

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

I.A. 133 OF 2022

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Anish Niranjan Nanavaty
The Resolution Professional
...Applicant

Vs.

Reliance Communications Limited &
Another
...Respondents

In the matter of

C.P.(IB) No. 1386/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Telecom Ltd.

Corporate Debtor

\Order delivered on: 15.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant/RP

:

Mr. Anoop Rawat a/w Mr.

For the Respondent 1 : Rishabh Jaisani and Ms. Kriti Kalyani, Advocates
Mr. Ankit Lohia a/w Mr. Udit Raghuwanshi and Ms. Divya Jain, Advocates

ORDER

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

1. This application IA 133/2022 was filed by Mr. Anish Niranjana Nanavaty ("Applicant") in the matter of M/s Reliance Telecom Limited (Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs:

- a) Order and declare that the Impugned Transaction effected through Impugned Letter dated 29th May 2017, and acts undertaken in furtherance thereof constitute a preferential transaction under Section 43 of the Code;
- b) Order and declare that the Impugned Transaction effected through Impugned Letter 29th May 2017 and acts undertaken in furtherance thereof, as being null and void and set aside the same;

2. This Tribunal vide order dated 15.05.2018 initiated the CIRP against the Corporate Debtor by admitting the application the creditor under the IBC, 2016 and Mr. Pradeep Kumar Sethi was appointed as the IRP. Further, the RP issued Public Announcement inviting claims on 07/05/2019 fixing the last date

of submission as 21/05/2019. In the meantime, the respondent-Shri Anish Nanavaty has also been substituted as the Resolution Professional.

2.1. The RP has observed that prior to the commencement of the CIRP of the Corporate Debtor, the Corporate Debtor entered into certain transactions falling under section 43 of the Code, in as much as the Corporate Debtor adjusted the amount which was initially receivable by it from Respondent No.2/Reliance Webstore Limited (RWSL) to settle the payable to Respondent No. 1/Reliance Communications Limited (RCOM) to the extent of INR 50 crores by way of the letter dated 29th May 2017 ("Impugned Letter"), which constitutes a preferential transaction under section 43 of the Code.

2.2. The Admission Order was challenged by certain directors and shareholders of the Corporate Debtor before the National Company Law Appellate Tribunal ("NCLAT"/ "Appellate Authority"). By an Order dated 30th May, 2018, inter alia, the NCLAT stayed the Admission Order. Thereafter, in view of the subsequent developments, which may not be relevant for the purposes of this Application, the directors/shareholders withdrew the Appeal filed before the NCLAT and by an Order dated 30th April, 2019 the NCLAT permitted the withdrawal of the Appeal and also directed this Adjudicating Authority to proceed with the matter in accordance with law. By an Order dated 7th May, 2019 this Adjudicating Authority directed recommencement of the CIRP of the Corporate Debtor.

2.3. Pursuant to the aforesaid, the Applicant has taken over the management and business affairs of the Corporate Debtor, including its other functions as an RP under the Code. 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 for the period 15th May, 2016 to 15th May 2018 ("Review Period"). The Auditors by way of their interim report dated 9th January, 2020 which forms a part of the final set of report dated 10th January 2020 ("Auditor's Report"), have identified that the adjustment of the amount which was initially receivable by the Corporate Debtor from Respondent No.2/RWSL to settle the dues of Respondent No.1/RCOM to the extent of INR 50 crores by way of the Impugned Letter ("Impugned Transaction") would constitute a preferential transaction under the Code.

2.4. The brief background in relation to the above Impugned Transaction is summarised as below:-

- a. In or around 2017, the Corporate Debtor had a payable of INR 50 crores to Respondent No.1/ RCOM on account of unsecured loans taken by the Corporate Debtor from RCOM to meet its fund requirements for certain corporate purposes ("Payable").
- b. In or around 2017, the Corporate Debtor had a receivable from Respondent No.2/ RWSL to the extent of INR 50

crores under various operational services such as customer life cycle management services and collection from Distributors ("Receivables").

- c. On 29th May, 2017, the Corporate Debtor, the Respondent No.1/RCOM and Respondent No.2/RWSL entered into Impugned Transaction, whereby the receivables from Respondent No.2/RWSL was adjusted to settle the payable to the Respondent No.1/RCOM to the extent of INR 50 crores.
- d. Further, in the books of accounts of the Corporate Debtor, the Receivables were adjusted against the Payable to Respondent No. 1/RCOM to the extent of INR 50 crores
- e. By virtue of the Impugned Transaction, the Corporate Debtor has, in effect, made payments to Respondent No. 1/RCOM of INR 50 crores by adjusting the amount which was initially receivable by it from Respondent No.2 / RWSL to settle the dues of Respondent No.1/RCOM to the extent of INR 50 crores

2.5. The adjustment of the Receivables in the aforesaid manner amounts to a preferential treatment under section 43 of the Code by the Corporate Debtor as the said adjustment has the effect of putting Respondent No.1/RCOM, in a beneficial position, than it would have been if the distribution of assets were being made under liquidation of the Corporate Debtor in accordance with Section 53 of the Code, vis-a-vis the other creditors of the Corporate Debtor by adjusting the amount receivable by Corporate Debtor from Respondent

No.2/RWSL to settle the dues of Respondent No. 1/RCOM. The adjustment of the Receivables amounting to INR 50 crores falls during a period of 2 years preceding the insolvency commencement date (in the present case 15th May 2018) as required under Section 43(4) of the Code.

2.6. The Corporate Debtor was in financial distress at the time when the Receivables were adjusted to settle the dues of Respondent No.1/RCOM to the extent of INR 50 crores and the Corporate Debtor had defaulted in payment of other various financial creditors.

2.7. The adjustment of the Receivables was not in the ordinary course of business of the Corporate Debtor considering (i) that the Corporate Debtor was entitled to receive INR 50 crores from Respondent No.2/RWSL, which has been adjusted against dues payable to another company, i.e. Respondent No.1, and (ii) at the time when the Impugned Transaction was undertaken, the Corporate Debtor had defaulted in payment to other various financial creditors but the payable to a related party have been vide this adjustment, and (1) absence of discussions/approvals on (a) the Impugned Letter and /or (b) the adjustment of the Receivables in the Minutes of Meetings of the Audit Committee Meetings and the Board Meetings for the review period, ie. 15th May, 2016 to 15th May, 2018.

2.8. The Resolution Professional/Applicant has analysed the adjustment of the Receivables and has determined that the same would tantamount to a preferential transaction under

Section 43 of the Code. Further, the adjustment of the Receivables has been analysed/ reviewed by the Auditors and they have concluded that the said adjustment is a preferential transaction under Section 43 of the Code. More specifically, the Auditor's Report observes that the Receivables adjusted, which were initially receivable by the Corporate Debtor were transferred to Respondent No.1/RCOM and subsequently in the books of accounts of the Corporate Debtor, the Receivables were adjusted against the existing payable balance of Respondent No.1/RCOM to the extent of INR 50 crores

2.9. It is also pertinent to highlight that Respondent No. 1/ RCOM is presently undergoing CIRP in terms of the provisions of the Code. A resolution plan submitted by UV Asset Reconstruction Company Limited has been approved by the committee of creditors of Respondent No.1/ RCOM and is presently pending approval of this Adjudicating Authority.

3. The Respondent No.1 filed affidavit in reply dated 13.10.2023 stating that pursuant to the Impugned Transaction dated May 29, 2017, the receivable of Respondent No. 1 from the Corporate Debtor was substituted as the receivable from Respondent No. 2. Further, there was a liability owed by Respondent No. 1 to Respondent No. 2, which was simultaneously adjusted against the aforesaid receivable. Therefore, similar to the adjustment of the receivables and payables at the Corporate Debtor, there was a similar adjustment undertaken by the Respondent No. 1, which was simultaneously undertaken.

- 3.1. It is also important to highlight that similar to the Impugned Transaction having been reported by the Applicant, the resolution professional of Respondent No. 1 has also filed an application under Section 43 of the Code reporting the corresponding transaction set out above bearing I.A No. 288 of 2022, which is sub-judice before this Adjudicating Authority.
- 3.2. In view of the aforesaid, the receivable of Respondent No. 1 from the Corporate Debtor stood adjusted and set-off against the liability owed by Respondent No. 1 to Respondent No. 2 and hence, it is not reflected as an asset of Respondent No. 1 and therefore, not further dealt with in the resolution plan of Respondent No. 1.
- 3.3. It is respectfully submitted that irrespective of whether the amount in question is being considered as an asset of Respondent No. 1 in the CIRP of Respondent No. 1 and being dealt with in the Resolution Plan, Section 14(1)(d) of the Code prohibits recovery of any property which is in the possession of the corporate debtor, i.e., the Respondent No. 1 herein.
- 3.4. As the aforesaid monies stemming from the Impugned Transaction are alleged to have been adjusted towards receivables of Respondent No. 1 prior to CIRP and as on date, there is an ongoing moratorium prevailing in respect of Respondent No. 1 as ordered by this Adjudicating Authority, it is respectfully submitted that this Adjudicating Authority ought to allow the CIRP of Respondent No. 1 to run its due course as

per provisions of the Code, and not pass any adverse order in relation to these monies.

3.5. The Respondent No.1 submits that the Hon'ble Supreme Court in plethora of cases such as *Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.* and *Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657* has held that once the CoC approved resolution plan is approved by the Adjudicating Authority and the corporate debtor is put back on its feet, then no surprise claims should be flung on the successful resolution applicant so that it can start with fresh slate on the basis of the approved resolution plan. Therefore, any reversal of the Impugned Transaction by this Adjudicating Authority would set at naught this principle established by the Hon'ble Supreme Court to provide the successful resolution applicant the business of the corporate debtor on a fresh slate.

4. Heard learned counsel for the both sides and perused the records.
- 4.1. 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.-

4.2. (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.”

4.3. 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”.*

4.4. In the present case, it is not in dispute that the impugned transaction had the effect of paying off Respondent No. 1's antecedent debt in preference over other creditors and the Respondent No. 1 would have received less than what it got by way of this transaction, as this transaction discharged the debt owed by Respondent No. 1 to Respondent No. 2. Undisputedly, the said transaction is within 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.

4.5. 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.

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

4.7. In this case, the Corporate Debtor, Respondent No. 1 & Respondent No. 2 are related parties and belong 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.

4.8. The Resolution Plan of Corporate Debtor as well of Respondent No. 1 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. 1 has filed any claim in the CIRP of Corporate Debtor, nor Respondent No. 2 has done so in CIRP of Respondent No. 1 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. 1 and 2 can not file the claim in CIRP of Corporate Debtor and Respondent No. 1 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 of 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.

5. In view of foregoing, IA 133 of 2022 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)

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

I.A. 138 OF 2022

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Anish Niranjan Nanavaty
The Resolution Professional

...Applicant

Vs.

Reliance Tech Services Limited & Another

...Respondents

In the matter of

C.P.(IB) No. 1386/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Telecom Ltd.

Corporate Debtor

Order delivered on: 15.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant/RP

:

Mr. Anoop Rawat a/w Mr.

Rishabh Jaisani and Ms. Kriti Kalyani, Advocates
For the Respondent 2 : Mr. Ankit Lohia a/w Mr. Udit Raghuwanshi, Advocates

ORDER

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

1. This application IA 138/2022 was filed by Mr. Anish Niranjan Nanavaty (“Applicant”) in the matter of M/s Reliance Telecom Limited (Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 (“Code”), seeking following reliefs:
 - a. Order and declare that the Impugned Transaction, ie the transaction set out in paragraphs nos. 8(a) to 8(e) as entered into between the Corporate Debtor and the Respondents through the Impugned Letter dated 29th May, 2017 and acts undertaken in furtherance of the Impugned Letter dated 29th May 2017, constitute a preferential transaction under Section 43 of the Code;
 - b. Order and declare the aforesaid Impugned Transaction, as entered into between Corporate Debtor and the Respondents by way of the Impugned Letter dated 29th May, 2017 and acts undertaken in furtherance of the same, as being null and void and set aside the same,
 - c. Any other relief, including under Section 44 of the Code, that this Hon'ble Adjudicating Authority may deem fit.
2. This Tribunal vide order dated 15.05.2018 initiated the CIRP against the Corporate Debtor by admitting the application filed by the creditor under the IBC, 2016 and Mr. Pradeep Kumar Sethi was appointed as the IRP. Further, the RP issued Public Announcement inviting claims on 07/05/2019 fixing the last date of submission as 21/05/2019. In the meantime, the respondent-

Shri Anish Nanavaty has also been substituted as the Resolution Professional.

- 2.1. The RP has observed that prior to the commencement of the CIRP of the Corporate Debtor, the Corporate Debtor entered into certain transactions falling under Section 43 of the Code, in as much as the Corporate Debtor adjusted certain amounts which was initially receivable by it from Respondent No. 1/ Reliance Tech Services Limited (RTSL) to settle the dues of Respondent No.2/ Reliance Communications Infrastructure Limited (RCIL), to the extent of INR 26 crores by way of the Impugned Letter dated 29th May, 2017 ("Impugned Letter"), which constitutes a preferential transaction under Section 43 of the Code.
- 2.2. By an order dated 15th May, 2018 ("Admission Order"), this Adjudicating Authority had admitted a company petition filed by an operational creditor and had commenced the CIRP of the Corporate Debtor the Admission Order was challenged by certain directors and shareholders of the Corporate Debtor before the National Company Law Appellate Tribunal ("NCLAT"). By an order dated 30th May, 2018, inter alia, the NCLAT stayed the Admission Order. Thereafter, in view of the subsequent developments, which may not be relevant for the purposes of this Application, the directors/ shareholders withdrew the Appeal filed before the NCLAT, and by an order dated 30th April, 2019, the Hon'ble NCLAT permitted the withdrawal of the Appeal and also directed this Adjudicating Authority to proceed with the matter in accordance with law, Further, by an order dated 7th May, 2019, this Hon'ble Adjudicating Authority directed recommencement of the CIRP of the Corporate Debtor.
- 2.3. In view of the aforementioned Orders, the CIRP of the Corporate Debtor was recommenced. Subsequently, by an order dated 21 June, 2019 of this Hon'ble Adjudicating Authority (published on 28th June,

2021), the Applicant has been confirmed as the resolution professional for the Corporate Debtor.

- 2.4. Pursuant to the aforesaid, the Applicant has taken over the management and business affairs of the Corporate Debtor, including its other functions as an RP under the Code. 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 for the period 15th May, 2016 to 15th May, 2018 ("Review Period"). The Auditors by way of their report dated 9th January, 2020 which forms a part of the final set of report dated 10th January, 2020 ("Auditor's Report") have identified that the adjustment of the amount which was initially receivable by the Corporate Debtor from Respondent No.1 /RTSL to settle the dues of Respondent No.2/RCIL, to the extent of INR 26 crores ("Impugned Transaction") under the Impugned Letter would constitute a preferential transaction under the Code.
- 2.5. In or around 2017, the Corporate Debtor had a receivable from Respondent No.1/RTSL to the extent of INR 26 crores on account of certain advances provided by Corporate Debtor to RTSL to avail IT services ("Receivables"). In or around 2017, the Corporate Debtor also had payable of INR 26 crores to Respondent No.2/RCIL on account of USO tower and customer care services ("Payable"). On 29th May, 2017, the Corporate Debtor, the Respondent No.1/ RTSL and Respondent No.2/RCIL entered into an arrangement by way of the Impugned Letter, whereby the Receivables from Respondent No.1/RTSL was adjusted to settle the Payable to the Respondent No.2/RCIL, to the extent of INR 26 crores. Further, in the books of accounts of the Corporate Debtor, the Receivables were adjusted

against the Payable balance of Respondent No.2/ RCIL, to the extent of INR 26 crores

- 2.6. The adjustment of the Receivables in the aforesaid manner amounts to a preferential treatment under Section 43 of the Code by the Corporate Debtor as the said adjustment has the effect of putting Respondent No.2/RCIL, 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 of the Corporate Debtor by adjusting the amount receivable by it from Respondent No.1/RTSL to settle the dues of Respondent No.2/RCIL. The adjustment of the Receivables amounting to INR 26 crores falls during a period of 2 years preceding the insolvency commencement date (in the present case 15th May, 2018) as required under Section 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 Respondent No.2/RCIL to the extent of INR 26 crores and the Corporate Debtor had defaulted in payment of other various financial creditors. That the adjustment of the Receivables was not in the ordinary course of business of the Corporate Debtor considering (i) that the Corporate Debtor was entitled to receive INR 26 crores from Respondent No.1 / RTSL, which has been adjusted against dues payable to another company, i.e. RCIL, and (ii) at the time when the Impugned Transaction was undertaken, the Corporate Debtor had defaulted in payment to other various financial creditors but the payables to a related party have been made vide this adjustment, and (iii) absence of discussions/approvals on (a) the Impugned Letter and/or (b) the adjustment of the Receivables in the Minutes of Meetings of the Audit Committee Meetings and the Board Meetings for the review period, Le. 15th May, 2016 to 15th May, 2018.

- 2.7. The Resolution Professional / Applicant has analysed the adjustment of the Receivables and has determined that the same would tantamount to a preferential transaction under Section 43 of the Code Further, the adjustment of the Receivables has been analysed/reviewed by the Auditors and they have concluded that the said adjustment is a preferential transaction under Section 43 of the Code. More specifically, the Auditor's Report observes that the Receivables adjusted, which were initially receivable by the Corporate Debtor were transferred to Respondent No.2/RCIL and subsequently in the books of accounts of the Corporate Debtor, the Receivables were adjusted against the existing payable balance of Respondent No.2/RCIL to the extent of INR 26 crores.
- 2.8. It is also pertinent to highlight that the Respondent No. 2 was undergoing CIRP when the Auditor's Report was received and subsequently, a resolution plan submitted by Reliance Projects and Property Management Services Limited has been approved by the Committee of Creditors and is presently pending approval before the Adjudicating Authority.
3. The Respondent No.2 filed affidavit in reply dated 13.10.2023 stating that pursuant to the Impugned Transaction dated May 29, 2017, the receivable of Respondent No. 2 from the Corporate Debtor was substituted as the receivable from Respondent No. 1. Further, there was a liability owed by Respondent No. 2 to Respondent No. 1, which was simultaneously adjusted against the aforesaid receivable. Therefore, similar to the adjustment of the receivables and payables at the Corporate Debtor, there was a similar adjustment undertaken by the Respondent No. 2, which was simultaneously undertaken.
- 3.1. In view of the aforesaid, the receivable of Respondent No. 1 from the Corporate Debtor stood adjusted and set-off against the liability owed

by Respondent No. 1 to Respondent No. 2 and hence, it is not reflected as an asset of Respondent No. 1 and therefore, not further dealt with in the resolution plan of Respondent No. 1.

3.2. It is respectfully submitted that irrespective of whether the amount in question is being considered as an asset of Respondent No. 1 in the CIRP of Respondent No. 2 and being dealt with in the Resolution Plan, Section 14(1)(d) of the Code prohibits recovery of any property which is in the possession of the corporate debtor, i.e., the Respondent No. 2 herein.

3.3. As the aforesaid monies stemming from the Impugned Transaction are alleged to have been adjusted towards receivables of Respondent No. 2 prior to CIRP and as on date, there is an ongoing moratorium prevailing in respect of Respondent No. 2 as ordered by this Adjudicating Authority, it is respectfully submitted that this Adjudicating Authority ought to allow the CIRP of Respondent No. 2 to run its due course as per provisions of the Code, and not pass any adverse order in relation to these monies.

3.4. The Respondent No.1 submits that the Hon'ble Supreme Court in plethora of cases such as *Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.* and *Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657* has held that once the CoC approved resolution plan is approved by the Adjudicating Authority and the corporate debtor is put back on its feet, then no surprise claims should be flung on the successful resolution applicant so that it can start with fresh slate on the basis of the approved resolution plan. Therefore, any reversal of the Impugned Transaction by this Adjudicating Authority would set at naught this principle

established by the Hon'ble Supreme Court to provide the successful resolution applicant the business of the corporate debtor on a fresh slate.

4. Heard learned counsel for both sides and perused the records.
- 4.1. 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.”

4.2. 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”.

- 4.3. 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. 1 would have received less than what it got by way of this transaction, as this transaction discharged the debt owed by Respondent No. 2 to Respondent No. 1. Undisputedly, the said transaction is within 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.
- 4.4. 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.

- 4.5. We note that the receivable of Respondent No. 2 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.
- 4.6. In this case, the Corporate Debtor, Respondent No. 1 & Respondent No. 2 are related parties and belong 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.
- 4.7. 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 can not 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. While the resolution plan in case of Respondent No. 2 has been approved by this Tribunal also, the resolution plan in case of Corporate Debtor is still pending for approval before this Tribunal on account of certain issues arising from plan being sub-judice before Hon'ble Supreme Court in both the cases.

4.8. In view of above, we are of considered view that an order in relation to this transaction shall be prejudicial to the interest of the parties, who had undertaken the impugned transaction in normal course of their business. Accordingly, we consider it appropriate to dismiss this application.

4.9. In view of foregoing, IA 138 of 2022 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)

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

I.A. 176 OF 2022

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Anish Niranjan Nanavaty
The Resolution Professional

...Applicant

Vs.

Reliance Webstore & Another

...Respondents

In the matter of

C.P.(IB) No. 1386/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Telecom Ltd.

Corporate Debtor

Order delivered on: 15.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant/RP

:

Mr. Anoop Rawat a/w Mr.

Rishabh Jaisani and Ms. Kriti
Kalyani, Advocates

For the Respondent 2 : Mr. Ankit Lohia a/w Mr. Udit
Raghuwanshi , Advocates

ORDER

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

1. This application IA 176/2022 was filed by Mr. Anish Niranjana Nanavaty ("Applicant") in the matter of M/s Reliance Telecom Limited (Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs:
 - a. Order and declare that the Impugned Transaction, i.e. the arrangement set out as entered into between the Corporate Debtor and the Respondents through the Impugned Letter dated 31st January, 2018, and acts undertaken in furtherance thereof, constitute a preferential transaction under Section 43 of the Code:
 - b. Order and declare the aforesaid Impugned Transaction, entered into between Corporate Debtor and the Respondents by way of the Impugned Letter dated 31 January 2018 and acts undertaken in furtherance of the Impugned Letter, as being null and void and set aside the same;
 - c. Any other relief, including under Section 44 of the Code, that this Adjudicating Authority may deem fit.
2. The present Application is being filed seeking the setting aside of the preferential transaction entered, by way of letter dated 31st January, 2018 ("Impugned Letter"), into between Reliance Telecom Limited ("RTL" or "Corporate Debtor") and the Respondent Nos. 1 and 2, which are Reliance Webstore Limited ("RWSL") and Reliance Communications Limited ("RCOM") respectively ("Impugned Transaction"). The Resolution

Professional ("RP"/"Applicant") of the Corporate Debtor humbly submits that the amount of INR 30 crores which was initially receivable by Corporate Debtor from Respondent No.1/RWSL, has been adjusted against dues payable to another company, ie. Respondent No.2/RCOM as a result of 2018 entering into the aforesaid preferential transaction prior to the commencement of the corporate insolvency resolution process ("CIRP") of the Corporate Debtor.

- 2.1. This Tribunal vide order dated 15.05.2018 initiated the CIRP against the Corporate Debtor by admitting the application the creditor under the IBC, 2016 and Mr. Pradeep Kumar Sethi was appointed as the IRP. Further, the RP issued Public Announcement inviting claims on 07/05/2019 fixing the last date of submission as 21/05/2019. In the meantime, the respondent- Shri Anish Nanavaty has also been substituted as the Resolution Professional.
- 2.2. The Admission Order was challenged by certain shareholders/directors of the Corporate Debtor before the National Company Law Appellate Tribunal ("NCLAT "Appellate Authority"), and stayed by the NCLAT by an order dated 30th May, 2018 ("Stay Order") Thereafter, in view of the subsequent developments, the directors/shareholders withdrew the Appeal filed before the NCLAT and by an order dated 30th April, 2019 ("Withdrawal Order"), the NCLAT permitted the withdrawal of the Appeal and also directed this Hon'ble Tribunal to proceed with the matter in accordance with the law. By an Order dated 7th May 2019 ("CIRP Revival Order"), this Adjudicating Authority directed recommencement of the CIRP of the Corporate Debtor
- 2.3. In view of the aforementioned the CIRP of the Corporate Debtor was recommenced. It is pertinent to note, by an order dated 9 May 2019, the period between 30th May 2018 and 30 April 2019 has been excluded by this Hon'ble Adjudicating Authority from the calculation of the CIRP. Subsequently, by an order dated 21 June 2019 (published on 28th June

2019) of this Hon'ble Adjudicating Authority, the Applicant has been confirmed as RP. Pursuant thereto, the Applicant, as the RP, has taken over the management and business affairs of the Corporate Debtor in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") with effect from 28 June 2019,

- 2.4. Vide engagement letter dated 15th July 2019, the Applicant had appointed Grant Thornton India LLP ("Auditor"), 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 15th May 2016 to 15th May 2018 ("Review Period").
- 2.5. The Auditor by way of their report dated 19 December 2019, which forms part of the final set of report dated 10th January 2020 ("Auditor's Report"), identified that the that the adjustment of the amount which was initially receivable by the Corporate Debtor from Respondent No.1/RWSL to settle the dues of Respondent No.2/ RCOM to the extent of INR 30 crores by way of the Impugned Transaction would constitute a preferential transaction under the Code. It is submitted that the adjustment of the receivables has led to Respondent No.2/RCOM being in a beneficial position compared to the other secured creditors / lenders, if the distribution was made in liquidation of the Corporate Debtor. Further, the Corporate Debtor was in financial distress at the time when the receivables were adjusted to settle the dues of Respondent No.2/RCOM
- 2.6. In light of the aforesaid, the Applicant most respectfully submits that this Hon'ble Adjudicating Authority be pleased to declare that the Impugned Transaction effected through letter dated 31 January 2018 and acts undertaken in furtherance thereof constitute a preferential transaction under Section 43 of the Code and set it aside, and provide consequent directions under Section 44 of the Code.

3. The Respondent No.2 filed affidavit in reply dated 13.10.2023 stating that pursuant to the Impugned Transaction dated 31.01.2018, the receivable of Respondent No. 2 from the Corporate Debtor was substituted as the receivable from Respondent No. 1. Further, there was a liability owed by Respondent No. 2 to Respondent No. 1, which was simultaneously adjusted against the aforesaid receivable. Therefore, similar to the adjustment of the receivables and payables at the Corporate Debtor, there was a similar adjustment undertaken by the Respondent No. 2, which was simultaneously undertaken.
- 3.1. In view of the aforesaid, the receivable of Respondent No. 1 from the Corporate Debtor stood adjusted and set-off against the liability owed by Respondent No. 1 to Respondent No. 2 and hence, it is not reflected as an asset of Respondent No. 1 and therefore, not further dealt with in the resolution plan of Respondent No. 1.
- 3.2. It is also important to highlight that similar to the Impugned Transaction having been reported by the Applicant, the resolution professional of Respondent No. 1 has also filed an application under Section 43 of the Code reporting the corresponding transaction set out above bearing I.A No. 288 of 2022, which is sub-judice before this Hon'ble Adjudicating Authority.
- 3.3. It is respectfully submitted that irrespective of whether the amount in question is being considered as an asset of Respondent No. 1 in the CIRP of Respondent No. 2 and being dealt with in the Resolution Plan, Section 14(1)(d) of the Code prohibits recovery of any property which is in the possession of the corporate debtor, i.e., the Respondent No. 2 herein.
- 3.4. As the aforesaid monies stemming from the Impugned Transaction are alleged to have been adjusted towards receivables of Respondent No. 2 prior to CIRP and as on date, there is an ongoing moratorium prevailing in respect of Respondent No. 2 as ordered by this Adjudicating

Authority, it is respectfully submitted that this Adjudicating Authority ought to allow the CIRP of Respondent No. 2 to run its due course as per provisions of the Code, and not pass any adverse order in relation to these monies.

3.5. The Respondent No.1 submits that the Hon'ble Supreme Court in plethora of cases such as *Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.* and *Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657* has held that once the CoC approved resolution plan is approved by the Adjudicating Authority and the corporate debtor is put back on its feet, then no surprise claims should be flung on the successful resolution applicant so that it can start with fresh slate on the basis of the approved resolution plan. Therefore, any reversal of the Impugned Transaction by this Adjudicating Authority would set at naught this principle established by the Hon'ble Supreme Court to provide the successful resolution applicant the business of the corporate debtor on a fresh slate.

4. Heard learned counsel for both sides and perused the records.

4.1. 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.”*

4.2. 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”.*

4.3. 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. 1 would have received less than what it got by way of this transaction, as this transaction discharged the debt owed by Respondent No. 2 to Respondent No. 1. Undisputedly, the said transaction is within 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.

4.4. 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.

4.5. We note that the receivable of Respondent No. 2 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.

- 4.6. In this case, the Corporate Debtor, Respondent No. 1 & Respondent No. 2 are related parties and belong 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.
- 4.7. 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 can not 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. While the resolution plan in case of Respondent No. 2 has been approved by this Tribunal also, the resolution plan in case of Corporate Debtor is still pending for approval before this Tribunal on account of certain issues arising from plan being sub-judice before Hon'ble Supreme Court in both the cases.
- 4.8. In view of above, we are of considered view that an order in relation to this transaction shall be prejudicial to the interest of the parties, who had undertaken the impugned transaction in normal course of their business. Accordingly, we consider it appropriate to dismiss this application.

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 176 OF 2022
IN
CP (IB) 1386 OF 2017

5. In view of foregoing, IA 176 of 2022 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)

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

I.A. 287 OF 2022

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Anish Niranjan Nanavaty
The Resolution Professional

...Applicant

Vs.

Reliance Communications Limited & Another
...Respondents

In the matter of

C.P.(IB) No. 1386/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Telecom Ltd.

Corporate Debtor

Order delivered on: 15.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant/RP

:

Mr. Anoop Rawat a/w Mr.

Rishabh Jaisani and Ms. Kriti Kalyani, Advocates
For the Respondent 2 : Mr. Ankit Lohia a/w Mr. Udit Raghuwanshi, Advocates

ORDER

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

1. This application IA 287/2022 was filed by Mr. Anish Niranjan Nanavaty ("Applicant") in the matter of M/s Reliance Telecom Limited (Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs:
 - a. Order and declare that the Impugned Transaction, i.e. transaction set out as entered into between the Corporate Debtor and the Respondents, constitute preferential transaction under Section 43 of the Code;
 - b. Order and declare the aforesaid Impugned Transaction entered into between Corporate Debtor and the Respondents as being null and void and set aside the same,
 - c. Any other relief, including under Section 44 of the Code, that this Hon'ble Adjudicating Authority may deem fit.
2. The present Application is being filed seeking the setting aside of the preferential transaction entered, by way of letter dated 31 March 2019 ("Impugned Letter"), into between Reliance Telecom Limited ("RTL"/ "Corporate Debtor") and the Respondent Nos. 1 and 2, which are Reliance Webstore Limited ("RWSL") and Reliance Communications Limited ("RCom") respectively ("Impugned Transaction"). The Resolution Professional ("RP"/ "Applicant") of the Corporate Debtor, the Applicant herein, humbly submits that the amount of INR 19.59 crores which was

initially receivable by Corporate Debtor from Respondent No.1/RWSL, has been adjusted against dues payable to another company; i.e. Respondent No.2/RCom as a result of entering into the aforesaid preferential transaction prior to the commencement of the corporate insolvency resolution process ("CIRP") of the Corporate Debtor.

2.1. This Tribunal vide order dated 15.05.2018 initiated the CIRP against the Corporate Debtor by admitting the application the creditor under the IBC, 2016 and Mr. Pradeep Kumar Sethi was appointed as the IRP. Further, the RP issued Public Announcement inviting claims on 07/05/2019 fixing the last date of submission as 21/05/2019. In the meantime, the respondent- Shri Anish Nanavaty has also been substituted as the Resolution Professional.

2.2. The Admission Order was challenged by certain shareholders/directors of the Corporate Debtor before the National Company Law Appellate Tribunal ("NCLAT"/ "Appellate Authority"), and stayed by the NCLAT by an order dated 30 May 2018 ("Stay Order"). Thereafter, in view of the subsequent developments, the directors/shareholders withdrew the Appeal filed before the NCLAT and by an order dated 30 April 2019 ("Withdrawal Order"), the NCLAT permitted the withdrawal of the Appeal and also directed this Tribunal to proceed with the matter in accordance with the law. By an Order dated 7 May 2019 (CIRP Revival Order"), this Adjudicating Authority directed recommencement of the CIRP of the Corporate Debtor

2.3. In view of the aforementioned orders, the CIRP of the Corporate Debtor was recommenced. pertinent to note, by an order dated 9 May 2019, the period between 30 May 2018 and 30 April 2019 has been excluded by this Hon'ble Adjudicating Authority from the calculation of the CIRP. Subsequently, by an order dated 21 June 2019 (published on 28 June 2019) of this Hon'ble Adjudicating Authority, the Applicant has been confirmed as RP. Pursuant thereto, the Applicant, as the RP, has taken

over the management and business affairs of the Corporate Debtor in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code") with effect from 28 June 2019.

- 2.4. Vide engagement letter dated 15 July 2019, the Applicant had appointed Grant Thornton India LLP ("Auditor"), in order to ascertain if the Corporate Debtor had entered into transactions which could be classified as, inter alia, preferential, undervalued, extortionate and fraudulent, as per the Code.
- 2.5. The Auditor by way of their interim report dated 9 January 2020, which forms part of the final set of report dated 10 January 2020 ("Auditor's Report"), identified that the adjustment of the amount which was initially receivable by the Corporate Debtor from Respondent No.1/RWSL to settle the dues of Respondent No.2 / RCom to the extent of INR 19.59 crores by way of the Impugned Transaction would constitute a preferential transaction under the Code. It is submitted that the adjustment of the receivables has led to Respondent No.2 / RCom being in a beneficial position compared to the other secured creditors/lenders, if the distribution was made in liquidation of the Corporate Debtor.
- 2.6. The brief background in relation to the Impugned Transaction above is summarised as below:-
- i. During the Review Period, i.e. between 15th May, 2016- 15th May, 2018, the Corporate Debtor had a receivable from Respondent No. 1/ RWSL to the extent of Rs. 19.59 crores ("Receivables").
 - ii. During the Review Period, i.e. between 15th May, 2016-15th May, 2018, the Corporate Debtor also had payable of Rs. 19.59 crores to Respondent No.2/ RCom with respect to outstanding unsecured loan ("Payable")
 - iii. On 31 March 2019, the Corporate Debtor, the Respondent No.1/RWSL and Respondent No.2/RCom entered into an

arrangement by way of an assignment, whereby the Receivables from Respondent No.1/RWSL was adjusted to settle the Payable to the Respondent No.2/RCom to the extent of Rs. 19.59 crores.

- iv. Further, in the books of accounts of the Corporate Debtor, the Receivables were adjusted against the Payable to Respondent No.2 / RCom to the extent of Rs. 19.59 crores.
- v. While the CIRP of the Corporate Debtor was commenced vide the Admission Order dated 15th May, 2016, the CIRP was stayed vide the subsequent Stay Order dated 30th May, 2018, and the interim resolution professional had handed over the control of the Corporate Debtor back to the ex-management of the Corporate Debtor. The CIRP was recommenced vide the CIRP Revival Order dated 7th May, 2019 which was passed by this Tribunal subsequent to the Withdrawal Order. Therefore, evidently, during the period between 30th May, 2018 till 7th May, 2019, the ex- management of the Corporate Debtor had complete control over all functions and operations of the Corporate Debtor, including the Impugned Transaction, which was done on 30th March, 2019. While this transaction does not appear to fall strictly within the Review Period; i.e., between 15th May, 2016-15th May, 2018, however in view of the peculiar facts of this case, the Applicant has filed this application for classification of the Impugned Transaction as a preferential transaction under Section 43 of the Code.

2.7. Further, the Corporate Debtor was in financial distress at the time when the receivables were adjusted to settle the dues of Respondent No.2/RCom.

2.8. In light of the aforesaid, the Applicant most respectfully submits that this Adjudicating Authority be pleased to declare that the Impugned Transaction effected through letter dated 31 March 2019 and acts undertaken in furtherance thereof constitute a preferential transaction

under Section 43 of the Code and set it aside, and provide consequent directions under Section 44 of the Code.

3. The Respondent No.2 filed affidavit in reply dated 13.10.2023 stating that pursuant to the Impugned Transaction dated 31.03.2019, the receivable of Respondent No. 2 from the Corporate Debtor was substituted as the receivable from Respondent No. 1. Further, there was a liability owed by Respondent No. 2 to Respondent No. 1, which was simultaneously adjusted against the aforesaid receivable. Therefore, similar to the adjustment of the receivables and payables at the Corporate Debtor, there was a similar adjustment undertaken by the Respondent No. 2, which was simultaneously undertaken.
 - 3.1. It is also important to highlight that similar to the Impugned Transaction having been reported by the Applicant, the resolution professional of Respondent No. 2 has also filed an application under Section 43 of the Code reporting the corresponding transaction set out above bearing I.A No. 143 of 2022, which is sub-judice before this Hon'ble Adjudicating Authority.
 - 3.2. In view of the aforesaid, the receivable of Respondent No. 2 from the Corporate Debtor stood adjusted and set-off against the liability owed by Respondent No. 2 to Respondent No. 1 and hence, it is not reflected as an asset of Respondent No. 2 and therefore, not further dealt with in the resolution plan of Respondent No. 2.
 - 3.3. It is respectfully submitted that irrespective of whether the amount in question is being considered as an asset of Respondent No. 1 in the CIRP of Respondent No. 2 and being dealt with in the Resolution Plan, Section 14(1)(d) of the Code prohibits recovery of any property which is in the possession of the corporate debtor, i.e., the Respondent No. 2 herein.

- 3.4. As the aforesaid monies stemming from the Impugned Transaction are alleged to have been adjusted towards receivables of Respondent No. 2 prior to CIRP and as on date, there is an ongoing moratorium prevailing in respect of Respondent No. 1 as ordered by this Adjudicating Authority, it is respectfully submitted that this Adjudicating Authority ought to allow the CIRP of Respondent No. 2 to run its due course as per provisions of the Code, and not pass any adverse order in relation to these monies.
- 3.5. The Respondent No.2 submits that the Hon'ble Supreme Court in plethora of cases such as *Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.* and *Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657* has held that once the CoC approved resolution plan is approved by the Adjudicating Authority and the corporate debtor is put back on its feet, then no surprise claims should be flung on the successful resolution applicant so that it can start with fresh slate on the basis of the approved resolution plan. Therefore, any reversal of the Impugned Transaction by this Adjudicating Authority would set at naught this principle established by the Hon'ble Supreme Court to provide the successful resolution applicant the business of the corporate debtor on a fresh slate.
4. Heard learned counsel for both sides and perused the records.
- 4.1. 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.”

4.2. 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”.*

4.3. 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. 1 would have received less than what it got by way of this transaction, as this transaction discharged the debt owed by Respondent No. 2 to Respondent No. 1. Undisputedly, the said transaction is within 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.

4.4. 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.

4.5. We note that the receivable of Respondent No. 2 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.
- 4.6. In this case, the Corporate Debtor, Respondent No. 1 & Respondent No. 2 are related parties and belong 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.
- 4.7. 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 can not 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. While the resolution plan in case of Respondent No. 2 has been approved by this Tribunal also, the resolution plan in case of Corporate Debtor is still pending for approval before this Tribunal on account of certain issues arising from plan being sub-judice before Hon'ble Supreme Court in both the cases.

- 4.8. In view of above, we are of considered view that an order in relation to this transaction shall be prejudicial to the interest of the parties, who had undertaken the impugned transaction in normal course of their business. Accordingly, we consider it appropriate to dismiss this application.
5. In view of foregoing, IA 287 of 2022 is dismissed and disposed of accordingly.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)

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

I.A. 527 OF 2022

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Anish Niranjana Nanavaty
The Resolution Professional

...Applicant

Vs.

Reliance Communications Limited

...Respondents

In the matter of

C.P.(IB) No. 1386/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Telecom Ltd.

Corporate Debtor

Order delivered on: 15.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant/RP : Mr. Anoop Rawat a/w Mr. Rishabh Jaisani and Ms. Kriti Kalyani, Advocates

For the Respondent 1 : Mr. Ankit Lohia a/w Mr. Udit Raghuwanshi, Advocates

ORDER

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

1. This application IA 527/2022 was filed by Mr. Anish Niranjnan Nanavaty ("Applicant") in the matter of M/s Reliance Telecom Limited (Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs:
 - a. Order and declare that the Impugned Transaction, i.e. transaction set out as entered into between the Corporate Debtor and the Respondents, constitute preferential transaction under Section 43 of the Code;
 - b. Order and declare the aforesaid Impugned Transaction entered into between Corporate Debtor and the Respondents as being null and void and set aside the same,
 - c. Any other relief, including under Section 44 of the Code, that this Hon'ble Adjudicating Authority 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 its CIRP, the Corporate Debtor repaid to the Respondent, an unsecured loan amounting to INR 2,955.11 crores, which was availed by the Corporate Debtor from the Respondent M/s Reliance Communication Limited, which is also in CIRP. The Corporate Debtor further made payments

towards interest at the rate of 13.41% on the said unsecured loan, amounting to INR 170.45 crores.

2.1. This Tribunal vide order dated 15.05.2018 initiated the CIRP against the Corporate Debtor by admitting the application the creditor under the IBC, 2016 and Mr. Pradeep Kumar Sethi was appointed as the IRP. Further, the RP issued Public Announcement inviting claims on 07/05/2019 fixing the last date of submission as 21/05/2019. In the meantime, the respondent- Shri Anish Nanavaty has also been substituted as the Resolution Professional.

2.2. In view of the aforementioned Orders, the CIRP of the Corporate Debtor was recommenced. It is pertinent to note, by an Order dated 9 May 2019, the period between 30 May, 2018 and 30th April, 2019 has already been excluded by this Hon'ble Adjudicating Authority. Subsequently, by an order dated 21 June, 2019 (published on 28th June, 2021) of this Hon'ble Adjudicating Authority, the Applicant has been confirmed as the resolution professional for the Corporate Debtor

2.3. Pursuant to the aforesaid, the Applicant has taken over the management and business affairs of the Corporate Debtor, including its other functions as an RP under the Code. 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 as per the Code. The Auditors, by way of their interim report dated 9th January, 2020, which formed part of the final report dated 10 January, 2020 ("Auditor's Report"), have identified the Impugned Transaction, ie, the repayments made by the Corporate Debtor towards the unsecured loan taken by it from the Respondent, along with interest thereon, amounting to INR 3,125.56 crores, would constitute a

preferential transaction under Section 43 of the Code, being a transaction which has been entered into during the period of 2 years prior to insolvency commencement date, the period prescribed under Section 43(4) of the Code ("Review Period") (and during the period in which the Stay Order was in force and the erstwhile management was in control of the Corporate Debtor (which though was not in the period of 2 years prior to insolvency commencement date).

- 2.4. Sometime in or around 2016-2017, the Corporate Debtor availed of an unsecured loan from the Respondent by entering into the loan agreement. During the period of 15th May, 2016 to 1 December 2017 and thereafter on 1st July, 2018, the Corporate Debtor, in multiple tranches, repaid an amount of INR 2,955.11 crores to the Respondent under the aforesaid loan agreement, in priority to making payments to its secured lenders, and also made payments towards interest on the said unsecured loan amounting to INR 170.45 crores, during the period of 29th March, 2017 to 30th March, 2017, in multiple tranches. By virtue of the Impugned Transaction, the Corporate Debtor has made repayments of unsecured loans and the interest thereon to the Respondent in priority to secured lenders.
- 2.5. Pertinently, for the repayments made on 1 July, 2018, it is to be noted that while the CIRP of the Corporate Debtor was commenced vide the Admission Order dated 15th May, 2016, the CIRP was stayed vide the subsequent Stay Order dated 30th May, 2018, and the interim resolution professional had handed over the control of the Corporate Debtor back to the ex-management of the Corporate Debtor. The CIRP was recommenced by the CIRP Revival Order dated 7 May, 2019 which was passed by this Tribunal subsequent to the Withdrawal Order. Therefore, evidently, during the period between 30th May, 2018 till 7 May, 2019, the ex-management of the Corporate Debtor had complete control over all functions and

operations of the Corporate Debtor, including the Impugned Transaction, which was done on 30 March, 2019. While this transactions done on 1 July, 2018 do not appear to fall strictly within the Review Period, ie, between 15 May, 2016-15 May, 2018, however in view of the peculiar facts of this case, the Applicant has filed this application, including the repayments made on 1 July, 2018, for classification of the Impugned Transaction as a preferential transaction under Section 43 of the Code.

- 2.6. The repayments towards the unsecured loan along with payments of interest thereon as aforesaid have the effect of putting 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, vis-d-ets the other creditors of the Corporate Debtor by making repayments to it in preference to the secured creditors of the Corporate Debtor. The repayment of the unsecured loan along with the interest thereon amounting to INR 3,125.56 crores falls during a period of 2 years preceding the insolvency commencement date (and during the period in which the Stay Order was in force and the erstwhile management was in control of the Corporate Debtor (which though was not in the period of 2 years prior to insolvency commencement date)), as required under Section 43(4) of the Code.
- 2.7. The Corporate Debtor was in financial distress at the time when payments under the Impugned Transaction were made to the Respondent and the Corporate Debtor had defaulted in payment of other various financial creditors. Pertinently as on 1 July, 2018, the Admission Order had already been passed and the CIRP was only stayed owing to the Stay Order. That the repayments made under the Impugned Transaction were not in the ordinary course of business of the Corporate Debtor considering (1) that the loan taken

from the Respondent, which is a group company, was unsecured in nature, (ii) that payments against such an unsecured loan were preferentially made while not making payments to the secured lenders and financial creditors of the Corporate Debtor; and (iii) no approvals being obtained from the consortium of lenders of the Corporate Debtor prior to making the aforesaid payments.

2.8. That 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 along with interest thereon is a preferential transaction under Section 43 of the Code. More specifically, the Auditor's Report observes that the repayment of the unsecured loan and interest thereon was made in priority to the secured lenders of the Corporate Debtor, and that the Auditors were informed that no approvals were obtained from the consortium of lenders prior to making the aforesaid payments under the Impugned Transaction

2.9. Thus, the Impugned Transaction constitutes a preferential transaction under Section 43 of the Code and the Respondent herein ought to be directed to refund all the monies received by it under the said Impugned Transaction, amounting to INR 3,125.56 crores.

3. The Respondent No.1 filed affidavit in reply dated 13.10.2023 stating that pursuant to the Impugned Transaction during the period from May 15 2016 to March 31, 2019, the Corporate Debtor repaid to the Respondent, the unsecured loan which was availed by the Corporate Debtor from the Respondent. There was a similar adjustment undertaken by the Respondent, which was simultaneously recorded in the books of accounts as repayment of the existing loan.

- 3.1. In view of the aforesaid transaction leading to realization of receivables, the amounts pertaining to impugned transaction are not reflected as an asset of Respondent and therefore dealt with in the resolution plan.
- 3.2. That irrespective of whether the amount in question is being considered as an asset of Respondent in the CIRP of Respondent No. 2 and being dealt with in the Resolution Plan, Section 14(1)(d) of the Code prohibits recovery of any property which is in the possession of the corporate debtor, i.e., the Respondent herein.
- 3.3. The Respondent submits that the Hon'ble Supreme Court in plethora of cases such as *Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.* and *Ghanashyam Mishra & Sons (P) Ltd. V. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657* has held that once the CoC approved resolution plan is approved by the Adjudicating Authority and the corporate debtor is put back on its feet, then no surprise claims should be flung on the successful resolution applicant so that it can start with fresh slate on the basis of the approved resolution plan. Therefore, any reversal of the Impugned Transaction by this Adjudicating Authority would set at naught this principle established by the Hon'ble Supreme Court to provide the successful resolution applicant the business of the corporate debtor on a fresh slate.
4. Heard learned counsel for both sides and perused the records.
- 4.1. In this case, the Applicant as well as Respondent are in CIRP, and the Resolution Plan, in both the case, has been approved by CoC and both these plan are still pending for approval before this Tribunal on account of certain issues arising from plan being sub-judice before Hon'ble Supreme Court in both the cases. Upon payment of these

amounts, even though preferential in nature, the accounts of the parties were settled and the Respondent filed its claim in CIRP accordingly. It is undisputed fact that both the parties are related parties. Neither of the Resolution Plan provides for any payment to the related parties. Accordingly, even if this Tribunal proceeds to pass any Order setting aside the impugned transaction of preferential payments, such Order shall have no consequence as fresh claim even if allowed to be admitted shall have to be dealt with in accordance with the CoC approved plan, which provides NIL amounts towards the claim of the related parties. Accordingly, we are of considered view that this Application has become meaningless and any order in the present application shall be of no consequence. Accordingly, we consider it appropriate to dismiss this application.

5. In view of foregoing, IA 527 of 2022 is dismissed and disposed of accordingly.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)