

**NATIONAL COMPANY LAW TRIBUNAL**

**COURT ROOM NO. 1,**

**MUMBAI BENCH**

**Item No. 19**

**IA 1726/2024 (NEW IA) IA 306/2022 in C.P. (IB)/1387(MB)2017**

CORAM:

**SH. PRABHAT KUMAR      JUSTICE VIRENDRASINGH BISHT (Retd.)**

**HON'BLE MEMBER (TECHNICAL)    HON'BLE MEMBER (JUDICIAL)**

ORDER SHEET OF THE HEARING ON **17.04.2024**

NAME OF THE PARTIES:    **ERICSSON INDIA PRIVATE LIMITED VS  
RELIANCE COMMUNICATIONS LIMITED**

Sections 60(5) & 9 of the Insolvency and Bankruptcy Code, 2016

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**ORDER**

**IA 1726/2024 in C.P. (IB)/1387(MB)2017**

- 1) Ms. Aarya More, Ld. Counsel for the Applicant is present. Though the Ld. Counsel for the Resolution Professional is present physically, he has not put his appearance in the Attendance Sheet.
- 2) Ld. Counsel for the Resolution Professional seeks some time to have clarification whether additional claim of the Department of Telecommunication is reflected in the books of accounts of the Corporate Debtor or not. Time is allowed.
- 3) At request, stand over to 08.05.2024, for further consideration and hearing.

**IA 306/2022 in C.P. (IB)/1387(MB)2017**

- 1) Though the Ld. Counsel for the Resolution Professional is present physically, he has not put his appearance in the Attendance Sheet. Mr. Tushad Kakalia, Ld. Counsel for the Respondent No. 1 and Mr. Ankit Lohia, Ld. Counsel for the Respondent No. 2 are present.
- 2) The present Interlocutory Application has been filed by the Resolution Professional of the Corporate Debtor seeking the following reliefs:
  - a. *Order and declare that the Impugned Transaction, i.e. the transaction set out in paragraph nos. 9(a) to 9(e) as entered into between the Corporate Debtor and the Respondents through the Impugned Letter dt. 28.05.2017 and acts undertaken in furtherance of the same, constitute a preferential transaction u/s 43 of the Insolvency and Bankruptcy Code, 2016.*
  - b. *Order and declare that the aforesaid impugned transaction entered into between Corporate Debtor and the Respondents by way of the Impugned Letter dt. 28.05.2017 and acts undertaken in furtherance of the same, as being null and void and set aside the same.*
- 3) Resolution Professional of the Corporate Debtor has observed that prior to the commencement of the Corporate Insolvency Resolution Process of the Corporate Debtor, the Corporate Debtor entered into certain transactions falling u/s 43 of the Insolvency and Bankruptcy Code, 2016, in as much as the Corporate Debtor adjusted the amount which was initially receivable by it from Respondent No. 1/NEPL to settle the dues of the Respondent No. 2/RCIL to the extent of Rs. 4318.25 Crores by ways of the Impugned Letter dt. 28.05.2017.

- 4) It is to be noted that the this Bench ordered the Corporate Debtor into CIRP on 15.05.2018 and subsequently, vide order dt. 18.05.2018, appointed an Interim Resolution Professional with respect to the Corporate Debtor. It is also submitted that the Admission Order and the order appointing IRP was challenged by certain Shareholders of the Corporate Debtor before the Hon'ble Appellate Tribunal and the Hon'ble Appellate Tribunal stayed the process *vide* order dt. 30.05.2018. However, further, in view of the subsequent developments, the shareholders withdrew the said Appeal and the Hon'ble Appellate Tribunal permitted the withdrawal of the said Appeal by order dt. 30.04.2019, and directed the Adjudicated Authority to proceed further in the matter in accordance with the law.
- 5) Further, by an order dt. 09.05.2019, the period between 30.05.2018 and 30.04.2019 has been excluded by this Bench from the calculation of the CIRP. It is averred that by an Engagement Letter dt. 15.07.2019, the Applicant had appointed Grant Thornton India LLP, in order to ascertain if the Corporate Debtor had entered into transactions which could be classified as, *inter alia*, preferential, undervalued, extortionate and fraudulent, for the period 15.05.2016 to 15.05.2018. Further, the Auditors by their Report dt. 09.01.2020, which forms a final set of Report dt. 10.01.2020, have identified that the adjustment of the amounts which was initially receivable by the Corporate Debtor from the Respondent No. 1 to settle the dues of the

Respondent No.2 to the extent of Rs. 4318.25 Crores under the Impugned Letter would constitute a potential preferential transaction under the Code.

- 6) It is further averred that prior to May, 2017, the Corporate Debtor had a receivable from the Respondent No. 1 to the extent of Rs. 4318.25 Crores on account of capital advances given for fibre assets. In or around May, 2017, the Corporate Debtor also had payable of Rs. 4318.25 Crores to the Respondent No. 2 on account of certain trade payables/other liabilities. On 28.05.2017, Respondent No. 1 and the Respondent No. 2 entered into an agreement by way of the Impugned Letter, whereby the receivables from the Respondent No. 2 was adjusted to settle the Payable to the Respondent No. 1 to the extent of Rs. 4318.25 Crores. Further, in the books of accounts of the Corporate Debtor, the receivables were adjusted against the payable to the Respondent No.2 to the extent of Rs. 4318.25 Crores.
- 7) It is also submitted that the adjustment of the receivables in the aforesaid manner amounts to a preferential treatment u/s 43 of the Code by the Corporate Debtor as the said adjustment has the effect of putting Respondent No.2 in a beneficial position than it would have been in the event of a distribution of assets being made under liquidation of the Corporate Debtor in accordance with Section 53 of the Code *vis-à-vis* the other Creditors by adjusting the amount receivable by it from the Respondent No. 1 to settle the dues of the Respondent No. 2.

- 8) Applicant submits that the adjustment of the receivables amounting to Res. 4318.25 Crores falls during a period of Two years preceding the Insolvency Commencement Date as required u/s 43(4) of the Code. The Corporate Debtor was in Financial Distress at the time when the Receivables were adjusted to settle the dues of the Respondent No.2 and the Corporate Debtor had defaulted in payment of other various Financial Creditors.
- 9) Applicant lastly submits that the said adjustment of the receivables was not in the ordinary course of business of the Corporate Debtor. Applicant has analysed the adjustment of the receivables and has determined that the same would tantamount to a preferential transaction.
- 10) Respondent No. 2 has also filed and placed on record Affidavit in Reply and we have perused the same.
- 11) Heard the learned counsel for the both sides and perused the records.
- 12) 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.”*

- 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 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, it is not in dispute that the impugned transaction had the effect of paying off Respondent No. 2's antecedent debt in preference over other creditors, and the Respondent No. 2 would have got less than what it got by way of this transaction, as this transaction discharged the debt owed by Respondent No. 1 to Corporate Debtor. Undisputedly, the said transaction is with the look back period of two years, as is applicable in case of transaction with the related party. The Respondents have pleaded that this transaction was undertaken in the Ordinary Course of Business.

**15)** The Hon'ble Supreme Court in case of Anuj Jain IRP for Jaypee Infratech Limited vs. Axis Bank (2020) ibclaw.in 06 SC has held at Para 25.5 thereof that

“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)** We note that the receivable of Respondent No. 2, which is in CIRP, from the Corporate Debtor stood adjusted and set-off against the liability owed by Respondent No. 2 to Respondent No. 1. This transaction had the effect of squaring off the receivable of Corporate Debtor from Respondent No. 1. Consequently, neither Respondent No. 2 filed its claim in the CIRP of the Corporate Debtor nor Respondent No. 1 filed its claim in CIRP of the Respondent No. 2. The Resolution Plan in case of Corporate Debtor and Respondent No. 2 has not dealt with the claim of Respondent No. 2 against the Corporate Debtor and claim of Respondent No. 1 against Respondent No. 2 respectively.

**17)** In this case, the Corporate Debtor, Respondent No. 1 & Respondent No. 2 are related parties and belongs to same group of companies. In case of group companies, it is in ordinary course to settle the intra group balances by way of journal entries which has the effect of the settling the balances in

these group companies inter-se. Undisputedly, no amount has been paid in cash in this transaction.

- 18)** The Resolution Plan of Corporate Debtor as well of Respondent No. 2 provides NIL amount payable to the related parties and it is not in dispute that Respondent No. 1 is related party of Corporate Debtor and Respondent No. 2 is also a related party of Respondent No. 1. On the other hand, neither the Respondent No. 2 has filed any claim in the CIRP of Corporate Debtor, nor Respondent No. 1 has done so in CIRP of Respondent No. 2 in view of stated position in their books of accounts arising from the impugned transaction having been undertaken to settle intra group companies' balances. Accordingly, if the impugned transaction is ordered to be set aside, the Respondent No. 2 and 1 cannot file the claim in CIRP of Corporate Debtor and Respondent No. 2 respectively, as the Resolution Plan in both the cases has already been approved by the CoC and is still pending for approval before this Tribunal on account certain issues arising from plan being sub-judice before Hon'ble Supreme Court in both the cases. Nonetheless, we are of considered view that an order in relation to this transaction shall be redundant at this juncture and shall be prejudicial to the interest of the parties, who had undertaken the impugned transaction in normal course of their business and have taken such position in its books of account.

19) In view of foregoing, IA 306 of 2022 is dismissed and disposed of accordingly.

Sd/-

**PRABHAT KUMAR  
MEMBER (TECHNICAL)**

Sd/-

**JUSTICE VIRENDRASINGH BISHT  
MEMBER (JUDICIAL)**

Vedant Kedare