

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

I.A. 1966 OF 2020

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

Mr. Anish Niranjan Nanavaty
The Resolution Professional

...Applicant

Vs.

Globalcom IDC Limited

...Respondents

In the matter of

C.P.(IB) No. 3025/MB/2019

State Bank of India

Financial Creditor

Vs.

Reliance Communications Infrastructure
Limited

Corporate Debtor

Order delivered on: 02.05.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Rishabh, Advocate
For the Respondent : Mr. Malhar Zatakia, Advocate

ORDER

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

1. This Application IA 1966/2020 is filed by Mr. Anish Niranjana Nanavaty, the Resolution Professional ("Applicant") against Globalcom IDC limited, in the matter of Reliance Communications Infrastructure Limited (Corporate Debtor) under Section 43 and 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs :
 - a. Order and declare that the Impugned Transaction, whereby a payment amounting to Rs.23.93 crores has been made by the Corporate Debtor on behalf of the Respondent, constitutes a preferential transaction under Section 43 of the Code;
 - b. Order and direct the Respondent to repay/ refund the sum of Rs.23.93 crores to the Corporate Debtor pursuant to the Impugned Transaction;
2. The present application has been filed impugning the payment made towards Goods and Services Tax ("GST") by the Corporate Debtor on behalf of the Respondent amounting to Rs.23.93 crores which constitutes a preferential transaction under the Code.

- 2.1. After his appointment as Resolution Professional of the Corporate Debtor, the Applicant took over the management and business affairs of the Corporate Debtor, and appointed auditors, Batliboi and Purohit, Chartered Accountants ("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 25th September, 2017 to 25th September, 2019 ("Review Period").
- 2.2. Sometime in or around January 2018 the Corporate Debtor had a payable balance of Rs.59.67 crores towards data centre related services provided by Respondent to the Corporate Debtor, assignment of receivables by the Respondent to the Corporate Debtor and other net advances received from the Respondent in the form of loan and inter corporate deposit. The Corporate Debtor made payment amounting to Rs. 23.93 crores on behalf of the Respondent towards the GST liability of the Respondent. At the same time, an amount of Rs.23.93 crores was debited to the Respondent in the books of accounts of the Corporate Debtor. Thus, the balance payable by the Corporate Debtor to the Respondent stood reduced by Rs.23.93 crores.
- 2.3. The Impugned Transaction amounts to a preferential transaction under Section 43 of the Code for the following reasons:
- a. That the Corporate Debtor had payables, i.e, an antecedent debt amounting to Rs.59.67 crores towards the Respondent;
 - b. That the Impugned Transaction has the effect of putting the Respondent in a beneficial position vis-à-vis the other creditors of the Corporate Debtor, 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;

- c. That the Impugned Transaction was undertaken during a period of 2 years preceding the insolvency commencement date (in the present case 25th September, 2019) as required under Section 43(4) of the Code. As stated above, the payments were made during the period January, 2018 to August, 2018.
 - d. The Corporate Debtor was in financial distress at the time when Impugned Transaction was undertaken and the Corporate Debtor had defaulted in payment of other various financial creditors.
 - e. That the Impugned Transaction was not made in the ordinary course of business of the Corporate Debtor considering that ordinarily the liability towards GST was to be paid for by the Respondent as per the applicable laws in force. However, in the present case Corporate Debtor has paid the GST dues of Respondent.
- 2.4. The Resolution Professional / Applicant has analysed the Impugned Transaction and has determined that the same would tantamount to a preferential transaction under Section 43 of the Code.
- 2.5. The Applicant prays that the Tribunal be pleased to order and declare that the Impugned Transaction, whereby a payment amounting to Rs.23.93 crores has been made by the Corporate Debtor on behalf of the Respondent, constitutes a preferential transaction under Section 43 of the Code and order and direct the Respondent to repay/ refund the sum of Rs.23.93 crores to the Corporate Debtor pursuant to the Impugned Transaction.

3. The Respondent have filed affidavit in reply dated 7th December 2022 stating that the present application is devoid of any merits, baseless, frivolous and without appreciating true facts of the case. The important sequence of the events which is critical for appreciating the issue on hand and only goes to show that the Applicant has approached this Adjudicating Authority with unclean hands.
 - 3.1. It is also critical to mention that the entire allegation of the Applicant in the present application is not maintainable.
 - 3.2. Respondent is a leading provider of Internet Data Center (IDC) infrastructure services. Customers outsource their critical systems to take care of their IT infrastructure hosting and other technology. Respondents deliver secure, reliable, and scalable hosting, network, application and consulting services to the customer. Respondents state- of-the-art hosting and managed services provide the essential security, speed and reliability to get online faster and ensure servers are up and running safely at all times. Besides, it is a carrier-neutral data center with major ISP's connection terminating at all data centers.
 - 3.3. Corporate Debtor was providing marketing, selling and collection agent services and IDC services against certain Government contracts. In the present case Corporate Debtor outsourced their critical systems to the Respondent to take care of their IT infrastructure hosting and other telecom & networking related equipment that are needed to provide services to its customers
 - 3.4. In January 2018, Corporate Debtor owed Rs.59.68 Crore to the Respondent. Because of huge receivables, Respondent was in financial distress. Corporate Debtor during the period January 2018 to August 2018 directly discharged the GST liability of Rs. 23.93 Crores on behalf of Respondent to safeguard its interest so that the

services to them continues seamlessly as non payment of GST dues might result in attachment of Bank Accounts of Respondent and could adversely affect the day-to-day functioning of the Respondent and in turn disrupt the services to the Corporate Debtor. Corporate Debtor adjusted the above GST payment against the outstanding amount payable to Respondent.

3.5. Thereafter, Corporate Debtor failed to pay the dues of the Respondent and as at the Insolvency Commencement Date i.e., 25th September 2019, the dues went upto Rs.131.92/- Crores which was an increase of Rs. 72.24/- Crores (approx.) from January 2018.

3.6. Applicant has also acknowledged the Respondents' claim of Rs.80.10/- Crores as Operational Debt and Rs 51.82 Crores as financial debt.

3.7. Respondent submits that the transaction in question was in the ordinary course of business and squarely falls within the ambit of Section 43(3)(a) of IBC, 2016 which is evident from the fact that the Respondent continued its services to Corporate Debtor and the outstanding amount payable to Respondent by Corporate Debtor increased from Rs.59.68 Crores in January 2018 to Rs.131.92/- Crores as on the Insolvency Commencement Date i.e., 25th September 2019.

3.8. Without prejudice to the aforesaid submission, the Respondent states the application as filed and framed by the applicant is not maintainable, bad in law and required to be dismissed at threshold.

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.-

(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. 1’s antecedent debt in preference over other creditors, and the Respondent No. 1 would have get less than what it got by way of this transaction. Undisputedly, the said transaction is with 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.

5. We note that the Respondent was a service provider to the Corporate Debtor and the obstruction in the business of Service provider on account of unpaid GST dues by the Respondent has impacted the business operations of the Corporate Debtor. It is pertinent to note that the GST

department is also empowered to seek payment from the debtors of the registered person against the dues owed by such registered person by issuing garnishee notices. Undisputedly, the amount has been deposited by the Corporate Debtor to the account of Central Govt. which had the affect of discharge of GST liability of the Respondents to that extent. No amount is stated to be paid to the Respondent.

6. Considering the peculiar facts of the case, we are of the considered view that this transaction is in ordinary course of business of the Corporate Debtor having been entered into to destruction in the service of Respondent on one hand and garnishee proceedings from the GST department on the other hand. Similarly, it is a ordinary course of business of a business entity to cause its debtors to discharge its GST liability in case the payments are not forthcoming regularly from them. In view of this, we have no hesitation to hold that the such transaction as carry out in ordinary course of business and falls within the exclusionary clause embodies in Section 43 (3) of the Code.
7. In view of the foregoing, IA 1966/2020 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)