

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

ORDER SHEET OF THE HEARING ON 2nd July, 2024, 10:30 A.M.

**IA (IBC)/11/GB/2022
IA (IBC)/17/GB/2022
In CP (IB)/3/GB/2020**

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

In the Matter of	Kamal Agarwal, RP Vs Gautam Saha, 2. Abhijit Dutta 3. Potential Coaching Institute Pvt. Ltd.
Under Section	U/s 9 of IBC, 2016

For Petitioner (s) : Mr. K. Agarwal, RP in person

For Respondent (s) : Mr. B. Sharma, Adv.

ORDER

Order pronounced in the open court *vide* separate sheets.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
H.V. Subba Rao
Member (Judicial)

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IA (IBC)/11/GB/2022

In CP (IB)/3/GB/2020

In the matter of:

An Application under Section 43 of the Insolvency and Bankruptcy Code, 2016;

-And-

In the matter of:

An Application under Rule 11 of the NCLT Rules, 2016;

-And-

In the matter of:

Kamal Agarwal, Resolution Professional for M/s Concept Eduventures Private Limited (Corporate Debtor)] having address at 487/27 School Road, Near Peergarhi Metro Station, New Delhi-110087; **...Applicant**

-Versus-

Gautam Saha, Suspended Director of the Corporate Debtor having address 1002, Shubham Heights Kahilipara, Guwahati, Assam- 781019; **...Respondent No. 1**

-And-

Abhijit Dutta, Suspended Director of the Corporate Debtor having address Flat No/ A2, Block B3, City Heart Apartment Borasevice, GS Road, Guwahati- 781007;

...Respondent No. 2

-And-

Potential Coaching Institute Private Limited, Partner of the Corporate Debtor having address House No. 160, 4th Floor, Rajgarh Road, Lachit Nagar, Guwahati, Assam- 781007;

...Respondent No. 3

-And-

Bijoy OM & Associates, Transaction Auditor having address at House No. 26, Professor para, 2nd Floor, H.S. Road, Chatribari, Guwahati-781008. **...Respondent No. 4**

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Coram:

Shri H. V. Subba Rao : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing):

For Petitioner : Mr. K. Agarwal, RP
For Respondent : Mr. B. Sharma, Mr. M. Jain (Advs.)

Order pronounced on: 02.07.2024

ORDER

1. This Interlocutory Application i.e., IA (IBC)/11/GB/2022 has been filed under Section 43 of the Insolvency and Bankruptcy Code, 2016 read with rule 11 of the NCLT rules, 2016 praying for the following relief -
 - a. *Pass an order requiring the Respondent No 1 (Gautam Saha) to pay Rs. 36,87,164/- (Rs. Thirty-Six Lakhs Eighty-Seven Thousands One Hundred and Sixty Four) back in the account of the Corporate Debtor;*
 - b. *Pass an order requiring the Respondent No 2 (Abhijit Dutta) to pay Rs. 21,15,500/- (Rs. Twenty One Lakhs Fifteen Thousands Five hundred) back in the account of the Corporate Debtor;*
 - c. *Pass an order on the preferential transactions identified by the Respondent No 4 (Transaction Auditor) as this Tribunal may deem fit and proper.*
2. The relevant submissions of the Applicant made *vide* their Petition, Rejoinder and Written Notes are extracted hereunder:
 - 2.1 This Tribunal *vide* order dated 09.12.2020, allowed the application bearing IA(IBC)/64/GB/2020 in CP(IB)/3/GB/2020, for the appointment of the Applicant, Mr. Kamal Agarwal as the RP of the Corporate Debtor replacing Mr. Amit Pareek, IRP.

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2.2 The suspended directors failed to provide all the information as was required by the Resolution Professional including the consolidated Tally Data for 31.03.2019 and up to the Insolvency Commencement Date and therefore an application under Section 19(2) of the Code was also filed *vide* IA 40 of 2021. Based upon the limited information provided by the suspended directors, the transaction auditor has prepared and submitted his report and identified preferential transactions to the tune of Rs 80,17,701/-. The Transaction Auditor in his reports has identified the following transaction to be preferential which is detailed in observation no 32, 34, 35, 36, 37, 38, 39 and 4A and is listed below : -

Observation No.	Nature of Transaction	Amount involved
32	Share of Loss of the corporate debtor in Potential & Concept Educations for F/Y 2018- 2019	7,31,579/-
34	Amount paid by Potential & Concept Educations to Abhijit Dutta (Respondent no 2)	10,58,132/-
35	Amount paid by Potential & Concept Educations to Gautam Saha (Respondent no 1)	14,60,413/-
36	Amount paid by Potential & Concept Educations to Champalal Bothra (landlord of Bongaigaon Centre)	9,72,000/-

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37	Amount paid by Potential & Concept Educations to Ms Sayera/ Sayena Islam (landlord of Christian Basti Centre)	11,31,300/-
38	Amount paid by Potential & Concept Educations to M/s Sukchaya (landlord of Maligaon Centre)	18,63,277 /-
39	Amount paid by Potential & Concept Educations to Mr. Netai Prasad Mazumdar & Ms Shobhana Mazumdar (joint landlord of Silchar Centre)	2,16,000/-
40	Amount paid by Potential & Concept Educations to M/s Rotary Club (landlord of Shivsagar Centre)	5,85,000/-
		80,17,701/ -
(Rs Eighty Lakh Seventeen Thousands Seven Hundred and One)		

- 2.3 The Applicant sought clarifications from the Respondent no. 4 regarding how the above-listed transactions are preferential in nature and covered within the purview of section 43 of the Code, *vide* e-mail dated 17.01.2022. However, no reply has been received from the transaction auditor till date and hence, he was also made a party to this matter.
- 2.4 The Applicant has identified the following transactions amounting to Rs. 58,02,664 (Fifty-Eight Lakh Two Thousand Six Hundred and Sixty-Four) to be preferential within the meaning of section 43 of the Code -

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Sl. No.	Nature of Transaction	Amount Involved	Look Back Period
1	Amount paid to Respondent no. 1 (Gautam Saha) from 27.12.2018 to 26.02.2020 (Related Party of the Corporate Debtor)	25,24,200/ -	Two Years Preceding the Insolvency Commencement date
2	Amount paid to Respondent no. 2 (Abhijit Dutta) from 27.02.2018 to 26.02.2020. (Related Party of the Corporate Debtor)	11,00,000/ -	Two Years Preceding the Insolvency Commencement date
3	Amount paid by corporate debtor to Respondent no. 1 from the account of partnership firm "Potential & Concept Educations" from 01.02.2019 till 17.09.2019	11,62,964/ -	Two Years Preceding the Insolvency Commencement date
4	Amount paid by the corporate debtor to Respondent no. 2 from the account of partnership firm "Potential & Concept Educations" from 01.02.2019 till 17.09.2019	10,15,500/ -	Two Years Preceding the Insolvency Commencement date
	Total	58,02,664/ -	
Rs. Fifty-Eight Lakh Two Thousand Six Hundred and Sixty Four			

2.5 Out of 58,02,664/- the respondent no. 1 is beneficiary of Rs 36,87,164/- (Rs. Thirty-Six Lakh Eighty Seven Thousands One Hundred and Sixty Four) and

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the respondent no 2 is beneficiary of Rs 21,15,500/- (Rs Twenty One Lakh Fifteen Thousand and Five Hundred). The same is supported by the ledger accounts prepared from the bank statements obtained by the applicant.

- 2.6 Respondent no. 1 and 2 are also the surety/ guarantor for loans advanced to the Corporate Debtor and are the shareholders of the Corporate Debtor holding 50% Equity Shares (4000 equity shares) each in the Respondent corporate debtor.
 - 2.7 The abovementioned transfer of funds as detailed has the effect of putting the beneficiaries in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53.
 - 2.8 Originally, under the Deed of Partnership dated 01.02.2019, the partnership firm "Potential and Concept Educations" was constituted with the Corporate Debtor and the Respondent no. 3, Potential Coaching Institute Private Limited, as its partner with 50% share each. The Partnership stood reconstituted *vide* deed of agreement dated 19.09.2019, whereby, the Corporate Debtor is retired from the partnership and the spouses of the suspended directors are made partners.
 - 2.9 Respondent no. 3 was made a party to the present application as it is the partner of the Corporate Debtor and may assist this Tribunal by providing the Tally data or any other software in which the accounts of the partnership firm "Potential & Concept Educations" are maintained since its inception (*i.e.*, 01.02.2019) along with audited financials from 01.04.2019 onwards.
 - 2.10 The timelines under Regulation 35A of CIRP Regulations 2016 are only directory in nature and cannot benefit the wrong doer as has been clarified by Hon'ble NCLAT in *CA(AT) INS no 583 of 2021* in the matter of *Aditya Kumar Tibrewal* as well as Hon'ble Delhi High Court in *LPA 7/2021* in the matter of *Tata Steel BSL Ltd. v. Venus Recruiters Pvt Ltd.*
3. Respondent No. 1 and 2 *vide* their reply and written submissions have contended that:

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- 3.1 In the instant case, insolvency commencement date is 26.02.2020. As per Regulation 35A of CIRP Regulations, 2016, the Applicant was required to form an opinion regarding the impugned transactions purportedly covered under Section 43 of the Code on or before 75th day from the insolvency commencement date, and to make the requisite determination on or before 115th day from the insolvency commencement date. Furthermore, the instant application for appropriate reliefs should have been filed on or before the 135th day of the insolvency commencement date. The Applicant has failed to adhere with the said timelines and also failed to show reasonable cause for such delay.
- 3.2 There is lack of determination by the Applicant and he has concluded that the Corporate Debtor had entered into certain prohibited transactions under the Code without independently applying his mind only based on the findings of the transaction auditor. Moreover, he has also shown through his submissions that upon being dissatisfied with the transaction auditor's findings, he made an unsuccessful attempt to seek clarification.
- 3.3 The Applicant has failed to provide any material documents to substantiate his contentions with regards to the transaction being preferential. Infact, he has only submitted a ledger account prepared by himself and failed to produce any bank statement from which he collected the transactions. The Ex-RP was also unsuccessful in disclosing the manner in which alleged transactions were identified as preferential. Furthermore, transaction no.3 and 4 so identified by the applicant originate from the account of Respondent No. 3, who is not the CD and against whom there is no prayer.
- 3.4 The transactions mentioned as preferential transactions were the transactions done in the ordinary course of business and have also been previously intimated the same to the Applicant that the said transactions were against the teaching services provided by Respondent No. 1 and 2. The amount was drawn as the salary of a teacher of Potential and Coaching Education Institution and not as the partner of the said firm.

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- 3.5 The Applicant, lacks the authority to file this application on preferential transactions, and has done so after the conclusion of CIRP without showing or seeking leave from this Tribunal. In the Resolution application, there is no authorization for him to file this application. Despite this, he misled the Tribunal by claiming to have been authorized to do so. Therefore, without proper authorization, this application is deemed illegal.
4. Relevant submissions made by Respondent No. 3 *vide* reply dated 04.05.2023 are extracted hereunder:
- 4.1 There is non-adherence of timelines laid down under Regulation 35A of CIRP Regulations, 2016. Further, the allegations of impugned transactions being preferential are *void ab initio*. The Respondent has provided all the necessary information in hand.
- 4.2 The Potential and Concept Education is not in surviving Partnership Firm along with suspended Directors at present and that the answering respondent has already provided with whatever documents available with the answering respondent to the Resolution Professional
5. Written submission *dated* 16.03.2023 filed by Respondent No. 4 was taken on record and thereby, Respondent No. 4 was released on 11.05.2023.
6. Heard both sides and perused the material available on record. To entertain this application the two main issues which needs to be dealt with on the face of it by this Tribunal are, firstly, whether the application is barred by period of limitation as prescribed under Regulation 35A of the CIRP Regulations and secondly, whether the ex-RP has the locus to file/continue with the said application under Section 43 at hand, even after the approval of Resolution Plan by the Tribunal or taking over of CD by SRA. With regards to the first issue, this Bench, while following the settled law of Regulation 35A of CIRP Regulations only being directory and not mandatory in nature, holds that this application is not barred by limitation. Secondly, this Bench finds that the locus to file/continue with the said application is being derived by the Applicant from the Order passed by this Tribunal dated 24.03.2022 approving the

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Resolution Plan [IA(IBC)/61/GB/2021 in CP(IB)/03/GB/2020], wherein it was clearly laid down by this Tribunal that the IAs in CP(IB)/03/GB/2020 not disposed off alongwith IA(IBC)/61/GB/2021, were to be decided separately and any amount, if recovered on the account of the two IAs so mentioned in the Order dated 24.03.2022 therein, namely, the present IA, IA (IBC)/11/GB/2022 and IA(IBC)/17/GB/2022 (Section 66) shall be used to pay the Employees /Faculties and so on as per the Sec 53 of IBC only after the payment of fees of the RP of Rs 50,000.00 p. m. as neither is there any further amount that is to be paid to the FC nor are there any workers. Hence, in light of the two aforementioned *prima facie* issues out of the way, this Bench is thereby proceeding to examine the Section 43 application on merits.

7. Hon'ble Supreme Court in ***Anuj Jain (RP) v. Axis Bank Limited & Ors. Civil Appeal Nos. 8512-8527 of 2019*** has extensively discussed preferential transactions and devised a step by step process for recognition of preferential transactions:

“ 19.5 Thus, the net concentrate of Section 43 is that if a transaction entered into by a corporate debtor is not falling in either of the exceptions provided by sub-section (3) and satisfies the three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so.

20. The analysis foregoing leads to the position that in order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case:

- (i). As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?*
- (ii). As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?*
- (iii) As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53?*

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(iv). If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period 73 of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?

(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

21. Having taken note of the salient features of Section 43 of the Code and the questions germane for its applicability over any transaction, we may now examine the questions calling for determination in these appeals. Obviously, if the transactions in question are to fall squarely within the mischief of Section 43, they must satisfy all the specifications and ingredients of sub-sections (2) and (4) of Section 43 and ought not to be within the exclusion provided in subsection (3) thereof. ...

...Even when all the requirements of sub-section (2) of Section 43 of the Code are satisfied, in order to fall within the mischief sought to be remedied by Section 43, the questioned preference ought to have been given at a relevant time. In other words, for a preference to become an avoidable one, it ought to have been given within the period specified in sub-section (4) of Section 43. The extent of 'relevant time' is different with reference to the relationship of the beneficiary with the corporate debtor inasmuch as, for the persons falling within the expression 'related party' within the meaning of Section 5 (24) of the 80 Code, such period is of two years before the insolvency commencement date whereas it is one year in relation to the person other than a related party."

8. Be that as it may, upon going through the records available and submissions made by Ex-RP in the present application, this Bench fails to find any merits in the Application. Although, enumeration of specific transactions made by the Ex-RP acts as sufficient proof of "firm determination" so made by him, however, the Ex-RP has been unsuccessful in showcasing the transactions referred to by him, as preferential by way of tangible and appreciable evidence. Moreover, the transactions identified by the Ex-

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RP as preferential may either have been salaries drawn by the Suspended Directors or are transactions that have taken place not by the CD but by one Partnership Firm, Potential and Concept Educations, the tally data or account details of which are unavailable with this Tribunal owing to the firm being a separate entity from the CD altogether. Furthermore, the burden of proof for proving avoidance transactions lies on the Applicant and in the present case, Ex-RP himself has been deficient in demonstrating the transactions in question as preferential, leaving a doubt in the mind of this Bench with regards to the preferential nature of the transactions in question. Therefore, in view of lack of concrete evidence with respect to the impugned transactions being preferential under Section 43, IBC, 2016, this Tribunal holds this application devoid of merits.

9. Hence, for the aforesaid reasons, we are of the considered opinion that there is no merit in the instant application and the same deserves to be rejected. Accordingly, IA (IBC)/11/GB/2022 stands **dismissed**.
10. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
11. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
12. File be consigned to records.

Sd/-

**Satya Ranjan Prasad
Member (Technical)**

Sd/-

**H.V. Subba Rao
Member (Judicial)**

Signed this on 2nd day of July, 2024