

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

I.A. 144 OF 2022

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

Mr. Anish Niranjana Nanavaty
The Resolution Professional

...Applicant

Vs.

Reliance Infratel Limited

...Respondent

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: 19.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

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

ORDER

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

1. This application IA 144/2022 has been filed by Mr. Anish Niranjana 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, ie arrangement entered into between the Corporate Debtor and the Respondents and acts undertaken in furtherance of the Impugned Transaction, constitute a preferential transaction under Section 43 of the Code,
 - b. Order and declare the Impugned Transaction, i.e. the arrangement entered into between Corporate Debtor and the Respondents and acts undertaken in furtherance of the Impugned Transaction, as being null and void and set aside the same,
2. The prior to the commencement of the CIRP, the Corporate Debtor has entered into certain transactions falling under section 43 of the Code, in as much as the Corporate Debtor adjusted certain amount which was initially receivable by it from Respondent M/s Reliance Infratel Limited against monies which were payable to settle the dues of Respondent, to the extent of Rs. 2,719 crores on 31 March, 2018, which constitutes a preferential transaction under Section 43 of the Code.
 - 2.1. 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

- 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 30 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 Hon'ble 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. In view of the aforementioned Orders, the CIRP of the Corporate Debtor was recommenced. Subsequently, by an order dated 21 June, 2019 (published on 28th June, 2021) of this Adjudicating Authority, 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 as other functions as a 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 10th 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 to settle the dues of the Respondent to the extent of Rs. 2,719 crores ("Impugned Transaction) would constitute a preferential transaction under the Code In or around the year 2008, the Corporate Debtor had a receivable from Respondent to the extent of Rs. 6,719 crores on account of transfer of optical fibre to the Respondent, pursuant to a scheme approved by the Hon'ble Bombay High Court vide order dated 18th July, 2009. In FY 2009-2010 and FY 2010-2011, the Respondent issued preference shares to the Corporate Debtor for an aggregate amount of Rs. 4,000 crores thereby resulting in a net receivable of Rs. 2,719 crore which was due to be received by the Corporate at the end of 31 March, 2018. Accordingly, during FY 18, there was a net receivable of Rs 2,719 crores to the Corporate Debtor, ("Receivables"). During FY 2017-2018 the Corporate Debtor also had payable of more than Rs 5.000 crores to Respondent on account of inter corporate deposit and other operational liabilities ("Payable"). On 31 March 2018, the Corporate Debtor entered into an arrangement with the Respondent by way of the Impugned Transaction, whereby the Receivables from Respondent were adjusted against the Payables to the Respondent to the extent of Rs 2,719 crores. Further, in the books of accounts of the Corporate Debtor, the Receivables were adjusted against the Payable to Respondent to the extent of Rs. 2.719 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 affect of putting Respondent, ma 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 the Corporate Debtor. The adjustment of the Receivables amounting to Rs. 2,719 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 to the extent of Rs. 2,719 crores and the Corporate Debtor had defaulted in payment of other various financial creditors.

2.6. 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 Rs. 2,719 crores from the Respondent, 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 (in) absence of discussions / approvals on (a) the Impugned Transaction 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, i.e. 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 Receivable were preferentially adjusted against the existing payable balance of the Respondent, to the extent of Rs: 2,719 crores.

It is also pertinent to highlight that the Respondent was undergoing a CIRP when the Auditor's Report was received and subsequently, a resolution plan submitted by Reliance Digital Platform & Project Services Limited has been approved by this Hon'ble Adjudicating Authority vide its order dated December 03, 2020. The approved resolution plan is, however, yet to be implemented and presently, the monitoring committee, constituting 2 representatives each of the successful resolution applicant, the undersigned in his capacity as insolvency professional and 2 representatives of financial creditors State Bank of India and China Development Bank, is overseeing the supervision of the implementation of the approved resolution plan.

3. Heard learned counsel and perused the records.

3.1. Section 43 of the Code deals with preferential transactions and relevant time. Section 43 of the Code is as follows:

“43 : Preferential transactions and relevant time.-

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in subsection (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—
(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have

been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers —

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation.—For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.”

- 3.2. The Hon'ble NCLAT in the case of ***GVR Consulting Services Limited vs. Pooja Bahry 2023 SCC Online NCLAT 220*** at para 23 states that *“There is no need to prove any fraudulent intent for a preferential transaction. When we look into the scheme of Section 43 of the Code, sub-section (2), a clear statutory provision is that a corporate debtor shall be deemed to have given a preference if conditions as mentioned in paragraph ‘a’ and ‘b’ are fulfilled. When a provision provides for deeming fiction, ‘deeming fiction’ come into play on fulfilment of the requirement even if in fact it may not be so. In sub-section (3) of Section 43, certain exception has been provided. Thus those transactions which fall as exception under Sub-Section (3) can be taken out of sub-section 2 of Section 43, rest shall be covered by deeming fiction”.*
- 3.3. In the present case, it is not in dispute that the impugned transaction had the effect of paying off Respondent's antecedent debt in preference over other creditors by setting off receivables from the Respondents, and the Respondent would have received less than what it got by way of this transaction. 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.
- 3.4. We note that the receivable of Respondent from the Corporate Debtor stood adjusted and set-off against the liability owed by Corporate Debtor to Respondent. This transaction had the effect of squaring off the receivable of Corporate Debtor against the liability. Consequently, neither Respondent filed its claim in the CIRP of the Corporate Debtor nor Corporate Debtor filed its claim in CIRP of the Respondent. The Resolution Plan in case of Corporate Debtor and Respondent have not dealt with the respective claims.

- 3.5. In this case, the Corporate Debtor & Respondent are related parties and belong to same group of companies. Undisputedly, no amount has been paid in cash in this transaction.
- 3.6. The Resolution Plan of Corporate Debtor as well of Respondent provides NIL amount payable to the related parties. Neither the Respondent has filed any claim in the CIRP of Corporate Debtor nor Corporate Debtor has done so in CIRP of Respondent in view of stated position in their books of accounts arising from the impugned transaction. While the resolution plan in case of Respondent 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.
- 3.7. In view of above, we are of considered view that the present application has become meaningless. Accordingly, we consider it appropriate to dismiss this application.
4. In view of the foregoing, IA 144/2022 is dismissed and disposed of accordingly.

Sd/-
Prabhat Kumar
Member (Technical)

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