THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

I.A. 178 OF 2022

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

Mr. Anish Niranjan Nanavaty
The Resolution Professional

…Applicant

Vs.

Reliance Communications Infrastructure Limited & Another

…Respondents

In the matter of

C.P.(IB) No. 1387/MB/2017

Ericsson India Pvt Ltd

Financial Creditor

Vs.

Reliance Communications 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, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This application IA 178/2022 was filed by Mr. Anish Niranjan Nanavaty ("Applicant") in the matter of M/s Reliance Communications 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 as entered into between the Corporate Debtor and the Respondents through the Impugned Letter dated 30th September, 2017 and acts undertaken in furtherance of the same, constitutes 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 30th September, 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. The present Application is being filed seeking the setting aside of the preferential transaction entered, by way of a settlement dated 24 September 2018, into between Reliance Communications Limited ("RCOM" or "Corporate Debtor") and the Respondent Nos. 1 and 2, which are Reliance Communication Infrastructure Limited ("RCIL") and One97 Communications Limited ("One97") respectively

("Impugned Transaction"). The Resolution Professional ("RP"/ "Applicant") of the Corporate Debtor, the Applicant herein, humbly submits that the amount of INR 5.63 crores which was initially receivable by Corporate Debtor from Respondent No.2 / One97, has been adjusted against dues payable to another company, i.e. Respondent No. 1/RCIL 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. By an order dated 15th May 2018 ("Admission Order"), this Hon'ble Adjudicating Authority had admitted a company petition and had commenced the CIRP of the Corporate Debtor. Further, by an order dated 18th May 2018, in furtherance of the Admission Order, this Hon'ble Adjudicating Authority was pleased to appoint an interim resolution professional ("IRP") with respect to the Corporate Debtor.

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 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 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. It is pertinent to note, by an order dated 9th May 2019, the period between 30 May 2018 and 30 April 2019 has been excluded by this Adjudicating Authority from the

calculation of the CIRP. Subsequently, by an order dated 21 June 2019 19 (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 28th 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 report dated 9 January 2020, which forms part of the final set of report dated 10 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.2/One97 to settle the dues of Respondent No.1/RCIL to the extent of INR 5.63 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.1/RCIL 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.1/RCIL.

2.6. In light of the aforesaid, the Applicant most respectfully submits that this Adjudicating Authority be pleased to declare that the Impugned Transaction 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.1 filed affidavit in reply dated 27.10.2023 stating that pursuant to the Impugned Transaction dated 24.09.2018, 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. 1, which was simultaneously undertaken.

   3.1. 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. 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. 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.

   3.3. 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.

3.4. 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 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, the Corporate Debtor and Respondent No. 2 are undergoing CIRP. The Plan in case of Corporate Debtor and Respondent No. 2 has been approved by CoC. While the Resolution Plan in case of Corporate Debtor is pending before this Tribunal for approval in view of certain issues in relation thereto pending before Hon'ble Supreme Court, the Resolution Plan in case of Respondent No. 2 has already been approved and is under implementation. It is not in dispute that the impugned transaction had the effect of discharging Respondent No. 2 from the receivables owed to the Corporate Debtor and in turn the Respondent No. 1's debt owed by the Respondent No. 2 was discharged. 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 from Respondent No. 2, in whose case Resolution Plan has already been approved by CoC, 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. None of the parties have filed any claim to this extent considering settlement of their inter-se accounts.

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. 2 provides NIL amount payable to the related parties and it is not in dispute that Respondent No. 2 is related party of Corporate Debtor and Respondent No. 2 is also a related party of Respondent No. 1. Neither the Respondent No. 1 has filed any claim in the CIRP of Respondent No. 2, nor Respondent No. 2 has filed any claim in CIRP of Corporate Debtor 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 Corporate Debtor can not file the claim in CIRP of Corporate Debtor and Respondent No. 1 respectively, as the Resolution Plan in case of Corporate Debtor and Respondent No. 2 has already been approved by the CoC and the Resolution plan 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 case of Corporate Debtor and the Resolution Plan in case of Respondent No. 2 has already been approved by this Tribunal and is in implementation stage. Nonetheless, we are of considered view that an order in relation to this transaction shall be meaningless 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 the foregoing, IA 178/2022 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)