

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

Rule 11 of NCLT Rules, 2016

IA 1270 OF 2020

IN

CP (I&B) No. 1387 OF 2017

Mr. Anish Niranjan Nanavaty

Resolution Professional of Reliance
Communications Limited

...Applicant

Vs.

Kunjbihari Developers Private Limited

...Respondent

In the matter of

Company Petition No. 1387 of 2017,

Under Section 43 of the Insolvency and

Bankruptcy Code, 2016

Ericsson India Private Limited

...Operational Creditor

Vs.

Reliance Communication Limited

... Corporate Debtor

Order delivered on: 24.07.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

Appearances:

For the Applicant/RP : Adv. Kriti Kalyani i/b Adv. Shardul
Amarchand Mangaldas & Co.

For the Respondent : Adv. Bhavana S. Jaipuria a/w Adv. Paresh
Patkar

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Interlocutory Application IA 1269 of 2020 is filed in Company Petition CP No. 1387 of 2017 by the Mr. Anish Niranjana Nanavaty, Resolution Professional of Reliance Communications Limited in terms of Section 43 of the Insolvency and Bankruptcy Code, 2016 in the matter of M/s Reliance Communication Limited seeking following relief;
 - a) *That the Hon'ble Tribunal order and declare that the repayment of the unsecured loan made by the Corporate Debtor to the Respondent amounting to Rs. 71.43 crores, through multiple tranches between 15.05.2017 to 13.10.2017 constitute a preferential transaction under Section 43 of the Code;*
 - b) *That the Hon'ble Tribunal order and declare that the repayment of the unsecured loan made by the Corporate Debtor to the Respondent amounting to Rs. 71.43 crores,*

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

*through multiple tranches between I 15.05.2017 to
13.10.2017 as being null and void and set aside the same;*

*c) That the Hon'ble Tribunal order and direct the
Respondent herein to refund to the Corporate Debtor, the
amount of Rs. 71.43 crores received by it as repayment of
an unsecured loan by the Corporate Debtor;*

*d) Any other relief, including under Section 44 of the Code,
that this Hon'ble Tribunal may deem fit.*

2. The present Application is being filed in view of the fact that the Applicant has observed that prior to the commencement of the corporate insolvency resolution process (“CIRP”), the Corporate Debtor repaid to the Respondent, an unsecured loan amounting to Rs. 71.43 crores, which was granted to it by the Respondent herein in the form of an inter-corporate deposit. Thus, the said payments of Rs. 71.43 crores made by the Corporate Debtor to the Respondent, being the Impugned Transaction, is liable to be set aside by this Hon’ble Tribunal.
3. The Applicant had appointed auditors, Grant Thornton India LLP (“Auditors”), in order to ascertain if the Corporate Debtor had entered into transactions which could be classified as, inter alia, preferential, undervalued, extortionate and fraudulent. The Auditors by way of their interim report dated 9 th January, 2020, which formed part of the final report dated 10th January, 2020 (“Auditor’s Report”) have identified that the repayments made by the Corporate Debtor towards the unsecured loan taken by it from the Respondent, amounting to Rs. 71.43 crores, would constitute a preferential transaction under the Code.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

4. In 2017, the Corporate Debtor availed of an unsecured loan in the form of intercorporate deposits of Rs. 71.43 crores from the Respondent by entering into 1 the loan agreements dated 7th March, 2017, 24th March, 2017, 5th April, 2017, and 10th April, 2017 at an interest rate of 13%. During the period of 15th May, 2017 to 13th October, 2017, in multiple tranches, the Corporate Debtor repaid an amount of Rs. 71.43 crores to the Respondent under the said loan agreements, in priority to its secured lenders. By virtue of the Impugned Transaction, the Corporate Debtor has made repayments of unsecured loans in priority to secured lenders.
5. The repayments towards the unsecured loan as aforesaid have the effect of putting the Respondent in a beneficial position vis-à-vis the other creditors of the Corporate Debtor by making repayments to it in preference to the secured creditors.
6. Thus, it puts the Respondent in a beneficial position than it would have been in the event of distribution of assets under liquidation of the Corporate Debtor in accordance with Section 53 of the Code.
7. The payments constituting the Impugned Transaction were not in the ordinary course of business of the Corporate Debtor considering (i) that the loan taken from the Respondent was unsecured in nature; (ii) non-payment to other secured or unsecured lenders and financial creditors; and (iii) no approvals being obtained from the consortium of lenders prior to making the aforesaid payments. Moreover, the Auditors have also reviewed the minutes of the meetings of the Audit Committee

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

meetings, the Board meetings and the Joint Lenders Forum (“JLF”) meetings for the review period, i.e. 15.05.2016 to 15.05.2018, however, no discussions / approvals on the repayment of the unsecured loan by the Corporate Debtor to the Respondent were found.

8. The Applicant has analysed the Impugned Transaction and has determined that the same would tantamount to a preferential transaction under Section 43 of the Code. Further, the Impugned Transaction has been analysed / reviewed by the Auditors and even they have concluded that the said repayment of the unsecured loan is a preferential transaction under Section 43 of the Code.
9. It is submitted that the Impugned Transaction constitutes a preferential transaction and the Respondent herein ought to be directed to refund all the monies received by it under the said Impugned Transaction, amounting to Rs. 71.43 crores.
10. The Respondent has filed reply dated 19.6.2023 stating that
 - a. Applicant has failed to independently opine that the said transactions are preferential in nature. The Applicant alleges that the said transactions are not in the ordinary course of business as GT has allegedly not found any discussions/ approvals with regard to the said transactions in the Minutes of the Board Meeting, Audit Committee Meeting and Joint Lenders Forum Meeting of the Corporate Debtor. Nowhere does the Applicant state that he has independently scrutinized the record to determine if any such discussions/ approvals were undertaken. The Respondent is not a group company of the Corporate Debtor. The Applicant has not given any reason or explanation whatsoever for concluding that that the response of the

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

management of the Corporate Debtor does not appear to be satisfactory.

- b. The purported Reports of GT are unreliable. Only portions of the purported Reports have been selectively produced by the Applicant which do not disclose the terms of reference to GT, the information and data shown to/ analyzed (if any) by GT. the purported Reports as produced do not disclose the basis of GT's purported assessment that the said transactions are preferential - for instance, GT's Report observes that the said transactions "appear to be a preferential transaction". GT has not considered whether the said transactions were in the ordinary course of business/ financial affairs.
- c. The said transactions were made in the ordinary course of business, hence is saved by the exception contained in Section 43(3) of the Code. In 2017, the Corporate Debtor was in requirement of funds for bona fide business purposes. Having regard to the same, various inter corporate deposit aggregating to Rs. 580 crores approx. (vide four loan agreement dated 7.3.2017, 24.3.2017, 5.4.2017 and 10.4.2017) were made by the Respondent with the Corporate Debtor for the different period as set out in the application. Besides this another sum of Rs. 7.97 crores was lent under two loan agreement dated 17.6.2017 and 27.7.2017. The deposit was made pursuant to duly executed document and carried an interest of 13% p.a. The deposit document was contemporaneously disclosed to Respondent's Auditors and the deposit was duly reflected in its financial statements. The said transactions were made in part repayment of the deposit as per the deposit document and in discharge of the Corporate Debtor's obligations. The amounts were paid in multiple tranches. The deposit and the said transactions between the Corporate Debtor and Respondent were on an arms length basis. Further, at the time the said transactions were made, the Corporate Debtor had not been

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

declared a non-performing asset. In fact, fair amount of sums (approx.. Rs. 24 crores) of the Respondent under the deposits remain to be paid by the Corporate Debtor as on date of commencement of CIRP.

11. Heard the learned counsel and perused the material available on record.
12. Section 43 of the Code deals with preferential transactions at relevant time. Section 43 of the Code is as follows:

“43 : Preferential transactions and relevant time.-

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in subsection (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—
(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers —

- (a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;*
- (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—*

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation.—For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.”

13. The Hon’ble NCLAT in the case of ***GVR Consulting Services Limited vs. Pooja Bahry 2023 SCC Online NCLAT 220*** at para 23 states that “*There is no need to prove any fraudulent intent for a preferential transaction. When we look into the scheme of Section 43 of the Code, sub-section (2), a clear statutory provision is that a corporate debtor shall be deemed to have given a preference if conditions as mentioned in*

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

paragraph 'a' and 'b' are fulfilled. When a provision provides for deeming fiction, 'deeming fiction' come into play on fulfilment of the requirement even if in fact it may not be so. In sub-section (3) of Section 43, certain exception has been provided. Thus those transactions which fall as exception under Sub-Section (3) can be taken out of sub-section 2 of Section 43, rest shall be covered by deeming fiction".

14. In the present case, the Corporate Debtor owed money to the Respondents prior to commencement of Insolvency resolution date and had paid some money towards repayment of such debt within the look back period of one years. It is not in dispute that the certain monies were paid to the Respondents towards antecedent debt and the Respondents were put in beneficial position in what they would have been in case such amounts were to be distributed in accordance with Section 53 of the Code. Accordingly, the transaction in question satisfies the basic ingredients contained in section 43(2) & (4). Hence, the transaction in question, to the extent it falls within the look back period of one year, is a preferential transaction.
15. The section 43(3) of the Code provides certain exceptions, whereby even a transaction falling within the mischief of Section 43(2) read with Section 43(4) of the Code are excluded from the scope of section 43 calling for orders u/s 44 of the Code. The Respondents have pleaded that the said transaction was carried out in Ordinary Course of business. The Respondent is a company engaged into business of development of commercial properties and is authorised to lend money not immediately required by it for its business. The Corporate Debtor is engaged in provision of cellular mobile telephony services and borrows the money for the purpose of its business to meet its short term and long term financial requirements. The question whether the transaction should be in ordinary course of business of either of party or it has to be in ordinary course of business of both the parties was decided by Hon'ble Supreme

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

Court in case of *Anuj Jain (IRB for Jaypee Infratech Ltd.) Vs. Axis Bank Ltd. reported at 2020 SCC Online SC 237* in the following words

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“Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, we have no hesitation in accepting the submissions made on behalf of the appellants that the said contents of clause (a) of sub-section (3) of Section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives. Therefore, the expression “or”, appearing as disjunctive between the expressions “corporate debtor” and “transferee”, ought to be read as “and”; so as to be conjunctive of the two expressions i.e., “corporate debtor” and “transferee”. Thus read, clause (a) of sub-section (3) of Section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of “or” as “and”, it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities.”

16. In the case of Anuj Jain (Supra), the Hon’ble Supreme Court further held that

28.2.2.... In other words, the whole of conspectus of sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of Section 43.

17. The Respondent has pleaded that the impugned transaction was made in discharge of Corporate Debtor's obligations and the at the time of undertaking repayment of part loan, the Corporate Debtor was not classified as NPA by any of its lenders. Further, a sum of Rs. 24 crores approx. is still due from the Corporate Debtor. The Respondent is a company engaged in the business of development of commercial properties and is authorised to invest and deal with moneys of the Company not immediately required in any manner in furtherance of its business of generation of power in terms of clause B(9) & B(10) of its Memorandum of Association. The Respondent is stated to have lent money repayable on demand, which was otherwise not immediately required by it. The money was lent between 7.3.2017 to 27.7.2017 under various term sheets and during 15.5.2017 to 31.10.2017, a sum of Rs. 71.43 crores was repaid to it in multiple tranches. This leads to the conclusion that the money was lent for short term period to deal with short term requirement of corporate debtor and was started to be paid back within short span. Further, there were back and forth lending repayment transactions. This clearly suggests that the repayment of the loan by the Applicant to the Respondent took place is in Ordinary Course of business of the Respondent. Now the question is whether the impugned transaction can be said to be in ordinary course of business of the Corporate Debtor so as to satisfy the test laid down in section 43(3) for exclusion from rigors of section 43 of the Code and as interpreted in Anuj Jain's case (Supra).
18. In the present case, the Corporate Debtor is cellular service provider and treasury management involving allocation of funds to the business need,

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

lender's repayment, investment opportunities is one of important function of its financial affairs. The Corporate Debtor borrowed from the Respondents to meet its financial requirements for its business. It is not the case of the applicant that the borrowings from the Respondent were for a purpose other than the business of the Corporate Debtor. Ordinarily, every borrower makes sure that the amounts borrowed are paid as and when it becomes due or with least delay. The loans taken from Respondents are stated to be paid in multiple tranches of odd amounts and the loan was repayable on demand. The Applicant has pleaded that the repayment of the inter corporate deposits, without a demand being raised by the Respondent, could not be said to be in Ordinary Course of business from Corporate Debtor's perspective, since Rcom was placed in NPA category, and was delaying / not repaying the loans owed to other financial creditors, during this period. However, we note that the account of the Corporate Debtor is stated to be classified as NPA on 26.08.2016 as noted in para 28 of the order dated 15.05.2018 passed by this Tribunal admitting the Corporate Debtor in CIRP and the loan was taken from the Respondent after classification of loan account as NPA by its financial creditors and the same was repaid within short span. The sanction letter does not stipulate that the demand for repayment of the loan is to be made in writing, hence, we do not find any substance in the submission that the loan amount had not fallen due for repayment. Hence, we are of considered view that such repayment of loan was in Ordinary Course of financial affairs of the Corporate Debtor as well. Since, the impugned transaction was in Ordinary Course of financial affairs of Corporate Debtor and the Respondent, we are of considered view that it squarely falls within the exception provided in Section 43(3) of the Code.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

**IA 1270 OF 2020
IN
CP (I&B) No. 1387 OF 2017**

19. In view of the above, **IA 1270/2020** is **dismissed** and **disposed of** accordingly.

**Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)**

**Sd/-
JUSTICE VIRENDRASINGH BISHT
MEMBER (JUDICIAL)**