

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

I.A. 290 OF 2022

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

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

Vs.

Reliance Infratel 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: 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 1 : Mr. Ankit Lohia, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This application IA 290/2022 was 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, i.e. transaction set out entered into between the Corporate Debtor and the Respondents through the Impugned Transaction and acts undertaken in furtherance of the same, constitute a preferential transaction under Section 43 of the Code,
 - a. Order and declare the aforesaid Impugned Transaction entered into between Corporate Debtor and the Respondents and acts undertaken in furtherance of the same, as being null and void and set aside the same.
2. The present Application is being filed as the RP has observed that prior to the commencement of the CIRP, the Corporate Debtor entered into certain transactions falling under Section 43 of the Code, in as much the Corporate Debtor adjusted certain amount which was initially receivable by it from Respondent No. 1/ RITL (Reliance Infratel Limited) to settle the dues of Respondent No 2/ ITVL (Independent TV Limited) to the extent of Rs. 100 crores, which constitutes a preferential transaction under Section 43 of the Code
 - 2.1. By an order dated 15th May, 2018 ("Admission Order"), this Hon'ble 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 7 May, 2019 this Hon'ble Adjudicating Authority directed commencement 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 under dated 21 June, 2019, 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 15 May, 2018 ("Review Period"). The Auditors by way of their report dated 9 January, 2020 which forms a part of the final set of report dated 10 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 RITL to settle the dues of Respondent No 2 (ITVL to the extent of Rs. 100 crores Impugned Transaction) would constitute a preferential transaction under the Code

- 2.5. In or around FY 2017 the Corporate Debtor had a receivable from Respondent No. 1/ RITL to the extent of Rs. 100 crores on account of inter corporate deposits (Receivables) in or around FY 2017, the Corporate Debtor also had payable of Rs. 100 crores to Respondent No.21 ITV1, on account of inter corporate deposit ("Payable) On 31 March, 2017, the Corporate Debtor the Respondent No. I/RITL and Respondent No.2 RBTL emerged into an arrangement by way of the Impugned Transaction, whereby the Receivables from Respondent No.1/RIIL was adjusted to settle the Payable to the Respondent No.2/ITVL to the extent of Rs. 100 crores. Further, in the books of accounts of the Corporate Debtor, the Receivables were adjusted against the Payable balance of Respondent No. 2/IIVL to the extent of Rs. 100 crores.
- 2.6. The adjustment of the Receivable 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/ITVL, 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-a-vis the other creditors of the Corporate Debtor by adjusting the amount receivable by it from Respondent No.1/RITL to settle the dues of Respondent No.2/ITVL.
- 2.7. The adjustment of the Receivables amounting to Rs. 100 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/ITVL to the extent of Rs. 100 crores and the Corporate Debtor had defaulted in payment of other various financial creditors. The adjustment of the Receivables was not in the ordinary course of business of the Corporate Debtor considering (1) that the Corporate Debtor was entitled to receive Rs. 100 crores from Respondent No.1/RITL and which has been adjusted against dues payable to another company, ie, ITVL (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, ie. 15th May, 2016 to 15th May, 2018. Thus, the adjustment of the Receivables in the aforesaid manner by the Corporate Debtor through the Impugned Transaction is a preferential transaction under Section 43 of the Code.

2.8. It is also pertinent to highlight that the Respondent No. I 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 the 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

- 2.9. It is submitted that the transaction constitutes a preferential transaction under Section 43 of the Code and the arrangement entered into between the Corporate Debtor and the Respondents by way of the Impugned Transaction ought to be set aside
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.-

- 3.2. (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.”

3.3. 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”.

3.4. In the present case, the Corporate Debtor and Respondent No. 1 are undergoing CIRP. The Plan in case of Corporate Debtor and Respondent No. 1 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. 1 has already been approved and is under implementation. It is not in dispute that the impugned transaction had the effect of discharging Respondent No. 1 from the receivables owed to the Corporate Debtor and in turn the amounts payable to Respondent No.2 by the Corporate Debtor stood 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.

3.5. 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.

- 3.6. We note that the receivable from Respondent No. 1, in whose case Resolution Plan has already been approved by CoC, stood adjusted and set-off against the liability owed by the Corporate Debtor to Respondent No. 2. This transaction had the effect of squaring off the receivable of Corporate Debtor from Respondent No. 1. None of the parties have filed any claim to this extent considering settlement of their inter-se accounts.
- 3.7. 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.
- 3.8. 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. 2 is related party of Corporate Debtor and Respondent No. 2 is also a related party of Respondent No. 1. Neither the Respondent No. 2 has filed any claim in the CIRP of Corporate Debtor nor Respondent No.2 would have done so in the

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. 2 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. 1 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. 1 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.

4. In view of the foregoing, IA 290/2022 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)