload any paper to MCA web portal after 2016, all the transactions causing adverse impact upon the assets of the Corporate Debtor are alleged to have happened after 2016 balance sheet was filed by the Corporate Debtor, until the time balance sheet for the year 2016 was filed, everything was intact with the corporate debtor. For R1 alone is the person in know of all these facts, duty is cast upon him to reveal all those facts and documents and establish those actions do not fall within the scope of avoidance transactions, undervalued transactions and fraudulent transactions. 42. The originals of the share purchase agreements in relation to transfer of the CD shares in its 100% subsidiary Net4 Network and in 51% subsidiary Pipetel to Trak Online have not been produced till date. No board resolution has been disclosed reflecting the CD transferring its shares in the aforesaid two companies to Trak Online.

43. Under Article 82A (k) of the AOA of the CD, so long as Madison India Capital HC (Madison) held at least 3% of the CD shares, entry of any material agreement by the CD with any group company/affiliates requires unanimous approval of the Board of Directors or at least the approval of each of the

Director of the CD. Madison held 8.46% equity in the CD as on 07.06.2017 and has seat on the Board. But Madison has mentioned in its affidavit dated 06.05.2019 confirming that no notices for Board meeting was sent to it after December, 2015, therefore even if the shareholding the CD held in its subsidiaries is transferred to any related party or any other person without compliance under Article 82A (k), it is *void ab initio*.

44. As per Section 56 of the Companies Act, 2013, no transfer of shares shall be registered unless proper instrument of transfer Form SH4 duly stamped and executed by or on behalf of the transferor or transferor has been delivered to company together with the share certificates. In the present case, only copy of the share agreements have been provided, Form SH4 has not been provided reflecting transfer of shares. The only evidence present in the CD books is the ledger entries of Trak Online which were provided to the RP by the Promoter himself.

45. Since the CD is a listed company, as per Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (SEBI LODR), every listed company shall make a disclosure of material events of the listed company to SEBI. Here in this case, the CD has not given any intimation to SEBI regarding the alleged transfer of shares.

46. Under Section 174 (1) of the Companies Act, 2013, the quorum of Board meeting shall be 1/3rd of its total strength or Two Directors whichever is higher. As per Section 174 (3) of the Companies Act, 2013, if the number of interested Directors exceeds or is equal to 2/3rds of the Board of Directors, the number of uninterested Directors present at the meeting shall not be less than two. Admittedly, the CD at the time of execution of alleged share transfer deeds had three Directors, of which Amarjeet Sawhney and Jasjith Singh Sawhney (R1) are father and son; it is how they are related to each other. Since it is showing only three directors were on Board, if the father and the son are treated as interested directors, it is obvious that such meeting could not have quorum with two uninterested directors. Therefore

the alleged Board Meeting if at all any happened it is in violation of Section 174 (3) of The Companies Act, 2013.

47. The Secretarial Audit Report provided for the financial year 2016 -17 dated 31st March, 2017 has not reflected that the CD has filed MGT-14 with the ROC. As per Section 117 (1) of The Companies Act, 2013, copy of every resolution or agreement dealing with the aspects specified in Section 117 (3) of the Act shall be filed with ROC within 30 days of date of passing such resolution. For the Board has not obtained unanimous approval to pass a resolution to transfer the shares held by the CD and quorum was not constituted as stated under Section 174 of the Act, the actions held out by R1 could not be taken into consideration to believe that the share transfers have been done within the look back period and not to defraud the creditors of the CD.

DIVERSION OF BUSINESS

48. In the application filed u/s 19(3), Sawhney for the first time came up with an averment in his reply stating that the CD entered into a Master Reseller Agreement dated 20.10.2016 with Net4 Network, by which Net4 Network is managing all the operations of the CD and providing services to its customers. The reason given for such transaction is, Net4 India having suffered with huge losses for few years, Net4 Network was appointed as Master Reseller to continue the business of the CD.

49. But to prove that the directors of the CD transferred its business to Net4 Network for the benefit of the corporate debtor, duty is cast upon the directors of the corporate debtor to prove that this business was transacted at the relevant point of time and timely reporting has been done and the transaction is transparent and it is for the benefit of the corporate debtor and its creditors. Let us see what the directors of the Corporate Debtors have done.

50. The CD entering into Master Reseller Agreement with Net4 Network is a related party transaction, as per Section 188 of the Companies Act, 2013, the CD was required to take Board approval before entering into such

agreement, besides this, it requires unanimous approval of the Board to enter into such transaction, but that has not been done.

51. The reason is not known for not providing the original of the Master Reseller Agreement (MSA) to the RP till date. These Respondents have so far not provided the Board Resolution of the Corporate Debtor as contemplated under the Companies Act 2013. We shall not forget that Net4 Network was originally wholly owned subsidiary of the Corporate Debtor. Net4 Network was calculatedly taken out from the hold of the corporate debtor and then MSA was executed devolving the business of the CD to Net4 Network. The interest of the creditors of the corporate debtor is paramount consideration when a company is likely to go into insolvency, when the respondents themselves say that the corporate debtor is in huge losses, can they divert the business to some other entity without putting it to the creditors of the corporate debtor?

52. On examination of the Audited Balance Sheet as on 31st March, 2016, Net4 Network itself is shown as loss making company. Assuming everything set up by the directors is taken in as correct, as per the terms and conditions of the MSA, Net4 Network is required to pay 25% of the Profit share to the CD from renewal of each domain registration for seven years, but in the ledger account of the CD from 01.04.2017 to 08.03.2019, no amount has been shown as received from Net4 Network. On the contrary, ₹3.48crore showing payable to Net4 Network as on 01.04.2017 has gone up to ₹8.23crore by the date CIRP was commenced. In avoidance transactions, undervalued transactions and fraudulent transactions, the RP will not be in a position to place all positive evidence required to prove these transactions. Since the Promoter Directors are the authors of each and every document of the CD until before admission, duty is cast upon them to prove that the transactions taken place are time to time reflected in the records of the books of company and on the portal of MCA as required under the Companies Act, 2013. For such accruals have not been reflected as stated by the Companies Act, 2013, their subsequent statements and the material not come into the records of the Company and ROC records cannot be believed. More especially

since the sole asset valuing the company is taken out, the statement of the Promoter Director shall not be believed in the absence of proof reflecting all these transactions are not only genuine and for the benefit of the corporate debtor and its creditors but also to show that they are not hit by the provisions of the Code.

53. In a business like this, the valuable assets would be trade names, licenses, registrations and services. When these assets have been taken out from the company one after another, the value of the company would vanish within no time. It is not the case of R1 that the Corporate Debtor did not do any business at any point of time, had it been so, there would not have been any occasion for transfer of its shareholding, its business and its trade names to various other entities.

54. As per the records shown by the corporate debtor in the year 2016, the turnover of products or service category was about ₹32.18Crore. As on 31.03.2016, Net4 Network was loss making company.

Now the point for determination is as to whether or not this transfer of shareholding, transfers of the business of the CD through Master Reseller Agreement and assignment of trademark to R1 have taken place in the ordinary course of business and to defraud the creditors of the CD.

55. For determination of given facts in issue, they shall be supported by proof, if the facts and the assertions made by the parties are proved by adducing documentary evidence, then a conclusion can be arrived at by the adjudicator. If we read section 3 of Indian Evidence Act, it could be figured out that “**court**” **includes all judges and Magistrates and all persons except arbitrators, legally authorised to take evidence.** It need not be said separately that this Tribunal has all the trappings of the Court so as to give a definitive judgment over the facts in issue pending before this Tribunal. The bar present in section 3 is arbitral tribunals cannot be construed as courts. But as to **persons** legally authorised to take evidence can be considered as court as envisaged u/s 3 of the Evidence Act. Letting in

evidence does not mean taking only oral evidence; it also includes taking evidence through affidavits and documents. If for any reason it is assumed that Evidence Act is not applicable to Tribunals, there is no bar at least in taking the logic and the clue from Evidence Act to arrive to truth by applying the principles envisaged in it. It shall be mentioned that section 424 of The Companies Act 2013 is amended so as to make it applicable to the Code as well, in the said section; NCLT is vested with the same powers as are vested in civil court in receiving evidence as stated in the Evidence Act.

56. With regard to the statement of R1 in his affidavit stating that shareholding of the CD was transferred to Trak Online, execution of Master Reseller Agreement and assignment of trademark to himself are all admissions as stated under Indian Evidence Act. R1 has not stopped making these admissions in his affidavit, he has gone further and filed photocopies of share transfer deeds, Master Reseller Agreement, Trademark Assignment Agreement, therefore this Bench is constrained to believe that R1 made efforts to divert the business of the CD to some other company upon whom R1 has full control. Since these are admissions from the side of R1 and other answering respondents, we believe those facts are not required to be proved again because they are not the facts in issue before this Authority.

57. Now the issue for determination is whether all this has happened to defraud the Creditors or not. It is to be seen who has to prove this fact, is it the RP to prove or R1 to prove that all these transactions have happened in the ordinary course of business and also occurred before the look back period mentioned in Section 43 of the Code and it has not been done to defraud the Creditors.

58. *Whenever anybody desires any Court, as stated in Section 101 of the Evidence Act, to give judgment as to any legal right or liability, the person asserting such right shall prove that those facts exist.* Initially the RP having stated that the shareholding of the CD was illegally transferred, the CD business was diverted, trademark of the CD was assigned to R1, it is obvious that those facts have to be proved by R1.

59. Since R1 himself stated on affidavit about transfer of business of the CD through MSA and about transfer of its trademarks, the burden of proof shifts upon R1 and other answering respondents that such transfer happened during the ordinary the course of business, as per the procedure laid down under Companies Act, 2013 and it has been done beyond the prescribed period mentioned under Section 43 & 47 of the Code and also to prove that all these acts are not intended to defraud the Creditors of the CD. We must also mention that R1 has been asserting transfer of shareholding, execution of Master Reseller Agreement, Assignment of Trademark, as per Section 103 of Indian Evidence Act, burden of proof with regard to those particular facts lie upon R1 and other answering respondents. Since disclosure has come from R1 and he has relied upon those facts to say that those actions will not fall within the ambit of Section 43,47,49 and 66 of the Code, R1 has to prove that those actions are not hit by those sections. As to all these transactional facts, since they are within the special knowledge of the respondents alone as stated under Section 106 of the Indian Evidence Act, if at all they failed to prove their assertions that the CD is liable to pay money to Trak Online, that these transfers happened prior to specified period, that the transactions happened during the ordinary course of business, that transfer of shareholding was carried towards the liability payable to Trak Online, valuation of those shares has been done, that such valuation is proportionate to the alleged debt liability and that these transaction have not been done to defraud the Creditors, it is to be presumed that R1 has failed to prove existence of all those facts aforementioned, then the only conclusion that could be drawn is that R1 and other answering respondents did all the above transactions to defraud the Creditors.

60. The respondents have not placed any of the originals reflecting these transactions either before this Bench or provided to the RP till date. Since these are the facts to be proved on examination, it is the duty of the respondents to place those originals but they failed to produce them in originals. It is not the case of the respondents that they lost those documents, therefore these documents shall be considered as secondary

evidence. Suppose they are lost, it is the duty of those respondents to prove that they are lost; simply by putting up a pleading that they are lost will not serve the purpose.

61. Since the CD is a listed company, in case any transfer of share holding has happened, it is the bounden duty of R1 and other respondents to notify that fact to SEBI within 30 days from the date of such transfer, that has not happened in this case, R1 has not placed any Board Resolution reflecting such transfer has happened at the date they have mentioned in the document, in this backdrop, it is to be treated that the respondents failed to prove that aspect therefore it can't be believed that Board has taken a decision with regard to the transfer of shareholding. It is the bounden duty of the Company to upload the Forms with ROC from time to time as and when any resolution is passed by the Company but not even a single resolution has been filed with the ROC reflecting that the Company passed resolution for transfer of shareholding or for transfer of the business of the company or for transfer of trademark to R1. As to Master Reseller Agreement is concerned, the domain name registration being the main business of the Company, the CD shall pass special resolution reflecting transfer of the asset of the CD to Net4 Network, but no such resolution is stated to have been passed nor any such resolution is notified to the ROC reflecting transfer of business of the Corporate Debtor to Net4 Network. Based on the failure of R1 and answering respondents to prove existence of facts as stated by them, it is to be construed they failed to prove transfer of shareholding of Net4 Network and Pipetel to Trak Online.

62. Since Company records are structured in such a way that every transaction that happens in the Company is recorded not only in the Company records but also with various regulating authorities on accrual basis as stated under the Companies Act, those transactions are to be presumed as true, unless they are rebutted. Such being the structuring of recording of facts, every fact need not be insisted upon to be proved by adducing oral evidence because records are available for ascertaining as to whether such fact has happened or not. In view thereof, when there is no

record of accrual of any fact asserted by a party, those facts need not be treated as in existence. Here transfer of shareholding is not shown as recorded anywhere in the records, execution of Master Reseller Agreement is not shown as recorded anywhere in the records, Assignment of Trademark is not shown as recorded anywhere in the records, therefore we are of the view that all these are not believable facts. The respondents have placed the ledger account reflecting transfer of shareholding, if at all it is accrued in the ledger records, it should have been recorded in other records as well but those records have not been placed before this Bench.

63. It is a fact that all records of the Company at least, until before admission remained in the custody of the Management of the Corporate Debtor, therefore they could have recorded all these facts in the records of the Company and those records could have been supplied to the RP reflecting timely accrual of all these facts in the records of the CD and the regulating authority but that has not been done. As on today there is no material on record to show that Master Reseller Agreement has been executed and that has been executed on particular date as mentioned by the CD, therefore it has to be held that the erstwhile management of the CD has miserably failed in proving transfer of the business of the CD through Master Reseller Agreement on the date mentioned by them and as per the procedure laid under the Companies Act, 2013.

64. On perusal of the factual aspect of this case and the affidavits filed by both the parties in the applications aforementioned, we observe that the RP asserted that R1 got transferred the shareholding of the CD lying in Net4 Network and Pipetel to Trak Online, R1 got executed Master Reseller Agreement in favour of Net4 Network by the CD to transfer the business of the CD to Net4 Network, R1 got "**net4**" trademarks in the name of him through an assignment deed before admission of the present Company Petition. The corollary submission of the RP is the entire value of the assets of the CD was taken out from the CD and put it in Net4 Network and shareholding of Net4 Network and Pipetel was transferred to Trak Online defrauding the creditors of the CD.

65. With regard to the contention of the Respondents that not making Pipetel as the party to the proceedings is fatal to the proceedings, we hold that since Pipetel is not going to be affected either by cancelling the transfer of shares held by the Corporate Debtor to Trak Online and since shares are freely transferable from one person to another under the Companies Act, not making Pipetel as a party to this proceeding will not have any adverse effect over Pipetel.

66. As to assignment of trade name, since this assignment is in relation to an action falling within the ambit of IBC to cancel the assignment of trademark in the name of R1, this issue need not be taken to trademark authority for such cancellation, only requirement is the applicant shall place this order before Trade Mark Authority to rectify the records.

67. The transactions afore mentioned will not be called as transfers made in the ordinary course of business, as to the business of the CD, providing domain service and collection of license fees will fall within the perspective of ordinary course of business.

Reliefs

68. On having discussed various transactions, it is evident that the directors fraudulently transferred the shareholding of the Corporate Debtor in their subsidiary companies to Trak Online to take out the holding of the corporate debtor over Net4 Network so that the corporate debtor will not have any right over the business of the corporate debtor subsequently transferred to Net4 Network, that the Corporate Debtor entered into undervalued and fraudulent transactions such as execution of Assignment Agreement of trade marks in favor of its director (R1) and execution of Master Reseller Agreement in favor of Net4 Network (R2) for keeping the assets of the Corporate Debtor beyond the reach of the Creditors so as to defraud the Creditors.

69. In view thereof, we hereby declare assignment of trademarks in the name of R1 is null and void and execution of Master Reseller Agreement in favor of Net4 Network is invalid, and direct R1 to restore the trade name

“**Net4**” to the Corporate Debtor and R2 to restore the business of the corporate debtor it has taken through Master Reseller agreement from the Corporate Debtor with immediate effect. Likewise, we hereby declare the Share Transfer Agreements reflecting transfer of Pipetel shares held by CD to Trak Online and transfer of Net4 Network shares to Trak Online as null and void.

70. For the transactions afore mentioned being declared as null and void, u/s 66 & 67 of the Code, whatever business so far Net4 Network held from the date of alleged transfer of business shall be inspected by an auditor appointed by this Bench on the suggestion made by the RP within 15 days thereof, and the auditor shall determine the opportunity loss to the CD within 30 days from the date of his appointment. Upon approval of the said report by this Authority, the promoter director Mr Jasjith Singh Sawhney (R1) shall pay back the loss estimated by the auditor to the CD because R1 is the person caused all these fraudulent transactions happened. R1 shall produce all relevant records within seven days from the date of receipt of request from the auditor to be appointed by this Bench.

71. Accordingly, CA 1140/2019 and 1756/2019 are hereby disposed of.

SD/-

**(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT**

SD/-

**(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL**

07.05.2021
Vineet