

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

M.A. 2047 OF 2019

Under Section 43 & 44 r/w Section 60 (5)
of Insolvency & Bankruptcy Code, 2016

Mr. Ashish Arjunkumar Rathi

...Applicant

V/s

Ms. Sonam Gutte & 3 others

...Respondents

In the matter of

C.P.(IB) No. 2295/MB/2018

American Express Bank Corp.

.... Financial Creditor

Vs.

Sunil Hitech Engineers Limited

...Corporate Debtor

Order delivered on: 07.05.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Gaurav Jain, Advocate

For the Respondent Nos. 1 to 3 : Mr. Shadab Jain, Advocate

For the Respondent No. 4 : Mr. Nausher Kohli, Advocate

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This Application MA 2047/2019 is filed on 06.06.2019 by Mr. Ashish Arjunker Rathi, ("Applicant") in the Liquidation Proceedings ("Liquidation") in the matter of M/s Sunil High Tech Engineer Limited [In Liquidation] (Corporate Debtor) under Section 44 & 44 r/w Section 60(5) of The Insolvency and Bankruptcy Code, 2016 ("Code") seeking following reliefs:
 - a. Declare the preferential transaction involving the transfer of Rs. 70,00,000/- (Rupees Seventy Lakhs only) to Respondent No. 1 by the Corporate Debtor in terms of Section 43 of the Code as avoidance transaction and direct its reversal;
 - b. To issue necessary directions to Ms. Sonam Gutte, Respondent No. 1, to refund the said amount of Rs. 70,00,000/- (Rupees Seventy Lakhs only) paid to her by the Corporate Debtor; and
 - c. Alternatively, to issue necessary directions to Mr. Sunil Gutte, Respondent No. 3, to refund the said amount of Rs. 70,00,000/- (Rupees Seventy Lakhs only) to the Corporate Debtor;
 - d. To declare the preferential transaction involving the transfer of Rs. 91,98,000 to Respondent No. 2 by the Corporate Debtor in terms of Section 43 of the Code as avoidance transaction and direct its reversal;
 - e. To issue necessary directions to Respondent No. 2 to refund the said amount of Rs. 91,98,000/- (Rupees Ninety Lakhs Ninety Eight Thousands only) paid to him by the Corporate Debtor; and
 - f. To declare the preferential transaction involving the transfer of Rs. 91,98,000/- (Rupees Ninety Lakhs Ninety Eight Thousands only) to

- Respondent No. 3 by the Corporate Debtor in terms of Section 43 of the Code as avoidance transaction and direct its reversal;
- g. To issue necessary directions to Respondent No. 3 to refund the said amount of Rs. 91,98,000/- (Rupees Ninety Lakhs Ninety Eight Thousands only) paid to her by the Corporate Debtor;
 - h. To issue necessary directions to Mr. Ratnakar Gutte, Respondent No. 2, to refund the amount of Rs. 8,27,822/- (Rupees Eight Lakhs Twenty Seven Thousands Eight Hundreds Twenty Two only) paid to him by the Corporate Debtor;
 - i. Alternatively, to issue necessary directions to Mr. Sunil Gutte, Respondent No. 3, to refund the entire amount of Rs. 1,92,23,822/- (Rupees One Crore Ninety Two Lakhs Twenty Three Thousands Eight Hundreds and Twenty Two only) to the Corporate Debtor;
 - j. To pass such other directions under section 43 and/or 44 against the Respondents as the Hon'ble Tribunal may deem fit; and
 - k. To pass such other order(s) against the Respondents or in favour of the Applicant for the benefit of the Corporate Debtor as the Hon'ble Tribunal may deem fit and appropriate in the facts and circumstances of the case.
2. An application for initiation of the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor, i.e., Sunil Hitech Engineers Limited ("Corporate Debtor") was filed by American Express Banking Corporation, a financial creditor, under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code") read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The said application was admitted by the Tribunal, Mumbai Bench, Mumbai vide order dated 10.09.2018, ("CIRP Order"). Vide the CIRP Order, Mr. Harshad Shamkant Deshpande (having IP registration no. IBBI/IPA-001/IP-P00166/2017- 2018/10335) was appointed as the Interim Resolution Professional ("IRP").

Preferential Transaction I:

2.1. Based on the review of financial statements, information made available by the management of the Corporate Debtor and after obtaining management response on the transactions, the Applicant has noted that the Corporate Debtor had entered into the following transaction, which is in the nature of preferential transaction in terms of Section 43 of the Code:

Leave and Licence Agreement for obtaining on license basis bungalow premises from related parties

2.2. During the course of discharging his duties as the resolution professional of the Corporate Debtor, it has come to the knowledge of the Applicant that the Corporate Debtor has taken on leave and license basis, all piece and parcel of bungalow premises situated at Bungalow No. 35 admeasuring 2798 sq. fts. (build up) area consisting of ground plus one upper floor constructed on Plot No. 35 and all exclusive rights to use apparent area of Plot No. 35, admeasuring 4395 sq. fts. carpet area in the housing scheme carried out on the said larger land known as "Della Enclave Phase-II" situated at Village Kunenama, Taluka Maval, District Pune ("License Premises I"), for a period of 18 months commencing from 03.01.2018 and ending on 02.07.2019, from the Respondent No. 1 and one Ms. Swati Phad, Plot No. 1, Near MLA Hostel, Civil Lines, Nagpur - 440 001 (Respondent No.1 & Ms. Swati Phad are collectively referred to as "Transaction - I Licensors"), who are absolute owners and in possession of the Licensed Premises, in terms of an agreement of leave & license dated 03.01.2018 executed between Transaction I

Licensors and the Corporate Debtor (the Licensee) ("Transaction I Agreement").

2.3. As per the terms of the Transaction I Agreement, the monthly usage charges (including maintenance charges for fitting and fixtures and other accessories installed in the Licensed Premises I) of the Licensed Premises I was agreed in the form of a license fee of Rs. 5,00,000/- (Rupees Five Lakhs) ("Licensee Fee") per month. Further, an amount of Rs. 70,00,000/- (Rupees Seventy Lakhs only) ("Security Deposit") was also deposited by the Corporate Debtor with the Respondent No.1, vide bank transfers of Rs. 10,00,000/- (Rupees Ten Lakhs) on 14.12.2017 and Rs. 60,00,000/- (Rupees Sixty Lakhs) on 22.12.2017.

2.4. The Transaction I Agreement provides that that the Licensed Premises I shall be used for situation of the guest house only by the Corporate Debtor.

2.5. That, as per the Transaction I Agreement, it was decided and agreed between the parties that the License fee of Rs. 5,00,000/- (Rupees Five Lakhs Only) per month would be adjusted from the Security deposit of Rs. 70,00,000/- (Rupees Seventy Lakhs Only) paid by the Corporate Debtor.

2.6. That, the Transaction I Agreement also contained the lock in period clause, in terms of which the entire duration of the agreement, i.e., 18 months, was specified as the lock in period during which neither the licensors nor the licensee shall be entitled to terminate the agreement.

2.7. It is worthwhile to note that the Respondent No. 1 is the wife of Respondent No. 4 and Ms. Swati Phad is the sister of Respondent

No. 4. Hence, both Respondent No. 1 and Ms. Swati Phad are related Parties of the Corporate Debtor and the instant transaction of the License entered into between Transaction I Licensors and the Corporate Debtor is a related party transaction.

2.8. As per the Transaction I Agreement, Rs. 5,00,000/- of license fees per month was to be adjusted from the said Security Deposit and such adjustment was done during the CIR Period also. Since such payment of license fees was a related party payment it could not be carried out without the prior approval of the Committee of Creditors of the Corporate Debtor ("CoC") as required by Section 28(1)(f) of the Code. Accordingly, the Resolution Professional demanded the amount of license fees adjusted from the said Security Deposit during the CIRP period from the Respondent No. 1 vide his letter dated 15.03.2019.

2.9. Further, as required by Section 28(1)(f) of the Code, the proposal for the payment of Rs. 5,00,000/- (Rupees Five Lakhs only) for license fees to be paid to the Respondent No. 1 during the CIRP period was put up for voting by the CoC as discussed in its 7th meeting held on 15.04.2019. However, the CoC in the e-voting, which took place from 17.04.2019 at 07:30 p.m. to 22.04.2019 at 06:00 p.m. (the "Voting Period") did not approve the said payment.

2.10. That, the forensic auditor appointed by the Applicant, namely, N V Dand & Associates has, in its report, also indicated the abovementioned transaction. The forensic auditor has mentioned that it enquired about the said transaction with the officials of the Corporate Debtor and it has been brought to his notice that the Licensed Premises I was being used as a central guest house of the Corporate Debtor as it has many projects in Maharashtra and that

the License Premises I is strategically located for co-ordinating projects in Maharashtra. It was also used as employee recreation/ seminar point. On the basis of its analysis and the representation by the officials of the Corporate Debtor, the forensic auditor has opined that "the said leasing of the premises could have been avoided, in view of its locations and usage explained by the officials of the Corporate Debtor. Hence, the said transaction would qualify as a 'Preferential Transaction' for the purpose of Section 43 of the Code.

2.11. That, since the Transaction - I is with the related party, therefore in terms of Section 43 of the Code, the relevant look back period is 2 years preceding the CIRP commencement date of the Corporate Debtor. Therefore, in terms of Section 43, the total amount of the License Fees paid during the said period of 2 years to the Respondent No. 1, which amounts to Rs. 70,00,000/- is required to be refunded to the Corporate Debtor as the said amount has been transferred to the Respondent No. 1 as a preferential payment in terms of Section 43 of the Code, which is required to be returned to the Corporate Debtor by the Respondent No. 1 to meet the ends of the justice.

Preferential Transaction II:

2.12. Based on the review of financial statements, information made available by the management of the Corporate Debtor and after obtaining management response on the transactions, the Applicant has noted that the Corporate Debtor had entered into the following transaction, which is in the nature of preferential transaction in terms of Section 43 of the Code:

Leave and Licence Agreement for obtaining on license basis registered office space from related parties

- 2.13. During the course of discharging his duties as the resolution professional of the Corporate Debtor, it has come to the knowledge of the Applicant that the Corporate Debtor has taken on leave and license basis an area of 1070 sq. ft. of Flat No. 72, 7th Floor, Sagar Tarang, Plot No. 15A, Khan Abdul Gaffar Khan Road, Worli, Mumbai ("Licensed Premises II"), for a period of 15 years commencing from 01.04.2011, from the Respondent No. 2 and Respondent No. 3, who are absolute owners and in possession of the Licensed Premises II, in terms of an agreement of leave & license dated 01.04.2011 executed between Respondent No. 2 & 3 and the Corporate Debtor (the Licensee) ("Transaction II Agreement").
- 2.14. That, as per the terms of the Transaction II Agreement, the monthly usage rent for the Licensed Premises was agreed in the form of a license fee of Rs. 7,66,500/- (Rupees Seven Lakhs Sixty-Six Thousands Five Hundreds only) per month ("Licensee Fee") with Rs. 3,83,250/- (Rupees Three Lakhs Eighty Three Thousands Two Hundreds Fifty Only) each to be paid Respondent No. 2 and Respondent No. 3.
- 2.15. The Transaction II Agreement provides that that the Licensed Premises - II shall be used for residential/ guest house purposes by the Corporate Debtor. It was however given to understand to the Applicant that the Licensed Premises are being used as registered office since 2017.
- 2.16. It is worthwhile to note that the Respondent No. 2 is the father of Respondent No. 4 and Respondent No. 3 is the mother of Respondent No. 4. Hence, both Respondent No. 2 and Respondent No. 3 are related Parties of the Corporate Debtor

and the instant transaction of the License entered into the Corporate Debtor with Respondent No. 2 and Respondent No. 3 is a related party transaction.

- 2.17. Considering the review of the Transaction II Agreement, some of the relevant clauses of which are discussed above, it follows that firstly the Licensed Premises II were taken on license basis for use as residential/guest house purposes, however later on, i.e., since May 2017 the Licensed Premises are being used as the registered office of the Corporate Debtor. It is noted that the Corporate Debtor already has an office at 6th Floor, C wing, MET educational complex, Gen. A.K.Vaidya Marg, Bandra Reclamation, Bandra (W), Mumbai- 400050, it is imperative to note that the above mentioned address was initially the registered office of the Company but the same was changed to 72, floor-7, Plot-15A, Sagar Tarang CHS, Khan Abdul Gaffar Khan Marg, Worli Seaface, Worli Colony, Mumbai-400030 w.e.f. 12.05.2017, the said property is in the name of Respondent No. 2 and Respondent Nos. 3.
- 2.18. The said arrangement was devised to transfer funds to Respondent No. 2 and 3, which could have been made available for other creditors of the Corporate Debtor There was no rationale for keeping the registered office at a residential flat. Thus, the whole purpose of using the Licensed Premises II as the registered office was to transfer the funds from the Corporate Debtor to the Respondent No. 2 and Respondent No. 3 towards the dues/outstanding of the License Fees under the Transaction II Agreement. The impact of such transfer of funds by the Corporate Debtor towards its debt/dues under the Transaction II Agreement is that the Corporate Debtor has put the

Respondent No. 2 and Respondent No. 3 in a beneficial position versus the other creditors of the Corporate Debtor than such Respondents would have been if there would be a distribution of the assets of the Corporate Debtor in terms of Section 53 of the Code Basis the review of the Transaction II Agreement and considering the above facts, the Applicant is of the opinion that the present transaction of the transfer of funds by the Corporate Debtor to discharge the dues under the Transaction II Agreement is in the nature of preferential transaction in terms of Section 43 of the Code. Further, the said transaction being a related party transaction is within the lookback period of 2 years as specified in Section 43 of the Code.

- 2.19. That, the Applicant has also written a letter dated February 12, 2019 and March 30, 2019 to Respondent Nos. 2 to refund the amounts received by them under the Transaction II Agreement, however Respondent No.2 replied that the said payments were made by IRP.
- 2.20. That, the forensic auditor appointed by the Applicant, namely, N V Dand & Associates has, in its report, also indicated the abovementioned transaction. The forensic auditor has mentioned that it enquired about the said transaction with the officials of the Corporate Debtor and on the basis of its analysis and the representation by the officials of the Corporate Debtor, the forensic auditor has opined that "Based on the replies furnished by the company and on the perusal of the rent / lease agreements with the directors (owner of the said premises), we are of the opinion that the said premise was primarily purchased for residential use. Further, with the current financial status of the company having a separate registered office in the same city

requires review and hence the payment of rent lease transaction qualifies as Preferential transaction under section 43.

- 2.21. That, the transaction of the payment of rent towards the Licensed Premises II for use as registered office is a transaction with the related party, therefore the same could not be carried out without the prior approval of the Committee of Creditors of the Corporate Debtor ("CoC") as required by Section 28(1) (f) of the Code. It was however noted by the Applicant that a monthly rent of Rs. 4,13, 911/- (Rupees Four Lakhs Thirteen Thousands Nine Hundreds and Eleven only) has been paid to the Respondent No. 2 during the CIRP period for two months, i.e., September & October, 2018. This was brought to the notice of the CoC by the Applicant in its meeting held on 11.01.2019. The CoC deliberated in this regard and observed that since necessary approvals have not been sought for making the above payments, the RP in his capacity has the right to demand back the money from the above parties. The CoC also opined that no rent can be paid in this regard, and that if required, the RP may explore the option of changing the registered office of the Company to either to Nagpur office or the current Corporate Office.
- 2.22. That, further, as required by Section 28(1)(f) of the Code, the proposal for the payment of Rs. 4,13, 911/- (Rupees Four Lakhs Thirteen Thousands Nine Hundreds and Eleven only) for rent of Registered office to be paid to the Respondent No. 2 during the CIRP period was put up for voting by the CoC as discussed in its 5th meeting held on 11.01.2019. However, the CoC in the e-voting, which took place from 13.01.2019 at 07:00 p.m. to 15.01.2019 at 07:00 p.m. (the "Voting Period") did not approve the said payment.

- 2.23. That, since the Transaction - II is with the related party, therefore in terms of Section 43 of the Code, the relevant look back period is 2 years preceding the CIRP commencement date of the Corporate Debtor. Therefore, in terms of Section 43, the total amount of the License Fees paid during the said period of 2 years to the Respondent No. 2 & Respondent No. 3, which amounts to Rs. 1,83,96,000/- (Rupees One Crore Eighty Three Lakhs Ninety Six Thousand) is required to be refunded to the Corporate Debtor. Besides, a sum of Rs. 8,27,822/- (Rupees Eight Lakhs Twenty Seven Thousands Eight Hundreds Twenty Two only) being the amount of License Fees paid to the Respondent No. 2 during September and October 2018 is also required to be paid back to the Corporate Debtor since the same has not been approved by the CoC in terms of the aforementioned e- voting. Therefore, in aggregate a sum of Rs. 1,92,23,822/- (Rupees One Crores Ninety Two Lakhs Twenty Three thousand Eight Hundred and Twenty Two only.), has been transferred to the Respondent No. 2 and Respondent No. 3 as a preferential payment in terms of Section 43 of the Code, which is required to be returned to the Corporate Debtor by such Respondents to meet the ends of the justice.
3. Heard learned Counsel and perused the material on record.
- 3.1. Section 43 of the Code deals with preferential transactions and 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—

(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.”

3.2. 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 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”.*

3.3. From the perusal of definition of preferential transaction, we note that a transfer of property for on account of debt or liabilities is deemed as a preferential transaction if such transfer results into placing the beneficiary in a position better than what it would have been in case of distribution u/s 53 of the Code.

- 3.4. In the present cases, the Corporate Debtor stated to have provide its security deposits to the related party under leave and license agreements for use of their premises for the purpose of business of Corporate Debtor and such security deposits is adjusted against future monthly license fees payable by the Corporate Debtor under such leave and licence agreement. The Applicant has not made out any case that the property taking under license agreement were not actually occupied or used by the Corporate Debtor. The Applicant has filed this Application on the basis of question of proprietary and wisdom raised by the transaction auditor by reviewing both the leave and license agreement. There is no allegation by the transaction auditor also that these properties were not used by the Corporate Debtor or the license fees levelled under the license agreement was in access of fair value. The transaction auditor has opined that the said leasing of premises could have been provided.
- 3.5. We further note that, the payment of security deposit was not made on account of any antecedent debt. On the contrary, the Corporate Debtor had given the money as security deposit which had been adjusted against the license fees payable on month on month basis. Merely because suspended board had not disclosed this transaction in the audited financial statement, this transaction cannot be deemed to be a preferential transaction in the absence of meeting out basic conditions embodied in the said section.
- 3.6. The Applicant has also sought directions for refund of amount of Rs.8,27,822/- paid to Respondent No.2 by the Corporate Debtor towards 2 months license fees that i.e. September & October 2018 after the commencement of CIRP. It is stated that this amount could have been paid only with express approval of CoC being a related party transaction and CoC disapproved the said transaction. On perusal of the minutes of CoC meeting held on 11.01.2019, we notice

that the CoC had authorized the RP to make payment of Rs. 4,13,911/- per month for use of rent of regd. Office to be paid to Mr. Ratnakar Gutte to be paid during CIRP period. The necessary Resolution has placed at Exhibit-L is reproduced hereinunder:

To discuss, consider and approve related party payments (Rent for Registered Office) during the CIRP period as per Section 28(1)(f) of the Code.

RESOLVED THAT pursuant to Section 28(1)(f) of the Insolvency and Bankruptcy Code, 2016, and other applicable provisions, if any, of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations framed thereunder, the Committee of Creditors hereby authorize the Resolution Professional to make the payment of Rs. 4,13,911 p.m. for rent of Registered Office to be paid to Mr. Ratnakar Gutte during the CIRP Period.

3.7. In view of the above Resolution approving the payment to Mr. Ratnakar Gutte, we do not find any merit in this relation also.

4. In view of aforesaid discussion, MA 2047 of 2019, is dismissed and disposed accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)