THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

I.A. 1276 OF 2020

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

Mr. Anish Niranjan Nanavaty
The Resolution Professional

…Applicant

Vs.

Reliance Capital Limited
Through its Administrator
Mr. Nageswara Rao Y

…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: 16.04.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Ankit Lohia, Advocate

For the Respondent : Mr. Santosh R. Bharucha, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This application IA 1276/2020 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 repayment of the unsecured loan made by the Corporate Debtor to the Respondent, along with interest thereon, aggregating to Rs. 1797.98 crores, through multiple tranches between 15th May, 2016 and 30th June, 2017 constitute a preferential transaction under Section 43 of the Code;
   b. Order and declare that the repayment of the unsecured loan made by the Corporate Debtor to the Respondent, along with interest thereon aggregating to Rs. 1797.98 crores, through multiple tranches between 15th May, 2016 and 30th June, 2017 as being null and void and set aside the same;
   c. Order and direct the Respondent herein to refund to the Corporate Debtor, the amount of Rs. 1797.98 crores received by it as repayment of an unsecured loan and payment of interest thereon by the Corporate Debtor;

2. The present Application is being filed in view of the fact that the Applicant has observed that prior to the commencement of the corporate insolvency resolution process ("CIRP"), the Corporate Debtor repaid to the Respondent, an unsecured loan amounting to Rs. 1,745 crores, which was granted to it by the Respondent herein. The Corporate Debtor further made payments towards interest at the rate of 12.50% on the said unsecured loan, amounting to Rs. 52.98 crores. Thus, the said payments aggregating to Rs. 1797.98 made by the Corporate Debtor to the Respondents, being the Impugned Transaction, is liable to be set aside by this Hon'ble Tribunal.

   2.1. 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. The Auditors by way of their interim report dated 9th January, 2020, which formed part of the final report dated 10th January, 2020 ("Auditor's Report") have identified that the repayments made by the Corporate Debtor towards the unsecured loan taken by it from the Respondent, along with interest thereon, amounting to Rs. 1797.98 crores, would constitute a preferential transaction under the Code.

   2.2. Sometime in 2016 and 2017, the Corporate Debtor availed of unsecured loans in the form of inter-corporate deposits from the Respondent by entering into the loan agreements dated 1st April, 2016, 8th June, 2016, 16th March, 2017, and 31st March, 2017. During the period of 15th May, 2016 to 30th June, 2017, in multiple tranches, the Corporate Debtor repaid an amount of Rs. 1,745 crores to the Respondent under the said loan agreement, in priority to its secured lenders and also made payments towards interest on the said unsecured loan amounting to Rs. 52.98 crores, during the period of 13th April, 2016 to 16th March, 2017 in multiple tranches. By virtue

of the Impugned Transaction, the Corporate Debtor has made repayments of unsecured loans and the interest thereon in priority to secured lenders.

2.3. 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 vis-à-vis the other creditors of the Corporate Debtor by making repayments to it in preference to the secure creditors.

2.4. Thus, it puts 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.

2.5. The payments constituting the Impugned Transaction were not in the ordinary course of business of the Corporate Debtor considering (i) that the loan taken from the Respondent, which is a group company, was unsecured in nature; (ii) non-payment to other secured lenders and financial creditors; and (iii) no approvals being obtained from the consortium of lenders prior to making the aforesaid payments. Moreover, the Auditors have also reviewed the minutes of the meetings of the Audit Committee meetings, the Board meetings and the Joint Lenders Forum ("JLF") meetings for the review period, i.e. 15th May, 2016 to 15th May, 2018, however, no discussions / approvals on the repayment of the unsecured loan by the Corporate Debtor to the Respondent were found.

2.6. 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.

2.7. It is submitted that the Impugned Transaction constitutes a preferential transaction and the Respondent herein ought to be directed to refund all the monies received by it under the said Impugned Transaction, amounting to Rs. 1797.98 crores.

3. The Respondent filed affidavit in reply dated 14.12.2023 and written submissions dated 29.02.2023 whereby it is reiterated that the alleged transactions did not reflect in the books of accounts/records of the Respondent. Therefore, there is no question arises that the purported transactions are preferential in nature.

3.1. It is submitted that the present Application ought to have been stayed in light of the CIRP and consequent moratorium in respect of the Respondent under section 14 of the Code. The Company Petition (IB) No. 1231/MB/2021 which was filed against the Respondent was admitted on 06.12.2021. It is thus reiterated that that the present Application could not have been proceeded with.

3.2. It is further submitted that in the Respondent's CIRP, the resolution plan has been approved by the COC. The Application for approval of the resolution plan vide Application No. IA (I.B.C)-2949/2023 has also been approved by this Tribunal on 27th February, 2024 and pursuant to the said approval, inter alia, any claims, liabilities which are not part of the approved Resolution Plan stands extinguished. Specifically, paragraph 49 of the order makes this aspect amply clear and same is reproduced for ready reference.

> *"49.It is trite law that all claims, liability or obligations against the Corporate Debtor extinguishes upon the approval of the Resolution Plan. and the Corporate Debtor cannot be made liable to pay any amount, of whatsoever nature, in relation to period upto the date of approval of Resolution Plan, irrespective of whether such amount was claimed or not, including the claims arising in future in respect of said period. Further, we are of considered view that the acquisition of the*

Corporate Debtor in terms of approved Resolution Plan by the Resolution Applicant is under a scheme approved in terms of provisions of Insolvency & Bankruptcy Code, 2016, no liability in relation to any tax can arise in the hands of the Successful Resolution Applicant from such acquisition. Accordingly, we allow the reliefs claimed in relation to liability or obligations, whether existing or arising in future, in relation to period upto the date of approval of this Plan and hold that the Corporate Debtor shall not be liable to any civil or criminal liability or obligation in relation to the said period upon implementation of this Plan. Consequently, it shall be deemed that all the creditors, including authorities, have issued no objection in respect of their claims, dues or civil or criminal actions against Corporate Debtor and shall update the status of the Corporate Debtor in their records accordingly. Accordingly, we allow Relief claimed vide clause no. 9.1.1.1, 9.1.1.4 to 9.1.1.17, 9.1.1.21 to 9.1.1.25, 9.1.1.29 to 9.1.1.30, 9.1.32 to 9.1.36, 9.1.2 to 9.1.6, 9.1.7 and all subclause thereunder, 9.18 to 9.1.13."

3.3. The Applicant is a debtor of the Respondent Vide several transactions, several sums that had been disbursed to the said Applicant by the Respondent in the ordinary course of business, it being a Core Investment Company in terms of Section 45-IA of the of the Section 45-1A of the Reserve Bank of India Act, 1934. The Applicant defaulted in repayment of some of the facilities extended to them.

3.4. In support of the application, the Applicant has relied on a report dated 10th January 2020, issued by Grant Thornton India LLP. ("the Report").

3.5. It is submitted that the Report ought not to be looked at for the following reasons:

a. The same is an incomplete document. The Applicant has not produced the entire report, but only a few pages thereof.
b. Normally, such reports contain various disclaimers which have the effect of watering down the findings of such report.
c. The Report itself does not arrive at any definite conclusion to the effect that the impugned transactions are preferential. In its final assessment, the Report concludes that the impugned transactions "appear to be" preferential.
d. The first entry in Annexure-1 to the Report and the first three entries in Annexure-10 to the Report are beyond the look back period.

3.6. The Applicant does not arrive at any independent finding of his own and merely reiterates the reasons provided in the Report as his own reasons for concluding that the impugned transactions are preferential. This becomes clear on a perusal of the relevant paragraphs of the Application and the Report.

3.7. The Hon'ble NCLT Kolkata Bench in the matter of Allahabad Bank Vs. SPS Steel Rolling Mills Ltd. in CA (IB) No. 937/KB/2018 connected with CP(IB) No. 595/KB/2017 [see paragraphs 1, 2, 3(A)(i), (ii), (iii), 5, 6, 7, 8, 10, 11, 14, 15, 16 and 17(A)] has inter alia held (i) that the onus is on the RP to prove that a transaction is preferential and falls within the ambit of Section 43 of the Code; (ii) that the RP must form an independent opinion in this regard; and (iii) that a Forensic Report with disclaimers holds no real value. It is submitted that the Applicant has failed to fulfil the aforementioned obligations in the present case.

3.8. It is impermissible in law to now permit the Applicant to file any claims at this juncture. Any claims which do not form part of the Resolution Plan would stand extinguished on the approval of the

Resolution Plan by this Tribunal. Further, the Resolution Plan so approved, would be binding on all the stakeholders and creditors including the Applicant as well.

3.9. The clean slate principle has been clearly set out in Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657

> *"93.... The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the corporate debtor is revived and is made an on- going concern. After CoC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the adjudicating authority can grant its approval to the plan. It is at this stage that the plan becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. The legislative intent behind this is to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans would go haywire and the plan would be unworkable." (emphasis supplied]*

3.10. While the Application in paragraph 10 contains an averment to the effect that the impugned transactions have the effect of putting the Respondent in a beneficiary position vis-à-vis the other creditors of the Corporate Debtor, the same is merely a bald averment. The Applicant has failed to substantiate such averment or justify its

correctness. The Applicant has made this averment in terms of Section 43(2)(b) of the Code only in an attempt to bring his case within the ambit of Section 43.

3.11. The NCLT New Delhi Bench in the matter of Miditech Pvt. Ltd. in C.A. - 646/(ND)2018 and C.A. - 743/(ND)2018 in C.P. No. 432/(ND)2017 (see paragraphs 11 to 16) inter alia held that the repayment of an unsecured loan even to a related party does not by itself make it a preferential transaction. The Tribunal also held that the RP therein had failed to establish how the Respondent therein would be in a more beneficial position than other secured creditors under Section 43(2)(b) of the Code.

3.12. None of the reasons provided by the Applicant in paragraph 12 of the Application show that the impugned transactions were preferential. Paragraph 11(a) merely states that the transactions fall within the look back period. It is submitted that this by itself does not make the transactions preferential. In paragraph 11(b), the Applicant states that the Corporate Debtor was in financial distress at the time. It is submitted that apart from the fact that the Applicant has failed to produce any material to substantiate this averment, the same in any event does not by itself make the transactions preferential.

3.13. The reasons given by the Applicant in paragraph 13 of the Application to show that the transactions were not in the ordinary course of business are picked entirely from the Report. Further, none of these reasons justify the Applicant's averment that the transactions were not in the ordinary course of business. It is submitted that the Applicant has failed to discharge the burden in this regard under Section 43(3)(a) of the Code.

3.14. The Applicant has annexed, various sanction letters/loan agreements between the Corporate Debtor and the Respondent.

These sanction letters / loan agreements contain the terms and conditions on which the loans were given by the Respondent to the Corporate Debtor and the terms and conditions and the timeframe within which the same were to be repaid. These documents clearly show that the impugned transactions were undoubtedly in the ordinary course of business of the Respondent as well as the Corporate Debtor.

3.15. The ***Hon'ble Supreme Court in the matter of Anuj Jain (IRB for Jaypee Infratech Ltd.) Vs. Axis Bank Ltd. reported at 2020 SCC Online SC 237*** (see paragraphs 84, 95, 119, 121, 123, 126, 127, 128 and 129) has interpreted 'ordinary course of business' as appearing in Section 43(3)(a) of the Code to mean "that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

3.16. It is submitted that the fact the Minutes of the Audit Committee Meetings, Board Meeting and Joint Lenders Forum Meetings do not contain any discussions on or approvals in respect of the impugned transactions goes to show that the same were in the ordinary course of business and required no special approvals. This is apart from the fact that the Applicant has not produced any such Minutes before the Tribunal.

3.17. At the time of arguments, the Applicant also relied on the annual reports of the Corporate Debtor for the years 2016-17 and 2017-18. It is pertinent that in the annual report for the year 2017-18, the name of the Respondent appears as one of the entities to which loans are payable by the Corporate Debtor.

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.-

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. In the present case, the Respondent is in CIRP and the Resolution Plan in their case has been approved by this Tribunal. The said resolution plan sets aside a sum of Rs. 50.00 crores towards the claims arising from the decision in various avoidance applications filed in relation to transactions where the Respondent is one of the party and may entail obligations to pay. Accordingly, we do not find any merit in the argument of the Respondent that no new claim could be proceeded against the Respondents after approval of plan in their case. However, all the claims against the Respondents arising from the avoidance applications filed in relation to transactions involving Respondents shall stand extinguished after payment of amount set aside in the plan.

4.4. Section 43 is a deeming fiction and Hon'ble Supreme Court in case of ***Anuj Jain Interim Resolution Professional for Jaypee Infratech***

Limited v. Axis Bank Limited (Civil Appeal 8512-8527 of 2019) at para 19.3 held that "*On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so*".

4.5. 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".*

4.6. In the present case, the Corporate Debtor owed money to the Respondents prior to commencement of Insolvency resolution date and had paid some money towards repayment of such debt within

the look back period of two years. It is not in dispute that the Respondents were put in beneficial position in what they would have been in case such amounts were to be distributed in accordance with Section 53 of the Code. Accordingly, the transaction in question satisfies the basic ingredients contained in section 43(2) & (4). Hence, the transaction in question, to the extent it falls within the look back period, is a preferential transaction. However, the section 43(3) of the Code provides certain exceptions, whereby even a transaction falling within the mischief of Section 43(2) read with Section 43(4) of the Code are excluded from the scope of section 43 calling for orders u/s 44 of the Code.

4.7. The Respondents have pleaded that the said transaction was carried out in Ordinary Course of business. The Respondent is a Core Investment Company, whose principal business is to invest its funds in the shares of the group companies as well as lending money to such group companies primarily. The Corporate Debtor is engaged in provision of cellular mobile telephony services and borrows the money for the purpose of its business to meet its short term and long term financial requirements. The question whether the transaction should be in ordinary course of business of either of party or it has to be in ordinary course of business of both the parties was decided by Hon'ble Supreme Court in case of Anuj Jain (supra) in the following words -

> *"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."

4.8. The Respondent has pleaded that the impugned transaction was made in discharge of Corporate Debtor's obligations and at the time of undertaking repayment of part loan, the Corporate Debtor was not classified as NPA by any of its lenders. Further, a sum of Rs. 1,470 crores is still due from the Corporate Debtor. The Respondent is a Core Investment Company who is mandated to hold not less than 90% of its net assets in the form of investment in equity shares, preference shares, bonds, debentures, debt or loans in group companies and in compliance thereof provides financial assistance to its group companies in accordance with law. This clearly suggests that the impugned transaction is in Ordinary Course of business of the Respondent. Now the question is whether the impugned transaction can be said to be in ordinary course of business of the Corporate Debtor so as to satisfy the test laid down in section 43(3) for exclusion from rigors of section 43 of the Code and as interpreted in Anuj Jain's case (Supra).

4.9. In the present case, the Corporate Debtor is cellular service provider and treasury management involving allocation of funds to the

business need, lender's repayment, investment opportunities is one of important function. It is not in dispute that the Corporate Debtor was not classified as NPA by any of its lenders when the impugned transaction of repayment took place. The Corporate Debtor borrowed from the Respondents to meet its financial requirements for its business. It is not the case of the applicant that the borrowings from the Respondent were for a purpose other than the business of the Corporate Debtor. Ordinarily, every borrower makes sure that the amounts borrowed are paid as and when it becomes due or with least delay. The loans taken from Respondents are stated to be paid on or after the tenure of loan. Hence, we are of considered view that such repayment of loan was in Ordinary Course of business of the Corporate Debtor as well. Since, the impugned transaction was in Ordinary Course of business of Corporate Debtor and the Respondent, we are of considered view that it squarely falls within the exception provided in Section 43(3) of the Code. Hence, the impugned transaction can not be held to be a preferential transaction in terms of section 43 of the Code.

5. In view of foregoing, IA 1276/2020 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)