

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**IA Nos. 1162/2022,1163/2022, 1842/2022
In
CP (IB) No. 35/Chd/HP/2017
(Admitted)**

Under Section 60(5) of IBC 2016

In the matter of:

Seashells Infrastructure Pvt. Ltd.

...Financial Creditor

Vs.

Rajpur Hydro Power Pvt. Ltd.

....Respondent-Corporate Debtor

And in the matter of IA No. 1162/2022

Sanjay Kumar Dewani,
Erstwhile Resolution Professional
having its registered office at
133, Bhagirathi Appts., Plot No.-13/1,
Sector-9, Rohini,
New Delhi-110085

...Applicant

Vs.

Mr. Totakura Rajshekar
Flat No. 401, 4th Floor
Vamshiram's Jyothi Banjara Apartments,
Road No. 5, Banjara Hills, Hyderabad-500034

...Respondent No. 1

M/s. Gautam's Auto Arena Cars Pvt Ltd.
Lane Beside, Minerva Hotel,
Opp. Cpi Office, Himayat Nagar,
Hyderabad-500029

...Respondent No. 2

M/s. Zaveri Infrastructure Pvt. Ltd.
C-2, Mezzanini Floor,
Mayur Kushal Complex,
Gunfoundry, Hyderabad-500001

...Respondent No. 3

Mr. Prakash Chand Parak,

Director,
Gautam Autoarena Cars Private Limited
1-10-7, Ashok Nagar Hymayath Nagar
Hyderabad-500029

...Respondent No. 4

Mr. Mahender Kumar Parak,
Director
Gautam Autoarena Cars Private Limited
1-10-7, Ashok Nagar Hymayath Nagar
Hyderabad-500029

...Respondent No. 5

Mr. Tayal Rupal, Director
Zaveri Infrastructure Pvt. Ltd.
Avantinagar 3-6-69/B/9 Basheerabagh
Hyderabad-500029

...Respondent No. 6

Mr. Tayal Sunil Kumar, Director
Zaveri Infrastructure Pvt. Ltd.
Avantinagar 3-6-69/B/9 Basheerabagh
Hyderabad-500029

...Respondent No. 7

And in the matter of IA No. 1163/2022

Sanjay Kumar Dewani,
Erstwhile Resolution Professional
having its registered office at
133, Bhagirathi Appts., Plot No.-13/1,
Sector-9, Rohini,
New Delhi-110085

...Applicant

Vs.

Mr. Totakura Rajshekar
Flat No. 401, 4th Floor
Vamshiram's Jyothi Banjara Apartments,
Road No. 5, Banjara Hills, Hyderabad-500034

...Respondent No. 1

Mrs. T. Satyavathi,
Flat No. 401, 4th Floor,
Vamshiram's Jyothi Banjara Apartments,
Road No. 5, Banjara Hills, Hyderabad-500034

...Respondent No. 2

And in the matter of IA No. 1842/2022
Sanjay Kumar Dewani,

Erstwhile Resolution Professional
having its registered office at
133, Bhagirathi Appts., Plot No.-13/1,
Sector-9, Rohini,
New Delhi-110085

...Applicant

Vs.

Mr. Totakura Rajshekar
Flat No. 401, 4th Floor
Vamshiram's Jyothi Banjara Apartments,
Road No. 5, Banjara Hills, Hyderabad-500034

...Respondent No. 1

Mrs. T. Satyavathi,
Flat No. 401, 4th Floor,
Vamshiram's Jyothi Banjara Apartments,
Road No. 5, Banjara Hills, Hyderabad-500034

...Respondent No. 2

Mrs. Sadhana Amaram,
Flat No. 103, Madhavi Enclave,
Opp. Hanuman Temple,
Motinagar, Hyderabad-500018

...Respondent No. 3

Mr. T. Satyanandam,
Flat No. 401, 4th Floor,
Vamshiram's Jyothi Banjara Apartments,
Road No. 5, Banjara Hills, Hyderabad-500034

...Respondent No. 4

Mr. M.J. Shantharam,
No. 2/1, Embassy Vogue,
Palace Loop Road, Vasanth Nagar,
Bangalore-560052

...Respondent No. 5

Judgment delivered on: 13.09.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

For the Applicant : Mr. Atul V Sood, Advocate for the applicant-
erstwhile RP
For the Respondents : Mr. Vaibhav Sahni, Advocate for respondent
No.1 in IA No.1162/2022 and for respondent No.1 and
2 in IA No.1163/2022 and for respondent Nos.1 to 4 in
IA No.1842/2022.
Mr. Sham Lal Saha, proxy counsel for Ms. Sagarika
Koneru, Advocate for the respondent Nos.3, 6 and 7 in

IA No.1162/2022.

Mr. Ravi Kumar Gupta, Advocate for respondent Nos.2, 4 and 5 in IA No.1162/2022.

Respondent No.5 already proceeded ex parte in IA No.1842/2022.

Per: Harnam Singh Thakur, Member (Judicial)

JUDGMENT

IA No. 1162/2022

This application has been filed on behalf of the erstwhile Resolution Professional of Rajpur Hydro Power Private Limited under Sections 45 & 48 of the Insolvency and Bankruptcy Code, 2016 with a prayer to direct the respondents' Nos. 1, 2, 4 and 5 to pay an amount of Rs. 5.61 Lakhs to the erstwhile Resolution Professional in respect of benefit received by purchasing a car at an undervalued price in terms of Section 48 of IBC and also to direct respondent Nos. 3,6 and 7 to pay an amount of Rs. 15.34 Lakhs to the erstwhile RP in respect of purchase of acre at an undervalued price in terms of Section 48 of IBC.

2. The facts as stated by the applicant are as under:

i. Pursuant to the admission of the corporate debtor on 11.07.2017, the Resolution Professional appointed T.R. Chadha & Co. LLP, Chartered Accountants for carrying out special purpose audit of the accounts of the corporate debtor for the period from 12.07.2015 to 10.07.2017. The findings of the audit are based on the following documents.

a. Financial Statements for the Financial Years 2015-16 and 2016-17.

- b. Provisional Financial Statements for the period starting from 01.04.2017 to 11.07.2017.
- c. Read only access to the Corporate Debtors Accounting Software i.e. Tally ERP9 for the period 01.04.2015 to 11.07.2017.
- d. Bank Statement of all the banks for period 12.07.2015 to 11.07.2017.
- e. Cash payment vouchers for the period 10.07.2015 to 30.11.2016.

3. The relevant parts of the audit report pertaining to this application are extracted below:

8.1.2 Sale of cars: The Company has sold two cars during our audit period. A Honda CRV on 15 June 2017 to Gautam's Auto Arena Cars Pvt. Ltd. for Rs. 14.00 Lacs, having book value of Rs.19.61 Lacs. Out of Rs.14 Lacs, Rs.2.12 Lacs has been adjusted for settlement of outstanding Car Loan (including interest) from Axis Bank and balance amount Rs.11.87 Lacs has been received, (Rs.1.87 Lacs in cash and Rs.10 Lacs through bank). Further, a Jaguar Car has been sold on 12/08/2015 to M/s. Zaveri Infrastructure Pvt. Ltd. for Rs.28.75 Lacs having book value of Rs.44.09 lacs. Amount received against the sale of this car has been used for settlement of loan against this car. Any document w.r.t. valuation of these two cars at the time of sale viz. quotes received from other parties (other than to whom cars have been sold), are not available on record. Therefore, the preferred / under valuation of sale price of the cars, if any, cannot be commented upon.

4. Based on the aforementioned report, it is submitted by the applicant that the respondents No. 1,2,4 and 5 are jointly and severally liable, to pay an amount of RS. 5.61 lacs (19.61-14) to the erstwhile Resolution Professional in respect of benefit received by M/s Gautam's Auto Arena Cars Pvt. Ltd. by purchasing car at undervalued price in terms of Section 48 of the IBC and respondent No 1,3,6 and

7 are jointly and severally liable to pay an amount of Rs. 15.34 Lakhs (44.09-28.75) to the erstwhile Resolution Professional in respect of benefit received by M/s Zaveri Infrastructure Pvt. Ltd. by purchasing a car at undervalued price in terms of Section 48 of the IBC.

5. Respondent Nos. 3, 6 & 7 in their reply have stated on affidavit that the car was purchased by the agent in Hyderabad, i.e, Jaguar Car namely M/s. Auto Pride of Rs. 28, 75, 000 and the book value of the car after the depreciation would have been near the amount which it was sold.

6. We have gone through the submissions made before us during the current proceedings.

7. As regards the sale of Honda CRV, we note that the alleged difference between the price at which it is sold and the book value of the said car is not significant. It is also difficult to accurately ascertain a price of a vehicle in a second hand car market. As regards the sale of the Jaguar Car, we note that the same was sold through a second hand car selling agency. This transaction cannot be said to be arranged as an undervalued transaction by the corporate debtor. Hence, we hold that in both these cases, the alleged difference of the sale value of the car and the book value of the same are a result of the prevailing market conditions at the time of the sale and no clear case of sale of Vehicles at undervalued price has been made out.

8. In view of this, the prayer under Sections 45 & 48 in the present application is not acceded to.

9. In the result, IA No. 1162/2022 is dismissed and disposed of accordingly.

IA No. 1163/2022

10. The present application filed by an erstwhile Resolution Professional under Sections 43 & 44 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016, seeking appropriate directions from this Tribunal.

11. The facts as stated by the applicant are as under:

- I. It is submitted that respondent No. 1 i.e. Mr. Totakura Rajshekar was the Managing Director of the Corporate Debtor. As per the books of accounts of the Corporate Debtor on 15.07.2016, a loan for an amount of Rs. 395 Lacs was received by the Corporate Debtor i.e. RHPPL from Mrs. T. Satyavathi, who is a related party of the Respondent No. 1
- II. The said unsecured loan received from Mrs.T.Satyavathi for business purposes was given as interest-free advance to Respondent and on 10.07.2017, a book adjustment entry has been passed for adjustment of loan and advances amounting to Rs. 388.88 Lacs recoverable from Respondent No. 1 with the outstanding unsecured loan of Mrs. T. Satyavathi
- III. It is alleged on 05.07.2017, a further amount of Rs. 5.80 lacs has been repaid through bank payment to Mrs. T. Satyavathi. It is submitted that no agreements for taking unsecured loans and giving loans and advances have been provided by Respondent No. 1 to the Resolution Professional. In the absence of any document showing the terms of repayment of said loan, said repayment

cannot be termed *bona fide* and is clearly within the ambit of Section 43.

IV. It is further alleged that a repayment of Rs. 5.80 Lacs in preference to other creditors has resulted in putting the recipient party i.e. Mrs. T. Satyavathi, in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53 of IBC.

V. It is submitted that the above repayment of Rs. 5.80 Lacs through the bank to Mrs. T. Satyavathi in preference of other creditors, resulted in putting Mrs. T. Satyavathi in a beneficial position in terms of Section 43(2)(b) of IBC therefore, the said transaction specifically falls within the ambit of preferential transaction, and accordingly Mrs. T. Satyavathi (a relative of Mr. Totakura Rajshekar) be directed to repay the amount of Rs. 5.80 Lacs, to the erstwhile Resolution Professional in terms of Section 44(1)(d) of IBC.

12. We have heard the learned counsel for the parties and have gone through the special purpose audit report.

13. In the course of the present proceedings, no reply was made on behalf of the respondents. We have also perused the reply filed on behalf of the respondent No.1 before the RP through email dated 26.03.2018 (Annexure A-4 of the application).

14. We have perused the email of the applicant dated 15.03.2018, which brought to the notice of Respondent No. 1, the preferential and undervalued transactions being entered by the corporate debtor, and also the reply dated

26.03.2018, wherein it is stated that various transactions of payments and receipts from Mr. T. Rajshekar, Managing Director, are shown as transactions within the scope of Section 43 of IBC 2016, despite the submission of complete details and explanations in this regard. It was stated that Mr. T. Rajshekar was supervising the entire business operations, and the site being away from the Corporate Office from where the transactions were being handled, and due to the stoppage of the flow of funds from PFS, Mr. Rajshekar had to raise funds for meeting the day-to-day expenses in order to keep alive the project implementation. In the bargain, the payments made to Mr. Rajshekar to meet the routine business payments were termed as 'Preferential Payments', which is highly objectionable.

15. In this connection, we refer to the decision of the Hon'ble NCLAT in the matter of **GVR Consulting Private Limited vs. Pooja Bhary Company Appeal (AT) (Insolvency) Nos. 405, 369 and 412 of 2022**, wherein it is held that:

"Taking financial assistance from related and non-related parties which transactions are subject of enquiry in the present Appeal can not be held to be ordinary course of business of the Corporate Debtor. The expression "ordinary course of business" or "financial affairs of the Corporate Debtor" has to be read "ejusdem generis". The expression "financial affairs of the Corporate Debtor" cannot be given an extended meaning as contended by Learned Counsel for the Appellants that all financial transactions done by the Corporate Debtor is covered within expression "financial affairs" hence the loan taken by the corporate debtor from different related and non-related parties is part of the financial affairs cannot be accepted. The Judgement of the Hon'ble Supreme Court in "Anuj Jain" (Supra), the emphasis has been given that transaction must fall into place as part of the undistinguished common flow of the business done. Undistinguished common flow of the business of the Corporate Debtor does not contemplate any such or particular situation where the Corporate Debtor's claim that its financial position became unstable due to market conditions and started arranging money from their relatives and other parties. Money arranged from relative and other parties by the Corporate Debtor thus cannot be held to be part of ordinary course of business or part of financial affairs.

(Emphasis Supplied)

16. In the same matter, the Hon'ble NCLAT has considered the issue of transactions undertaken due to the pressure from lenders and has further observed as under:

“The intent of the corporate debtor is not relevant since the Section 43 envisages statutory fiction as has been noted above. Whether the Act is voluntary or not has no relevance while coming to the conclusion whether the transaction is preferential or not.”

17. The aforementioned repayment of Rs. 5.80 Lakhs to a related party is clearly not a part of “ *the undistinguished common flow of the business done*”. As further, the motive or intent behind carrying out these transactions is immaterial for a preferential transaction under Section 43 of IBC. In view of this, Mrs. T. Satyavathi is directed to repay the amount of Rs. 5.80 Lacs, to the erstwhile Resolution Professional in terms of Section 44(1)(d) of IBC.

18. As a result, IA No. 1163/2022 is allowed and stands disposed of accordingly.

IA No. 1842/2022

19. This application has been filed on behalf of the erstwhile resolution professional of Rajpur Hydro Power Pvt. Ltd. under Sections 66(1) and (2) of the Insolvency and Bankruptcy Code, 2016, seeking appropriate directions from this Tribunal.

20. The facts stated by the applicant are as under:

- i. T.R. Chadha & Co. LLP, Chartered Accountants, after being appointed to carry out special purpose audit of the accounts of Corporate Debtor for period 12.07.2015 to 11.07.2017 (hereinafter

referred to as "**Auditors**") have completed the same on the basis of the following documents of the Corporate Debtor:-

- (a) Financial Statements for the FY 2015-16 and 2016-17.
 - (b) Provisional Financial Statements for the period starting from 01.04.2017 to 11.07.2017.
 - (c) Read only access to the Corporate Debtors Accounting Software i.e. Tally ERP9 for the period 01.04.2015 to 11.07.2017
 - (d) Bank Statement of all the banks for period 12.07.2015 to 11.07.2017.
 - (e) Cash payment vouchers for the period 10.07.2015 to 30.11.2016.
- ii. A copy of the Special Purpose Audit Report is annexed herewith and marked as Annexure A2.

21. The relevant part of the Special Audit Report pertaining to this application is extracted as under:

"8.1.1 Adjustment of loans & advances receivable with unsecured loans and other payable:

8.1.1.1 As per books of accounts, the Company has given an advance of Rs.395 Lacs to Mr. T. Rajshekar (Managing Director" on 15/07/2016. This advance was given out of unsecured loan amounting to Rs.395 Lacs received from Mrs. T. Satyavathi (a relative of Mr. T. Rajshekar) on the same date. On 10* July 2017, a book adjustment entry has been passed for adjustment of loan and advances amounting to Rs.388.88 Lacs recoverable from T. *Rajshekar with the outstanding unsecured loan of Mrs. T. Satyavathi.*

The agreements for taking unsecured loan and giving loan and advances along with the purpose, terms and condition of same are not available on record. Further, it may be noted that the receipt of unsecured loans and giving of loan & advances are two separate transactions with two different persons. Since the adjustment of loan and advance, recoverable from Mr. T. Rajeshekar, with the outstanding unsecured loan payable to a relative of Managing Director and

repayment of Rs.5.88 Lacs through bank in preference of other creditors resulted in putting the recipient party (Mrs. T. Satyavathi) in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53 of IBC, 2016, this adjustment and repayment of loan can be prima face considered as a preferential transaction under Section 43 of IBC, 2016.

8.1.1.2 In addition to the above unsecured loan of Rs.395 Lacs, the Company has received Rs. 12.68 Lacs from Mrs. T. Satyavathi, On 10/08/2016. This liability has been adjusted against the amount recoverable from **SVN Sailesh** on 10/07/2017 by way of books entry. There is no transaction with SVN Sailesh during our audit period except this adjustment entry and advance recoverable from SVN Sailesh was outstanding in the books prior to 1s April 2.015. In our opinion the adjustment of loan and advance, recoverable from SVN Sailesh with the outstanding unsecured loan received from relative of Managing Director, in preference of other creditors can also be similarly viewed as a preferential transaction under Section 43 of IBC, 2016.

8.1.1.3 The company has made a repayment of Rs.10 Lacs to Seashell Infrastructure Pvt. Ltd. (Seashell) on 10/08/2016 i.e within one year from the date of commencement of Insolvency proceedings. The payment is made out of an unsecured loan received from Mrs. T Satyavathi. As per books, an unsecured loan of Rs.20 lacs, from Seashell Infrastructure Pvt. Ltd., was lying in the books since prior to our audit period. Further, any agreement for taking an unsecured loan from Seashell defining the term and condition including repayment has not been shown to us. Since the repayment has the effect of putting Seashell in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53 of IBC, 2016, the repayment of unsecured loan to Seashell can be inferred to be preferential transaction under Section 43 of IBC, 2016.

8.1.1.4 Adjustment of unsecured loans against loan and advances recoverable from other parties:

In the books following unsecured loans have been adjusted with loan and advances by way of book entries passed on 10/07/2017:

S. No.	Particulars of Unsecured Loan Party	Whether relative (Yes/No)	Particulars of Loan & Advances Adjusted	Amount Adjusted (Amount in Rs.)	Date of Adjustment
1.	Ms. Sadhana Amaram	Yes	SVN Sailesh	10,00,000	10th July, 2017

2.	Mr. T. Satyanandam	Yes	SVN Sailesh	12,00,000	10th July, 2017
3.	Mr. Shantharam M.J,	Not Available	SVN Sailesh	5,00,000	10th July, 2017
4.	Mr. Shantharam M.J.	Not Available	SVN Sailesh	M/s. Yashsri Enterprises (I) Pvt. Ltd.	10th July, 2017

Unsecured loan payable and loan & advances recoverable from above parties were outstanding in the books since prior to our audit period. We have not been provided any document w.r.t. unsecured loan and loan & advances from/to these parties and rational of these adjustment entries passed in the books. In our opinion, the adjustment of loan and advance recoverable from SVN Sailesh and M/s. Yashsri Enterprises (I) Pvt. Ltd. with the outstanding unsecured loan received from Ms. Sadhana Amaram, Mr. T. Satyanandam and Mr. Shantharam M.J., in preference to other creditors can be a prima facie clubbed under preferential transactions under Section 43 of IBC, 2016.

*8.1.1.5 The Company has settled/paid amount payable of Rs.59.08 Lacs to Mr. T Rajshekar (Managing Director) outstanding in the books as on 12/07/2015 i.e. before our audit period, by way of bank payment and adjustment of amount recoverable from other parties. In our opinion the payment and settlement of outstanding payable amount of Rs.59.0 Lacs (as on 12/07/2015) to **Mr. T Rajshekar (Managing Director of the Company)** in preference of other creditors can be considered as preferential transaction under Section 43 of IBC, 2016.*

8.1.1.6 The Company had given advances to Mr. T Rajshekar by way of Bank Payment/adjustment of amount recoverable from other parties (M/s Avalon Enterprise/A.K. Raghu). As per books of accounts, amount recoverable from Mr. Rajshekar is settled as follows:

• In the books it has been shown that net cash of Rs.42.25 lacs was received (Rs.85.32 Lacs received and Rs.43.0; Lacs paid in cash) from Mr. T. Rajshekar during 12th July 2015 to 11th July 2017. On verification of books of accounts and cash vouchers, it was observed that following expenses have been booked in cash during audit period for which no proper supporting were attached with the payment vouchers:

Particulars	Amount in Rs. Lacs
Salary	12.39
Travelling	8.00

Rent	7.91
Vehicle Maintenance	3.72
Telephone/Internet	3.52
Maintenance Expenses	2.19
Stationary Expenses	1.13
Other Expenses	2.32
Grand Total	41.18

It may also be noted that there was no progress in the project during audit period, therefore, rational of incurring above expenses, for which payments were made in cash (in violation of Income Tax Act), cannot be commented upon specially or the absence of proper supporting with the vouchers and therefore, adjustment of amount receivable from Mr. T Rajshekar by showing receipt of cash can be inferred to be preferential transactions under Section 43 of IBC, 2016.

Further, advances of Rs.45.36 lacs recoverable from Mr. T Rajshekar had been adjusted in the books against various expenses/ payable (including Rs.36 lacs on account of Salary, Vehicle Maintenance and staff welfare payable to Mr. T Rajshekar). Details of the same is given below:

Date of entry in ledger	Ledger Description	Amount Rs. in Lacs
15-12-2015	Vehicle Maintenance-Site (Mr. T. Rajshekar)	6.00
31-03-2016	Salaries-HO Office (Mr. T. Rajshekar)	18.00
30-03-2016	Vehicle Maintenance-Site (Mr. T. Rajshekhar)	8.00
31-03-2016	Staff Welfare (Mr. T. Rajshekhar)	4.00
03-04-2017	Legal Expenses	0.75
03-04-2017	Audit Fee Payable	1.20
03-04-2017	Rent-Office	3.20
03-04-2017	Travelling Expenses-Directors	1.51
08-05-2017	Salaries-Staff	1.50
08-05-2017	Legal Expenses	0.45
15-06-2017	Travelling Expenses	0.75

Total	45.36
-------	-------

Considering that there was no progress in the project during the audit period, the rational of above expenses, which were adjusted with amount receivable from Mr. T Rajshekar cannot be commented upon. No proper support against these expenses were available on record viz. attendance records for salary, TDS deduction on salary of Mr. Rajshekar, supporting of vehicle maintenance and staff welfare expenses, rent agreements etc.

Further, since the adjustment of loan and advance, recoverable from Mr. T. Rajeshekar, with the outstanding payable resulted in putting the recipient parties (to whom the amount was payable) in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53 of IBC, 2016, these adjustments can be inferred as preferential transactions under Section 43 of IBC, 2016.”

22. We have heard the learned counsel for the applicant and have perused the records available.

23. The major findings of the special purpose audit report, which is extracted at para 17 above, is summarised below:

- i. The adjustment of advances amounting to Rs. 388.88 Lakhs recoverable from Mr. T. Rajshekar (Managing Director) with the outstanding unsecured loan from Ms. T. Satyavathi.
- ii. Adjustment of unsecured loans against loans and advances recoverable from a third party, i.e., SVN Sailesh through book entries.
- iii. Settlement of outstanding debts of Rs. 59 Lakhs of T. Rajshekar (Managing Director of the company) in preference to other creditors, booking of expenses without supporting vouchers etc. amounting to Rs. 41.18 Lakhs and 45.36 Lakhs.

24. The avoidance transaction in Insolvency Proceedings has been dealt with in the legislative schemes under several enactments relating to subject. Hon'ble Supreme Court had occasion to elaborately consider the scope and ambit of preferential transaction in IBC in **Anuj Jain Vs. Axis Bank Limited & Ors. [2020] ibclaw.in 06 SC**. Before we come to the treatment of law by the Supreme Court in "Anuj Jain", a look into the legislative scheme from Provincial Insolvency Act, 1920 till the IBC Code indicate that legislative requirements under the different enactments were not identical and ingredients for avoidance of a transaction under the different enactments has been separately dealt. The Companies Act, 1956 dealt with fraudulent transactions. In the IBC, preferential transactions and fraudulent transactions have been separately dealt with, ingredients to prove are different for preferential transactions. There is no need to prove any fraudulent intent for a preferential transaction.

25. Applying the ratio of the decision in the **Anuj Jain Vs. Axis Bank Limited & Ors. [2020] ibclaw.in 06 SC**, we note that in the present case, the major allegation relate to giving a preference to the "related party creditors" over others in settling their receivables from the corporate debtor. For instance, Mrs. T. Satyavathi, a close relative of the MD and shareholder of the corporate debtor, falls within the definition of "related party" as defined in Section 5(24) of the Code. The adjustment of an amount of Rs. 388.88 Lakhs through an adjustment book entry against the outstanding unsecured loan from Mrs. T. Satyavathi. Similarly, the outstanding debts of Rs. 59 Lakhs of T. Rajshekar (Managing Director of the company) has been settled in preference to other creditors. The other transactions mentioned in the special audit report are also of the same nature. The only exception is the expenses of Rs. 41.18 Lakhs and 45.36 Lakhs, which

were stated to be expenses shown in the books of accounts but not supported by vouchers.

26. The scope of Section 66 of IBC is to demonstrate that the business of the corporate debtor has been carried on with the “intent to defraud” its creditor or for “any fraudulent purpose”. Therefore, while looking into the purported/alleged fraudulent transaction, it has to be clearly established that the transaction was made with the intention to defraud /fraudulent purpose.

27. We would like to refer to section 66 of the Code which is reproduced hereinbelow for ready reference:

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any person who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if

(a) before the insolvency commencement date, such director or partner know or ought to have known that there was no reasonable prospect of avoiding the commencement of corporate insolvency resolution process in respect of such corporate debtor, and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of the corporate insolvency resolution process is suspended as per section 10A.

Explanation - For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such

director or partner, as the case may be, in relation to the corporate debtor.

28. Thus, we are of the view that the applicant is not able to establish successfully that the respondents are guilty under Section 66 of the Code. According to the principle of burden of proof, it is the applicant who has to establish that the said transactions are fraudulent,, which he is not able to establish. Also, the applicant has literally construed the documents and balance sheet and thus has lacked the forensic audit to establish that the funds are being siphoned off by the respondents, with the intent to defraud the creditors.

29. Further, in this connection, the applicant has relied on the decision of the Hon'ble NCLAT in the matter of ***Nitin Bharal and Ors. vs. Stockflow Express Private Limited (04.05.2022 - NCLAT) : MANU/NL/0293/2022***, wherein it was held that:

“A perusal of the scanned copy of the Bank Statement evidences that the Adjudicating Authority has rightly concluded that there are no reasons given for how an amount of Rs. 42,33,304/- has been settled for a mere payment of Rs. 3 Lakhs/-. This fraudulent transaction took place during the time the Appellants were Directors of the 'Corporate Debtor' and squarely falls within the ambit of Section 66 of the Code.”

30. However, On the face of it, the aforementioned case of Nitin Bharal (supra) is totally different to the facts of the present case at hand. While, in the present case, preferences were shown to certain creditors who are mostly related parties of the corporate debtor over other creditors whereas in the case of ***Nitin Bharal*** (supra), an outstanding amount was settled at a fraction of the original value, clearly intending to defraud the creditors.

31. We further note that the auditor has also made a reference to the aforementioned transactions as preferential transactions under Section 43 of IBC. Since, there is no alternative prayer in the present application to treat the said transactions under Section 43 of the Code, thus, the same has not been considered.

32. The applicant has prayed for relief in terms of Sections 66 & 67 of IBC, which cannot be granted as discussed above with reasons recorded hereinbefore. Consequently, the application in hand stands dismissed. However, the applicant is at liberty to avail the alternative remedy in accordance with law. No order as to costs.

Sd/-

(Subrata Kumar Dash)
Member (Technical)

September 13, 2023
PB

Sd/-

(Harnam Singh Thakur)
Member (Judicial)