



CS Makarand Joshi

## CORPORATE LAWS

### Case Law Update

#### Companies Act – 1<sup>st</sup> Case

Order of the ROC, Gujarat, Dadra & Nagar Haveli dated April 28, 2023

In the matter of M/s. Sun Pharmaceutical Industries Limited

##### Facts of the case

- M/s. SRBC & Co. LLP, Chartered Accountants ('Statutory Auditor') were Statutory Auditors of Sun Pharmaceutical Industries Limited ('SPIL/the Company') for financial years 2017-18 to 2021-22.
- An Inquiry was conducted into the affairs of SPIL under Section 206(4) of the Companies Act 2013 ('the Act'). Inquiry was conducted for investigation of affairs for financial years 2014-15 to 2017-18.
- In connection to this inquiry, the inquiry officer had issued Show Cause Notice ('SCN') to the Statutory Auditor of the Company for financial year 2017-2018 on November 10, 2022 in respect of non-disclosure of **material** 'related parties transaction' (hereinafter referred to as 'RPT') details as required under Indian Accounting standard 24 with

M/s. Aditya Medisales Ltd (hereinafter referred to as AML).

##### Charges levied

- Accordingly, it was alleged that Statutory Auditor have violated provisions of Section 143(3) of the Act which states that auditor's report shall state whether, in his opinion, the financial statements comply with the accounting standards?

##### Submissions by Statutory Auditor

- Statutory Auditor submitted that they had audited the financial statements of the Company with utmost diligence adhering to the requirements of the Act, Standards of auditing and other applicable audit requirements.
- AML was disclosed as related party in Note no. 52 and Note no.75 of the standalone and consolidated financial statements of the Company for the financial year ended March 31, 2018.
- AML was disclosed as related party under the applicable accounting standards during financial year 2017-2018.

- Transaction with AML were disclosed as part of related party transaction in annual report for financial year 2017-18 under category 'others'. Hence Statutory Auditors were of the view that they are in compliance with requirement of Indian accounting standard 24 and submitted that there was no element of fraud as per provision of the Act.
- Statutory Auditors have lastly submitted that they have complied with requirements of provisions of the Act, Indian accounting standard 24 and SEBI(LODR) 2015 and no penalty ought to be levied against them.

#### Submissions by Presenting Officer of ROC

- Presenting Officer submitted that Statutory Auditor had made omission of the adequate facts while reporting the related party transactions and thus they were negligent in compliance with their duty as per provisions of Section 143 (3) of the Act.
- Pursuant to clause(h) of sub section (3) of section 134 of the Act and rule 8(2) of the Companies (Accounts) Rules, 2014 the Company need to disclose material RPT in AOC-2. Hence transaction defined under rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 are called Material RPT. Therefore, as per the said rule, sale, purchase, supply of any goods or materials, directly or through appointment of agent, amounting to 10% or more of the turnover of the company or rupees one hundred crore, whichever is lower, is called **material** related party transactions.
- Hence, transaction made by the Company exceeded 10% of annual consolidated turnover for financial year 2016-2017 (10% of ₹ 8308.28 crore i.e., ₹ 830 crore) or ₹ 100 crore whichever is lower is called as **material** transaction.
- Presenting Officer further submitted that Statutory Auditor had not reported and quantified any Material RPT as per the requirement of Para 24A of IND AS 24. Instead of reporting material transaction separately, the Company had merged the same with others.
- Para 24 and 24A of IND AS 24 reads as follows: -
  - “24. *Items of a similar nature may be disclosed in aggregate except when separate disclosure is necessary for an understanding of the effects of related party transactions on the financial statements of the entity.*
  - 24A. *Disclosure of details of particular transactions with individual related parties would frequently be too voluminous to be easily understood. Accordingly, items of a similar nature may be disclosed in aggregate by type of related party. However, this is not done in such a way as to obscure the importance of significant transactions. Hence, **purchases or sales of goods are not aggregated with purchases or sales of fixed assets. Nor a material related party transaction with an individual party is clubbed in an aggregated disclosure.***”
- Para 24 and 24A of IND AS 24 does not mean that transactions are shown in such a way that importance of significant transaction is lost. Hence as per para 24A of Indian accounting standard 24, Statutory Auditor should

have disclosed Material RPT separately as per para 18, 19, 20 of IND AS 24.

- It was observed that ledger submitted by the Company in respect of transaction for financial year 2017-2018 with AML shows cumulative sales transaction exceeding above ₹ 900 crore. Hence transaction falls under material related party transaction and same was not shown by Statutory Auditor.
- Apart from AML, SPIL had entered into material related party transactions with Sun Pharma Laboratories Limited, Sun Pharma Medisales Private Limited, Be-Tabs Pharmaceutical Ltd, Sun Pharma Global, Sun Pharmaceuticals Industries Inc., and Sun Pharmaceuticals Industries (Europe)B.V. and Statutory Auditor had failed to report said material transactions in its reports for the financial year ended 2017-2018 as per Para 24A of IND AS 24.
- Merely stating name of RPTs is not adequate in disclosing the related party transactions. It is equally important that material related party transactions to be pointed out and quantified separately considering the special significance attached to quantum of shareholders money involved. Hence Statutory Auditors have been negligent on this part.
- From the record of the Company, it was found that Statutory Auditor had made non-compliance of said provision for financial years 2018-2019, 2019-2020, 2020-2021, and 2021-2022 also.
- Hence Presenting Officer concluded that Statutory auditors have been negligent of their duty as defined in of Section 143(3) the Act and therefore liable to be penalised under section 450 of the companies Act, 2013.

### Penalty As Per Section 450 of The Companies Act 2013

<i>Name of the auditor's firm</i>	<i>Penalty as per Section 450 of the Companies Act, 2013 (In Rs.) for FY 2017-2018 (In Rs.)</i>	<i>Maximum penalty</i>	<i>Penalty imposed (Rs.)</i>
SRBC & CO. LLP, Chartered Accountants	10,000+ 1000 per day	50,000	50,000

### Companies Act – 2<sup>nd</sup> Case

**Order of the ROC, Gujarat, Dadra & Nagar Haveli dated April 28, 2023**

**In the matter of M/s. Sun Pharmaceutical Industries Limited**

#### Facts of the case

- M/s. C.J. Goswami & Associates, Practicing Company Secretaries was appointed as Secretarial Auditor [‘Secretarial Auditor’] for the financial year 2014-2015, 2015-2016, 2016-2017, 2017-2018 respectively by Board of Directors of M/s. Sun Pharmaceutical Industries limited which is a Company registered under Companies Act ,2013 in the state of Gujarat and having its registered office at SPARC, Tandalja, Vadodara
- An inquiry was conducted of Sun Pharmaceutical Industries limited (hereinafter referred to as ‘SPIL/the Company’) under Section 206(4) of the Companies Act 2013 [‘the Act’] as ordered by Ministry of Corporate Affairs (‘MCA’) in the affairs of the Company covering the financial years from 2014-15 to 2017-2018.

- In connection to this inquiry, the inquiry officer had issued Show Cause Notice ('SCN') to the Secretarial Auditor on November 10, 2022 in respect of not reporting Aditya Medisales Ltd (hereinafter referred to as 'AML') as related party as per Indian Accounting Standard 24 and Accounting Standard 18 in financial statements of the Company for financial year 2014-2015, 2015-2016, 2016-2017.
- Secretarial Auditor further submitted that none of the secretarial audit report issued for Reporting Period stated that financial statements comply with the accounting standards.
- Secretarial Auditor further brought to the kind attention of the Presenting Officer a statement mentioned by Secretarial Auditor in the secretarial audit reports issued for Reporting Period at sr. no. 2 of Annexure 1 of the said reports that, "We have not verified the correctness and appropriateness of financial records and books of accounts of the company".

### Charges levied

- Secretarial Auditor of the Company was alleged to have not reported Aditya Medisales Ltd as related parties as per the requirement of IND-AS 24/AS-18 in the financial statement of the Company of FY 2014-15, 2015-16 and 2016-17.

### Submissions by Secretarial Auditor

- Mr. Chintan Goswami, Proprietor of M/s. C.J. Goswami & Associates, Practicing Company Secretaries submitted that the format of MR-3 i.e., Secretarial Audit report was already prescribed under Section 204 of the Act. As per the scope of secretarial audit as decided by Central Council of Institute of Company Secretaries of India ['ICSI'] at its 226<sup>th</sup> Central Council meeting, the provisions relating to audit of accounts and financial statement of the company is dealt in the statutory audit and Secretarial Auditor may rely on the reports given by statutory auditor or another designated professional. Therefore, relying on the reports given by M/s SRBC & Co. LLP, Statutory Auditor of SPIL for financial year 2014-15 to 2016-17 ['Reporting Period'] they believed that the Company complied with the provisions of section 133 of the Act regarding compliance with accounting standards.

- Secretarial Auditor further drew attention of the Presenting Officer to the extract of guidance note on undertaking secretarial audit assignments issued by ICSI on May 14, 2018 from (Chapter 1 of Guidance Note on Secretarial Audit) which states that,

*"The term Secretarial Audit is a mechanism which is connected with the audit of the non-financial aspects of the company.*

*The object of the Secretarial audit is evaluation and form an opinion and to report to the shareholders whether, the company has complied with applicable laws comprising various statues, rules, regulations, guidelines, followed the board processes and report on the existence of compliance management system.*

*Third party support and evidences: It would always be helpful to cross verification of the fillings made by the company at MCA, SEBI & other authorities independently. Verification of record and enquiries can also be made with the other statutory auditor and*

*internal auditors and consultants and Independent directors of the company”*

- Secretarial Auditor further submitted that duty cast upon secretarial auditor under relevant standards of auditing and reporting framework had been duly and fully complied. Secretarial Auditor further brought to the kind attention of Presenting Officer, observations/views in the secretarial audit report for the financial year ended March 31, 2016 and March 31, 2017.
- Secretarial Auditor further stated that as per their limited understanding on basis of documents available in public domain in relation to the non-disclosure of transaction with AML the Company had already settled this matter with SEBI. Secretarial Auditor hence sought the details of as to on what grounds this SCN was issued to them? Secretarial Auditor hence prayed for dismissing the allegations of non-compliance/ violation of the provision of the act and no penalty ought to be levied.

#### **Submissions by Presenting officer**

- The Presenting Officer submitted that inquiry on SPIL was based on a whistle blower complaint in respect of related party transactions, money diversions from SPIL to AML and other group companies of SPIL. As per Section 204 of the Act, the secretarial auditor plays a crucial role in laws for effective compliances. The object of secretarial audit is to evaluate and form an opinion and to report to the shareholders whether company has complied with applicable laws comprising various statutes, rules, regulations, guidelines, followed the board processes and report on the existence of compliance management system.

- Practicing Company Secretaries ('PCS') has the professional duty to provide an unbiased view on compliance status of the company. A PCS should be independent from company being audited. The Secretarial auditor is also expected to ensure that activities of the client company are in accordance with the applicable procedure and that supporting evidence is maintained by company and same is genuine. Presenting Officer further stated that PCS should have examined transactions during the Reporting Period to identify whether any fraud element is present or not?
- Presenting Officer further elaborated in detail the group structure of SPIL. He then stated that Mr. Dilip Sanghvi, Managing Director of SPIL has control over AML. Further highlighting the group structure of SPIL, Presenting Officer highlighted that companies were created between SPIL and AML to hide the director control of Mr. Dilip Sanghvi and their relatives in AML.
- Thus, he stated that it has been established that MD of SPIL, Mr. Dilip Sanghvi had control on AML and all other private body corporates were created between SPIL and AML to hide direct control of MD of SPIL. SPIL's RPT with AML exceeded Rs.100 crores which formed material and significant transaction.
- It was further stated that although the shareholder of AML is body corporate, but the main control person of all the body corporates was MD of SPIL, i.e., Mr. Dilip Sanghvi and their family members.

- Further highlighting on business of AML, Presenting Officer stated that AML was the sole distributor of the SPIL since long time in India. All the goods manufactured by SPIL were sold within India through AML. AML was also promoter company of SPIL since year 2001. Also, the promoters of SPIL were the shareholders of AML.
- SPIL and AML were Related party even before the merger of Sanghvi Finance Ltd because as per the scheme of merger filed by the Company before NCLT, the Company itself confirmed that all 22 transferor companies and Sanghvi Finance Pvt Ltd are connected with Mr. Dilip Sanghvi who is MD of SPIL.
- Mr. Dilip Sanghvi who is MD of SPIL and also holds more than 2% of AML (directly/indirectly), is therefore related party of AML as per Section 2(76) (v) and (vi) of the Act read with Accounting Standard 18.
- The Presenting Officer further stated that instead of complying his duties as per Guidance notes Secretarial auditor merely relied on Statutory auditor reports. Further replying to the submission of Secretarial Auditor about scope of secretarial audit as per ICSI 226<sup>th</sup> meeting, Presenting Officer stated that identification of related party under Section 2(76) and Section 188 of the Act fall under the purview of secretarial auditor of the company and non-reporting of AML as related party for Reporting Period falls under the purview of duty of secretarial auditor as per guidance note of Secretarial audit issued by ICSI. Hence Presenting Officer found Secretarial Auditor of SPIL guilty for violation of section 143(14) read with section 188 & 204 of the Companies Act, 2013.

#### Penalty as per Section 450 of the Companies Act 2013

<i>For the Financial year</i>	<i>Name of the auditor's firm</i>	<i>Penalty (In Rs.)</i>	<i>Maximum Penalty (In ₹ )</i>	<i>Penalty Imposed (In ₹ )</i>
2014-2015	C.J Goswami & Associates, Practicing Company Secretary	10,000+1000/- per day	50,000/-	50,000/-
2015-2016		10,000+1000/- per day	50,000/-	50,000/-
2016-2017		10,000+1000/- per day	50,000/-	50,000/-

#### SEBI

##### In the matter of CG Power and Industrial Solutions Limited - Adjudication order dated April 20, 2023

##### Facts of The Case

- CG Power and Industrial Solutions Ltd (hereinafter referred to as CG Power/the Company) filed a corporate

announcement with Bombay Stock Exchange (hereinafter referred to as BSE) and National Stock Exchange (hereinafter referred to as NSE) on August 20, 2019, which **disclosed the outcome of its Board meeting held on August 19, 2019**. From the said disclosure, Securities and Exchange Board of India (hereinafter referred to as



SEBI) noted that the **total liabilities** of the Company and the CG Power Group might have been **potentially understated** by approximately ₹ 1053.54 Crore and ₹ 1,608.17 Crore respectively, as on March 31, 2018 and by ₹ 601.83 Crore and ₹ 401.83 Crore, respectively as on April 1, 2017. SEBI also noted that **advances to related and unrelated parties** of the Company and the CG Power Group might have been **potentially understated** by ₹ 1,990.36 Crore and ₹ 2,806.63 Crore respectively, as on March 31, 2018 and by ₹ 1,479.34 Crore and ₹ 1,331.47 Crore respectively, as on April 1, 2017.

- With this observation SEBI sought information in this matter from the Company in order to examine as to whether there were any violations of the provisions of securities and other applicable laws by the Company and its Directors/Promoters, during the period **2016-2019**. SEBI also had sought responses from the Chairman (Gautam Thapar), past Directors (Madhav Acharya, B. Hariharan) and CFO (V. R. Venkatesh) of CG Power. CG Power then appointed M/s Vaish Associates, an independent law firm to investigate on certain transactions and submitted preliminary Investigation report.
- Subsequently, **SEBI, vide an Interim Order dated September 17, 2019, debarred Gautam Thapar – Chairman, VR Venkatesh - CFO, Madhav Acharya - former director and B Hariharan – former director from buying, selling or otherwise dealing in securities in any manner, either directly or indirectly, till further orders.**
- SEBI further appointed MSA Probe Consulting Private Limited (‘hereinafter referred to as MSA/Forensic Auditor’) for conducting the forensic audit of the books of accounts of CG Power. Further SEBI confirmed its interim order by passing a final order dt: March 11, 2020, pending receipt of the forensic audit report from MSA.
- MSA vide its forensic audit report suggested to **examine the role** of MD & CEO, Risk and Audit Committee (RAC), Board and other employees of CG Power as well as that of Mr. Ashwin Mankeshwar i.e., Managing Partner of **M/s K. K. Mankeshwar and Co.** (hereinafter referred to as **KKM/ Noticee No. 2**) who was the Statutory Auditor of the Company appointed in 81st Annual General Meeting of the Company dated September 28, 2018, till January 25, 2020. SEBI further conducted investigation in the matter and observed that M/s **Chaturvedi & Shah** (hereinafter referred to as **CAS/ Noticee No. 1**) was the joint statutory auditor of CG Power along with M/s Sharp & Tannan for the FY 2016-17 and subsequent to its resignation, on April 27, 2018, KKM was appointed as the statutory auditor of CG Power on April 28, 2018 to fill the casual vacancy, who completed the statutory audit of CG Power for the FY 2017-18.
- With regards to Noticee No. 2, SEBI noted from the Investigation Report (IR) that the statutory audit of CG Power for the FY 2018-19 was completed by KKM jointly with SRBC & Co. LLP after CG Power made an announcement in respect of various irregularities in the nature of fraud on August 20, 2019. While reviewing payments made in the past years, the Company came across certain unexplained payments from the Company and its subsidiaries made to KKM as well as association

of Mr. Ashwin Mankeshwar, Managing Partner of KKM, as a Director of Blue Garden Estate Private limited ('Blue Garden') and Acton Global Private limited ('Acton'). In this regard, the RAC of CG Power issued a show cause notice to KKM under Section 140(1) of the Companies Act, 2013 and provided KKM with an opportunity of being heard. However, no submissions were made by KKM in respect of the aforesaid show cause notice. SEBI Investigation further observed and alleged that CAS and KKM had been acting against the fiduciary capacity, and that instead of working in the interest of shareholders of CG Power, they facilitated the scheme of cleaning up the books of accounts of CG Power, despite being aware of the irregularities and misstatements in the financial statements of CG Power

### Charges Levied

- Violation of the provisions of section 12A(a), (b) and (c) of the SEBI Act, 1992 and Regulations 3(b), (c) and (d), 4(1) and 4(2)(f) of the Prohibition of Fraudulent Trade Practices (PFUTP) Regulations, 2003.

### Contentions by the Noticees

#### Noticee 1

1. **Sale of Nashik property and Kanjurmarg Property not known to Noticee:** Noticee 1 was questioned by the Forensic Auditor viz. MSA about the transactions with Blue Garden and Acton. In this regard Noticee 1 submitted that they were unaware of the transactions. Noticee 1 further submitted that transactions of Nashik & Kanjurmarg property were never disclosed to Board of Directors of the Company, filing of charge form

pertaining to same was also not done respective Registrar of Companies, guarantees and the undertakings were never routed through meeting of board of directors of the Company. Noticee 1 further stated that management representations provided to them for the financial year 2016- 17 were false and misleading.

2. **Netting off amount between two different entities not checked with each journal entry:** On the allegation of netting off amount, Noticee 1 submitted that they had only seen the net amount appearing in the final books of accounts for financial year 2016-2017 and not each individual entry.
3. **CG Power's advanced of ₹ 28 crore to Blue Garden was checked:** Noticee 1 stated that they were aware that CG Power had advanced a sum of ₹28 Crore to Blue Garden during the FY 2016-17, so they sought an explanation from CG Power for such advance. CG Power informed that they had made such payment towards consultancy services from Blue Garden. Noticee 1 further stated that they were provided with balance confirmation from Blue Garden and a copy of the agreement dated March 27, 2017 entered by CG Power with Blue Garden for provision of consultancy services. Noticee 1 further submitted that on furnishing of these documents they did not suspect any non-genuineness in this transaction between CG Power and Blue Garden.

#### Noticee 2

1. **Reinstatement of financials and audit opinion**  
Noticee 2 vide their Independent Auditor's Report dt: August 30, 2019



highlighted that they were informed by the Board of directors of the company that financial statements of earlier financial year 2016-2017 and 2017-2018 have been adjusted due to independent investigation carried out in the Company and that pending outcome of the investigation, the financial statements of 2016-2017 and 2017-2018 and of the year ended March 31, 2019 might get revised/restated. Therefore Noticee 2 in their Independent Auditor's Report dt: August 30, 2019 under the heading — '**Basis for disclaimer of opinion**' mentioned that in view of the proposed voluntary revision/restatement of the financial statements of prior years, which may result in revision/restatement of financial statements for the year ended March 31, 2019 and also considering the significance of certain transactions/specific matters described herein below, Noticee 2 were unable to determine the consequential impact of the proposed revisions/restatements and the impact of certain transactions/specific matters on the Standalone Financial Statements as at March 31, 2019.

**2. Concerns on appointment of Mr. Ashwin Mankeshwar, Managing Partner of KKM, as additional director in Blue Garden and Acton**

Noticee 2 vide reply dated January 15, 2023 stated that Mr. Ashwin Mankeshwar was inducted as an additional director in the Blue Garden and Acton on January 25, 2017 and he resigned from the said companies on March 14, 2017. During this period, he did not attend any meeting of both the companies nor was he privy to any transaction entered into by these companies. No remuneration was

drawn by him during the period he was appointed as a director in these companies. Mr. Ashwin Mankeshwar further submitted that his previous directorship was not in conflict with any other laws. Also, no payments were received by him other than in the course of his statutory audit. Hence Noticee 2 submitted that it cannot be stated that they did not act in their fiduciary capacity.

**Arguments by SEBI on Contentions made by Noticee 1**

**1. Sale of Nashik property and Kanjurmarg Property not known to Noticee**

SEBI noted that during the audit period i.e., during 2016-17, the transactions relating to a Nashik Property and a Kanjurmarg Property involving receipts of ₹ 390 crore by CG Power from Blue Garden and lending of ₹ 245 crore and ₹ 145 crore by CG Power to Acton and Avantha Holdings Ltd (hereinafter referred to as AHL) respectively were executed, which were not reflected in the audited financial statements of CG Power. Further said transactions were done without any agreement between CG Power, Blue Garden and Acton. SEBI noted that no approval/consent of Maharashtra Industries Development Corporation was obtained before sale of the Nashik property. Further, the land at Nashik was not a barren unused piece of land but home to a huge and fully operational factory owned by CG Power, which is a major contributor to CG Powers business and provides employment to a large number of people. It was further observed by SEBI that no approval was obtained from the Board of CG Power for the execution

of Memorandum Of Understanding between CG power and Blue Garden for transfer of Kanjurmarg property for a consideration amount of ₹ 498 Crore to which SEBI noted that the aforesaid factors were also not considered by Noticee No.1 in its audit report. SEBI hence stated that arguments of Noticee 1 cannot be sustained. SEBI thereafter stated that fraud done by CG Power involved multiple transactions each amounting to hundreds of crores. Further, the said transactions were done through the banking channel. At the time of preparation of the audit report, Noticee No.1 had access to the bank statements and books of accounts of CG power and also had the right to seek and obtain information and explanations from CG Power to their satisfaction but did not act upon. Rather, Noticee No.1 allowed the said irregularities in above mentioned transactions in its audit report for the FY 2016-17 which shows the involvement of Noticee No. 1 with the company for facilitating it in showing true and fair picture of the financials. Hence SEBI stated that contentions of Noticee 1 cannot be accepted.

## 2. **Netting off amount between two different entities**

SEBI noted that advances against sale of properties received from Blue Garden to the extent of ₹ 388 Crore were adjusted by netting off against the amount transferred as loans to Acton and AHL by passing journal entries on March 30, 2017 and March 31, 2017. Also, all the entries of the transactions were made in such a way to net off the assets and liabilities of different entities i.e., debit balance of one entity netted off with credit balance of other entity in the books of account of CG

Power which might not show the correct financial position of CG Power. SEBI further stated that in accounting norms, generally the netting of balance i.e., debit and credit of the same entity is permitted and not between the different entities. But in the present matter, the auditor did not raise question on the same and instead certified the same as true and fair in the auditor's report for the year 2016-17, which indicates the auditor's direct involvement on making such entries in the books of accounts of the company. SEBI hence stated that arguments of Noticee 1 cannot be sustained.

## 3. **CG Power had advanced sum of ₹ 28 crore to Blue Garden**

SEBI highlighted that the balance confirmation as on March 31, 2017 was signed on behalf of CG power by Mr. Madhav Acharya and on behalf of Blue Garden was signed by Mr. Bhimrao Venkataramana Rao. SEBI further noted that with regard to agreement dated March 27, 2017 which was signed by Mr. Bhimrao Venkataramana Rao on behalf of Blue Garden and Mr. V. R. Venkatesh on behalf of CG Power, Mr.V.R. Venkatesh had never been a director of CG Power. Further, he had taken charge as Chief Financial Officer of CG Power from Mr. Madhav Acharya only on August 11, 2017 i.e., subsequent to the aforesaid agreement stated to have been executed on March 27, 2017. Even Mr. Bhimrao Venkataramana, who had signed the agreement was appointed as a Director of Blue Garden only on April 15, 2017. SEBI therefore observed that the aforesaid facts clearly indicated that the agreement dated March 27, 2017 between CG Power and Blue Garden was created merely to provide some basis to the transactions between CG Power

and Blue Garden. SEBI further observed that the agreement was dated only 4 days prior to the end of the FY 2016-17 while the transactions between CG Power and Blue Garden had begun since May 2016. Therefore, SEBI noted that CAS, though admitted to have examined the said transaction, had not examined the aforesaid irregularities, and did not bring out in the audit report for the FY 2016-17. This all clearly indicated that CAS facilitated the company to make such entries in the books of account and hence were aware of the transactions relating to Nashik Property and Kanjurmarg Property involving Blue Garden to facilitate the scheme of cleaning up the books of accounts of CG Power. SEBI hence stated that arguments of Noticee 1 cannot be sustained.

#### **Arguments by SEBI on Contentions made by Noticee 2**

##### **1. Reinstatement of financials and audit opinion**

SEBI stated that Noticee 2 had raised various points with respect to the audit report of 2018-19 submitted by it on August 30, 2019. However no fraudulent transaction were reported in the audit report of 2017-18 during which all the aforesaid fraudulent transactions were carried out by the company. Further SEBI noted that the said audit report was submitted only on August 30, 2019 i.e., after CG Power made an announcement in respect of various irregularities in the nature of fraud on August 20, 2019. SEBI further noted that KKM was appointed by CG Power, immediately after resignation of CAS and without holding any Board Meeting. Further, after its appointment on April 28, 2018, KKM submitted audit report for 2017-18 on May 30, 2018 i.e., almost

in a month. In view of the aforesaid facts, SEBI stated that there is no merit in the submissions made by Noticee No. 2 that it highlighted certain points w.r.t. the irregularities in its audit report of 2018-19.

##### **2. Concerns on appointment of Mr. Ashwin Mankeshwar, Managing Partner of KKM, as additional director in Blue Garden and Acton**

SEBI mentioned that Memorandum of Understanding between Blue Garden and CG Power for assigning, sale and transfer of rights of Kanjurmarg Property was entered into on February 1, 2017 and the funds amounting to ₹ 190 Crore received by Blue Garden as loan from ABFL in this regard were transferred to CG Power on February 16 and 17, 2017. From the same it was clear that it happened during the tenure of Mr. Ashwin Mankeshwar as director in Blue Garden and just after his appointment. Forensic auditor also stated that Blue Garden and Acton were Special Purpose Vehicles, which were incorporated for effecting the transactions relating to Nashik Property and Kanjurmarg Property. SEBI further noted from Forensic audit report that KKM provided multiple services to Avantha Group and received substantial remuneration from them and were quickly appointed as the statutory auditor of CG Power upon resignation of CAS. This indicated KKM's close ties with Avantha Group entities who had been the beneficiaries of the fraudulent transfers from CG Power. SEBI further noted the fact that Mr. Ashwin Mankeshwar did not receive any remuneration from Blue Garden and Acton during the period of January 25, 2017 to March 14, 2017 while he was holding the position of Director in these companies, as also stated by Noticee No.

2 in its contention, actually shows his close proximity with these companies and the nature of transactions in which these companies were involved. SEBI therefore concluded that all above

facts clearly establish that Noticee No. 2 was aware of the irregularities and misstatements in the financial statements of CG Power, while issuing the audit report for the FY 2017-18.

### Penalty

<b>Sr. No.</b>	<b>Name of the Noticee</b>	<b>Violation</b>	<b>Penalty amount</b>
1	M/s Chaturvedi & Shah	Sections 12A(a), (b) and (c) of the SEBI Act, 1992; and Regulations 3(b), (c) and (d), 4(1) and 4(2)(f) of the PFUTP Regulations, 2003	₹ 5,00,000/-
2	M/s. K. K. Mankeshwar & Co.	Sections 12A(a), (b) and (c) of the SEBI Act, 1992; and Regulations 3(b), (c) and (d), 4(1) and 4(2)(f) of the PFUTP Regulations, 2003	₹ 5,00,000/-

### IBC

#### ***In the matter of M. Suresh Kumar Reddy (Appellant) vs. Canara Bank & Ors (Respondent) at Supreme Court dated 11 May, 2023***

- The Canara bank – a financial creditor and respondent (Respondent) filed an application u/s 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) before the National Company Law Tribunal (NCLT) Hyderabad, Telangana. The said application was filed against M/s Kranthi Edifice Pvt. Ltd - Corporate Debtor (CD).
- NCLT by an order dated 27 June 2022, admitted the application filed by the respondent and declared a moratorium for the purposes referred in section 14 of the IBC. The appellant who was the suspended director of the CD claimed to be an aggrieved person and preferred an appeal against the said order before the National Company Law Appellate Tribunal (NCLAT). However, NCLAT dismissed the appeal by an order dated 5 August, 2022.
- The respondent - Canara bank is the successor of Syndicate bank, which made an application u/s 7 of the IBC to NCLT. Syndicate bank was merged into the respondent-Canara bank. A letter of sanction dated 2 April, 2016 was issued by Syndicate bank by which credit facilities were sanctioned to the CD for one-year which were valid up to 28 February, 2017.
- The facilities granted by the Syndicate bank to the CD were fund-based - Secured Overdraft Facility of ₹ 12 crores and non-fund-based bank guarantees of ₹ 110 crores.
- In the application u/s 7 of the IBC, the Syndicate bank stated that as on 30 November 2019, the liability of the CD under the Secured Overdraft Facility was to the tune of approx. ₹ 7.5 crores and the liability of the CD towards outstanding bank guarantees were approx. ₹ 19.16 crores.
- On 21 October, 2022, Supreme Court issued notice and recorded a statement

of the appellant that a proposal for settlement under a One-Time Settlement Scheme was submitted to the respondent-Canara bank and a sum of ₹ 6 crores was deposited with them. However, the said proposal was turned down. Therefore, the appeal was taken up for hearing.

### Arguments of the Appellant

- It was submitted that repeated efforts were made to have one-time settlement of the dues payable to the respondent. But the said request was not acceded to.
- Reliance was placed on the decision of SC in the case of ***Vidarbha Industries Power Limited vs. Axis Bank Limited*** wherein it was submitted that even assuming that the existence of financial debt and **default on the part of the CD was established, the NCLT was not under an obligation to admit the application u/s 7**. For good reasons, NCLT could have refused to admit the application u/s 7 of the IBC. Further the appellant fairly pointed out the order dated 22 September, 2022 passed by SC in a review petition seeking a review of the decision in the case of Vidarbha Industries.
- Correspondences between the Government of Telangana and the Syndicate bank were referred where in contracts granted by the Telangana Government to the CD. Similarly, by a letter dated 7 August, 2019, the Government of Telangana requested the Syndicate bank to extend 29 bank guarantees mentioned in the said letter. Further, the CD addressed a letter to the bank on 9 January, 2020 by which a request was made to extend the bank guarantees.

- Attention of the SC was also drawn to a letter dated 8 January, 2020 addressed by the Government of Telangana to the bank requesting the bank to extend the seven bank guarantees mentioned therein. Notwithstanding the requests made by the State Government, Syndicate bank did not extend the bank guarantees. Thus, in a sense, the failure of the bank to extend the bank guarantees forced the CD to commit default. It was submitted that the bank is responsible for triggering the default.
- Attention was also drawn to the interim order dated 24 April, 2020 passed by the learned Single Judge of the Telangana High Court by which the respondent was restrained from taking coercive steps pursuant to letters of invocation of bank guarantees including handing over of Demand Drafts to the State Government. Hence, NCLT ought not to have admitted the application u/s 7 of the IBC.

### Arguments of the Respondent

- Reliance was placed on the decision of the SC in the case of ***E.S. Krishnamurthy and others vs. Bharath HiTech Builders Private Limited*** and it was stated that it still holds the field. It was submitted that once NCLT is satisfied that there is a financial debt and a default has occurred, it is bound to admit an application u/s 7 of the IBC.
- Also, highlighted that the decision in case of ***Vidarbha Industries (Supra)*** was peculiar to the facts of the case.
- Further, requested was made by the CD for extension of the bank guarantees was specifically rejected as communicated by the respondent by a letter dated 18 January, 2021 addressed to the CD. And

therefore, it was submitted that there was no error committed by NCLT in admitting application u/s 7 of the IBC.

### Held

- In the case of ***Innoventive Industries Limited vs. ICICI Bank and Another***, the scope of section 7 of IBC had been explained. The view taken in the case of *Innoventive Industries* has been followed by SC in the case of ***E S Krishnamurthy & Ors. vs. M/s Bharath Hi Tech Builders Pvt Ltd.***
- Once NCLT is satisfied that the default has occurred, there is hardly a discretion left with NCLT to refuse admission of the application u/s 7 of IBC. Default is defined under Section 3(12) of the IBC. Thus, even the non-payment of a part of debt when it becomes due and payable will amount to default on the part of a CD. In such a case, an order of admission u/s 7 of the IBC must follow. If the NCLT finds that there is a debt, but it has not become due and payable, the application u/s 7 can be rejected. Otherwise, there is no ground available to reject the application.
- Reliance was placed on the decision in the case of ***Vidarbha Industries and in particular a review petition was filed by the Axis Bank Limited*** seeking a review of the decision of ***Vidarbha Industries*** on the ground that the attention of the Court was not invited to the case of ***E.S. Krishnamurthy***. While disposing of review petition by Order dated 22 September, 2022, reported SC held thus:

*“The elucidation in paragraph 90 and other paragraphs were made in the context of the case at hand. It is well*

*settled that judgments and observations in judgments are not to be read as provisions of statute. Judicial utterances and/or pronouncements are in the setting of the facts of a particular case.*

*To interpret words and provisions of a statute, it may become necessary for the Judges to embark upon lengthy discussions. The words of Judges interpreting statutes are not to be interpreted as statutes.”*

- Thus, it was clarified by the order in review that the decision in the case of ***Vidarbha Industries*** was in the setting of facts of the case before SC. Hence, the decision in the case of ***Vidarbha Industries*** cannot be read and understood as taking a view which is contrary to the view taken in the cases of ***Innoventive Industries and E.S. Krishnamurthy***. The view taken in the case of ***Innoventive Industries*** currently also holds good.
- There were many guarantees issued by the bank. The interim order of the Telangana High Court does not relate to all bank guarantees. Moreover, there is no finding recorded in the interim order that the CD was not liable to pay the dues. The interim order only prevents coercive action against the CD.
- Even if NCLT has the power to reject the application u/s 7 if there were no good reasons to do so, in the facts of the case, the conduct of the appellant is such that no such good reason existed based on which NCLT could have denied admission of the application u/s 7 of the IBC.
- Hence, the application was dismissed.

