

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

Rule 11 of NCLT Rules, 2016

**IA 1800 OF 2020
IN
CP (I&B) No. 3568 OF 2019**

Mr. Dharit Kishorbhai Shah

...Applicant

Vs.

Mr. Vijay S Dandnaik (Erstwhile Director) and
Ors.

...Respondents

In the matter of

Company Petition No. 3568 of 2019, Under
Section 7 of Insolvency and Bankruptcy Code,
2016

Punjab National Bank

...Financial Creditor

Vs.

M/s Jailaxmi Sugar Products (Nitali) Pvt. Ltd.

... Corporate Debtor

Order delivered on: 10.07.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant/RP : Adv. Amey Hadwale

For the Respondent No. 3 : Adv. Chahat Modi

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ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Application IA 1800 of 2020 is filed in Petition CP No. 3568 of 2019 by the Mr. Dharit Kishorbhai Shah, the Resolution Professional in terms of Section 43 of the Insolvency and Bankruptcy Code, 2016 in the matter of M/s Jailaxmi Sugar Products (Nitali) Pvt. Ltd. seeking following relief;
 - a) *Consider and allow the instant Interlocutory Application in terms of Section 43 and 44 of IBC, 2016.*
 - b) *Direct Respondent No. 1 to pay an amount of Rs. 7,27,30,000/- (Rupees Seven Crore Twenty-Seven Lakhs Thirty Thousand Only) along with any rate of interest as deemed fit by this Hon'ble Tribunal, to the bank account of the Corporate Debtor;*
 - c) *Direct Respondent No. 2 to pay an amount to the tune of Rs. 74,00,000/- (Seventy-Four Lakhs) along with any rate of interest as deemed fit by this Hon'ble Tribunal, to the bank account of the Corporate Debtor;*
 - d) *Direct Respondent No. 3 to pay an amount of an amount to the tune of Rs. 29,00,000/- (Twenty-Nine Lakhs Only) along with any rate of interest as deemed fit by this Hon'ble Tribunal, to the bank account of the Corporate Debtor;*
 - e) *Pass appropriate directions/orders/penalties against Respondent No. 1, 2 & 3 in terms of Section 44, 66 & 67 of the Code including for recovery/restoration of legitimate amounts due to the Corporate Debtor;*

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f) And for such other/further order(s) and/or direction(s) as the facts and circumstances of the case may warrant.

2. An Application filed under Section 7 of IBC, was admitted by the Hon'ble Tribunal vide order dated 06.11.2019 and Mr. Dharit Kishorbhai Shah, the Applicant herein, bearing registration number IBBI/IPA-001/IP-P00993/2017-2018/11640 was appointed as Interim Resolution Professional of the Corporate Debtor.
3. The Applicant is the Resolution Professional. The Respondent No. 1 is Sh. Vijay S Dandnaik, the erstwhile director of the Corporate Debtor. Respondent No. 2 is Mitsu Engineering Co.; Respondent No. 3 is Shimpoli Sugar Suppliers; and Respondent No. 4 is Mr. Rohitraj Dandnadik.
4. The Corporate Debtor was declared as NPA on 31.03.2013 and a notice u/s 13(2) of SARFAESI Act was issued by one of the secured financial creditor namely Punjab National Bank for a default amount of Rs. 36,94,24,987/-. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process vide Order dated 6.11.2019 in terms of Order passed by this Tribunal in an application u/s 7 of the Code.
5. It is submitted by the Applicant that based on the investigation conducted by the applicant, certain transactions were traced which seemingly triggered section 43, 44, 66 and 67 of the Code. Accordingly, in compliance of the Regulation 35A of CIRP Regulations, the applicant in the 3rd Meeting of the CoC dated 06.03.2020, formed an opinion that the Corporate Debtor is subjected to the transactions covered under Sections 43, 45, 50 or 66.
6. Below are the transactions where undue preference has been given by the Corporate Debtor to the unsecured creditors, triggering provisions of section 43 of the Code.
7. **Transactions No. 1** : During the scrutiny of records of the Corporate Debtor, the applicant has learnt that the Corporate Debtor has availed an

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unsecured loan of Rs. 37,80,20,117/- from Respondent No. 1, a related party, which has been reflecting and standing outstanding in the Balance sheet of the Corporate Debtor since year 2014-15 to 2016-17. It has been further noticed that the Corporate Debtor has paid an amount to the tune of Rs. 727.30 lakhs in lieu of repayment of the unsecured loan to Respondent No. 1 in the following manner :

Date	Amount paid (In Lakhs)	Mode	Recipient	Remarks
04.01.2019	225.50	Cash	Mr. Vijay S Dandnaik	
02.02.2019	100.00	Cash	Mr. Vijay S Dandnaik	
04.09.2019	2.00	Cash	Mr. Vijay S Dandnaik	
28.09.2019	0.80	Cash	Mr. Vijay S Dandnaik	
30.08.2019	399.00	Bank	Mr. Vijay S Dandnaik	*(Refer Note:1)
TOTAL	727.30			

8. **Transaction No. 2 & 3** : During the scrutiny of records of the Corporate Debtor, the applicant has learnt that the Corporate Debtor had procured materials from Respondent No. 2 & 3 to the tune of Rs. 2,17,90,949/- and Rs. 1,55,03,493/- respectively and these amounts were outstanding in the financial statement as on 31.03.2015. It is submitted that the Corporate Debtor has paid in amount to the tune of Rs. 74,00,000/- to Respondent No. 2 and Rs. 29,00,000/- to Respondent No. 3 in lieu of part payment of their outstanding Debt in the following manner:

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Amount paid to Respondent No. 2/ Mitsu Engineering Co

Date	Amount paid (In Lakhs)	Mode	Recipient	Remarks
04.01.2019	20.00	Cash	Mitsu Engineering Co	
12.07.2019	20.00	Cash	Mitsu Engineering Co	
18.09.2019	15.00	Cash	Mitsu Engineering Co	
29.08.2019	19.00	Routed through Respondent No. 4	Mr. Rohitraj Dandnaik	*(Refer Note: 2)
TOTAL	74.00			

***Note 2:** Amount of Rs 20 Lakhs has been transferred on 29.08.2019 from the Bank account of the Corporate Debtor bearing A/c No. 917020061579294 maintained in Axis Bank Ltd Bank to Respondent No. 4, out of which Respondent no 4 claims to have transferred Rs 19 Lacs to Respondent no 2 in lieu of payment made by him to Respondent No. 2 on behalf of the Corporate Debtor. Transfer of Rs 20 Lakhs on 29.08.2019 can be corroborated from the bank account statement of the Corporate Debtor annexed herewith and marked as "Annexure H".



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Amount paid to Respondent No. 3/ Shimpoli Sugar Suppliers

Date	Amount paid	Mode	Recipient	Remarks
26.07.2019	2,00,000	Cash	Shimpoli Sugar Suppliers	
01.08.2019	3,00,000	Cash	Shimpoli Sugar Suppliers	
03.08.2019	4,00,000	Cash	Shimpoli Sugar Suppliers	
05.08.2019	2,00,000	Cash	Shimpoli Sugar Suppliers	
07.08.2019	3,00,000	Cash	Shimpoli Sugar Suppliers	
10.08.2019	3,00,000	Cash	Shimpoli Sugar Suppliers	
30.08.2019	2,00,000	Routed through Respondent No. 4	Mr. Rohitraj Dandnaik	*(Refer Note: 3)
01.09.2019	3,00,000	Routed through Respondent No. 4	Mr. Rohitraj Dandnaik	*(Refer Note: 3)
03.09.2019	2,25,000	Cash	Shimpoli Sugar Suppliers	
05.09.2019	2,50,000	Cash	Shimpoli Sugar Suppliers	



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10.09.2019	1,25,000	Cash	Shimpoli Sugar Suppliers	
29.09.2019	1,00,000	Cash	Shimpoli Sugar Suppliers	
TOTAL	29,00,000/-			

***Note 3:** Amount of Rs 5,00,000 (Rs 2,00,000.00 and Rs 3,00,000) has been transferred on 30.08.2019 from the Bank account of the Corporate Debtor bearing A/c No. 917020061579294 maintained in Axis Bank Ltd Bank to Respondent No. 4 in lieu of payment made by him to Respondent No. 3 on behalf of the Corporate Debtor. Transfer of Rs 5,00,000 (Rs 2,00,000.00 and Rs 3,00,000) has been transferred on 30.08.2019 can be corroborated from the bank account statement of the Corporate Debtor (Refer Annexure H)

9. The Applicant states that without any iota of doubt it can be clearly made out that the Corporate Debtor has given undue preference to Respondent No. 1, 2 and 3.
10. Only Respondent No. 2 has filed its reply stating that it had supplied capital goods in the year 2012-13, which were used to set up factories for sugar production and such goods enabled the corporate debtor to carry out its day to day functioning. It initiated legal proceedings against the corporate debtor in CMM Court, Sewree, under Section 138 of Negotiable Instruments Act, 1881 pursuant to dishonour of five cheques in 2014, which were issued towards payment of its outstanding dues. It is also stated to have filed a Company Petition No. 614 of 2015 before Hon'ble Bombay High Court, seeking to wind up the Corporate Debtor and the Hon'ble Court vide its order dated 4.1.2018 observed that the Company is commercially insolvent and requires to be wound up. This led to Respondent No. 1 entering into a settlement agreement with it to settle its dues for a sum of Rs. 1.25 crores and the impugned payment was received in pursuance thereto. The Respondent No. 2 has

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emphasised that the applicant can recover the amount from the proceeds that can be obtained after selling these goods and pay the secured creditors. It is further submitted that the goods supplied were crucial in nature and were important for the corporate debtor to sustain the business hence the debt incurred against them will fall under current liability and not as an operational debt as mentioned by the applicant.

11. Heard the Learned Counsel and perused the material on record.
12. The Hon'ble Supreme Court in the case of *Anuj Jain IRP for Jaypee Infratech Limited vs. Axis Bank Limited* laid down following test to ascertain whether a transaction falls u/s 43 of the Code.
 - a. As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?
 - b. As to whether such transfer is for on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor?
 - c. 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?
 - d. 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 and two years if it is for the benefit of related party?
 - e. As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?
13. It is not in dispute that the payments to Respondent No. 1, 2 & 3 were made within the look back period; there existed an antecedent debt; and the payment was made to them in preference over other creditors. The fact that the Hon'ble Bombay High Court had observed that the Corporate Debtor has become insolvent, it certainly leads to the

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conclusion that such payment had put these Respondents in a beneficial position than they would have been in the event of distribution of assets being made in accordance with section 53.

14. We note that the Respondent No. 1, 2 & 3 were paid substantial amount in cash by the Corporate Debtor, which certainly can not be held to be in ordinary course of financial affairs of the Corporate Debtor, more importantly when the Corporate Debtor's loan account had already been classified as NPA by the lender banks. The payment in cash, itself, suggests that these payments came to be made to avoid flagging by the lenders. We further note that some payments were made to Respondent No. 2 & 3 by routing these payments through the account of Respondent No. 4, which is also an abnormal circumstance in which the payments have been made to Respondent No. 2 & 3. As regards payments to Respondent No. 1, these payments cannot be said to be in ordinary course of business so as to exclude it from the application of deeming fiction embodied in section 43 of the Code. The contention of Respondent No. 2 that its debt is in nature of current liability and not operational debt, is not a relevant consideration as the payments towards other liabilities is also covered under the mischief of section 43 of the Code. Further, the contention of Respondent no. 2 that the applicant could recover these amounts from sale of capital goods, sold by it and lying with the Corporate Debtor, is also not relevant in the case, as the debts owed to creditors are to be dealt with in accordance with the Resolution Plan or Section 53 of the Code, as the case may be. Accordingly, we are of considered view that the Corporate Debtor has given preference to Respondent No. 1, 2 & 3 in making part payments towards the debt owed to them and such preference has placed these Respondents in a beneficial position than they would have been in terms of distribution u/s 53 of the Code.

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15. We, therefore, direct Respondent No. 1, 2 & 3 to make payment of Rs. 7,27,30,000/-, Rs. 74,00,000/- and Rs. 29,00,000/- to the Corporate Debtor within 30 days from the date of communication of this Order. In case the payment so ordered or any part thereof is made beyond 30 days, the amount remaining unpaid upon expiry of 30 days shall carry interest @ 12% p.a. and the amount remaining unpaid shall be paid along with interest.
16. In view of the foregoing, **IA 1800 of 2020** is **allowed** and **disposed of** accordingly.

Sd/-

**PRABHAT KUMAR
MEMBER (TECHNICAL)**

Sd/-

**JUSTICE V.G. BISHT
MEMBER (JUDICIAL)**