

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

**I.A. 2410 OF 2020**

Under Section 43 r/w Section 26 of  
Insolvency & Bankruptcy Code, 2016

**Mr. Kashyap Vaidya,**

**The Resolution Professional**

...Applicant

Vs.

**Mr. Harshad Thakkar & Others,**

**...Respondents**

In the matter of

C.P.(IB) No. 4488/MB/2018

IDFC First Bank

**Financial Creditor**

Vs.

Ashapura Intimates Fashion Limited

**Corporate Debtor**

***Order delivered on: 17.04.2024***

***Coram:***

**Shri Prabhat Kumar**

Hon'ble Member (Technical)

*Appearances*

**Justice Shri V.G. Bisht**

Hon'ble Member (Judicial)

For the Liquidator : Ms. Mitali Bhatt, Advocate  
For the Respondent : None

**ORDER`**

***Per: Prabhat Kumar, Member (Technical)***

1. This Application IA 279/2021 is filed under Section 66 r/w Section 26 of the Insolvency & Bankruptcy Code, 2016 (“Code”) by Mr. Kashyap Vaidya, the Resolution Professional (“Applicant”) in the Corporate Insolvency Resolution Process (“CIRP”) of Ashapura Intimates Fashion Limited (“Corporate Debtor”), seeking following reliefs:
  - i. Direct the Respondents as detailed in this application, to make such contributions in equal proportions to the assets of the Corporate Debtor equivalent to the sum of Rs. 5.74 crores as stated in this Application, in respect of preferential benefit availed by the Respondents vis-à-vis secured financial creditors.
  - ii. Pass appropriate directions / orders in terms of Section 44, of the Code including for recovery/ restoration of legitimate amounts due to the Corporate Debtor;
  - iii. Intimate IBBI for initiating a complaint to the Special Court in terms of section 236(2) of the Code, if this Hon'ble Tribunal deems fit;
2. The Applicant states that, the company petition was filed by Financial Creditor, IDFC First Bank Limited under the provisions of section 7 of the Insolvency and Bankruptcy Code 2016 (the “Code”). This Tribunal vide an Order dated 28 June, 2019 admitted the petition resulting into initiation of Corporate Insolvency Resolution Process (“CIRP”). Mr. Kashyap Vaidya (IBBI Reg. No. IBBI/IPA-001/IP01204/2018-19/11971) appointed as Interim Resolution Professional.
  - 2.1. The Applicant Resolution Professional (“RP”) states that during the course of CIRP and pursuant to approval and directions from the CoC, Transaction Auditor viz. BDO India LLP (Chartered Accountants)

(“Transaction Auditor”) were appointed to undertake the Transaction Audit of the books of the Corporate Debtor for the period from 01 April 2017 to 28 June 2019 (“Review Period”).

2.2. Subsequently, the Transaction Auditors have filed their report dated 21 April 2020 which provides sufficient reasons to believe that the Respondents had undertaken certain transactions by giving “preference” to other unsecured creditors vis-à-vis the secured lenders and are covered under the provisions of Section 43 of the Code.

**3. Transaction 1 – Repayment of Inter Corporate Depositors (ICDs) to the tune of Rs. 5.55 crores during the period 28 June 2018 to 28 June 2019 from the account of the Corporate Debtor.**

3.1. The Applicant submits that payments have been made to the Respondents (suspended Director) aggregating to Rs. 5.55 crores during the period 28 June 2018 to 28 June 2019, in priority to the secured lenders.

**7.1. PREFERENTIAL TRANSACTION U/S 43**  
1. Inter Corporate Deposits (ICD) (1/2)

On review of Inter corporate deposit ledgers in the Books of Accounts, for the Review Period, it was noted that the payments amounting to INR 19.76 crores were made to ICD parties. Detailed below are the list of ICD payments:

Sl. No.	Company	Relationship	Due Date	Op. Balance	1 April 2017 to 27 June 2018		28 June 2018 to 16 January 2019		17 January 2019* to 28 June 2019		Clg Balance
					Debit	Credit	Debit	Credit	Debit	Credit	
1	Ajay Multi Projects Limited	No	06-Mar-19	-	2.08	3.08	1.05	1.05	-	-	1
2	Amrapali Barter Private Limited	No	01-Aug-18	-	2.07	3.61	0.56	0.02	-	-	0.5
3	Apex Valves Private Limited	No	08-Jan-19	-	-	-	-	0.5	-	-	1
4	Devasah Investments Private Limited	No	05-Dec-18	-	-	1	0.04	-	-	-	-
5	Dhandhanla Brothers Private Limited	No	NA	-	1.03	1.03	-	-	-	-	0.4
6	Dhanshree Fashions Private Limited	No	05-Nov-18	-	0.43	0.83	0.02	0.02	-	-	-
7	Hermes Financers Private Limited	No	01-Aug-18	-	0.03	0.53	0.52	0.02	-	-	-
8	Monnet International Limited	No	28-Mar-18	-	1.02	1.02	-	-	0.5	-	-
9	Nimbi Jodha Trading & Finvest Private Limited	No	05-Nov-18	-	0	1	1.05	0.05	-	-	-
10	Prativa Suppliers Private Limited	No	17-Sep-18	-	1.02	1.02	-	-	-	-	-
11	Primrose Paper Mills Private Limited	No	14-Mar-18	-	0	1	1.05	0.05	-	-	-
12	Rajshree Developer-Entrepreneurs Private Limited	No	17-Sep-18	-	1.05	1.03	-	0.02	-	-	-
13	Ritman Commodities Private Limited	No	19-Jun-18	-	2.09	2.09	-	-	-	-	-
14	Runit Investments Company Private Limited	No	NA	-	-	-	0.03	1.03	-	-	1
15	Sky B Bangla Private Limited	No	31-Oct-18	-	2.09	3.09	0.04	0.04	-	-	0.5
16	Trumala Bataji Alloys Private Limited	No	22-Oct-18	-	0.04	1.04	0.55	0.05	-	-	6.4
17	Vinita Investment Limited	No	21-Nov-18	-	14.21	23.22	5.05	2.90	0.5	-	-
	<b>Total</b>										

Receipts and payments excludes cheque reversals.  
\*17 January 2019 is the date AIFL was declared NPA by Yes Bank Limited  
Source: Books of Accounts from Tally and ICD agreements

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- 3.2. The Respondents have preferred to pay the inter corporate deposits in priority to the secured lenders during the review period, especially within the one year prior to the date of insolvency commencement date (“ICD”) i.e. 28 June 2019.
- 3.3. Such transfer of funds to the tune of Rs. 5.55 crores has put the unsecured lenders in a “beneficial position” than it would have been in the event of a distribution of assets being made in accordance with section 53 of the Code;
- 3.4. The said unsecured lenders from whom the inter corporate deposit has been accepted as found to be “unrelated related party” in terms of the provisions of section 5(24) of the Code and hence, the look back period as per section 43(4)(b) is one year from the initiation of Corporate Insolvency and Resolution Process i.e. 28 June 2018 to 28 June 2019 and the said transfers are falling within the said period; and
- 3.5. The Applicant submits that the impugned transactions squarely satisfies all the requirements of being a “preferential transaction” in terms of the provisions of section 43 of the Code as explained above. Furthermore, it is also important to note that the Hon'ble Supreme Court in the case of JIL has held that the word “or” as appearing under section 43(3)(a) is to be read as “and”. Thereby emphasising the fact that the filter of a transaction being carried out in “ordinary course of business” ought to be considered in context to business of the Corporate Debtor. In other words, in order for a transaction to remain outside the ambit of the provisions of section 43, it ought to result in value enhancement or strengthening of the Corporate Debtor as a result of such “transfer of property” as held by the Hon'ble Supreme Court in the case of JIL, which is not the case in hand and hence the amount of Rs. 5.55 crores ought to be considered as preferential payments and the Respondents ought to be made to contribute the same back to the account of Corporate Debtor.

**4. Transaction 2 – Payments made to unsecured lenders to the tune of Rs. 0.19 crores during the period 28 June 2018 to 28 June 2019 from the account of the Corporate Debtor.**

- 4.1. The Applicant submits that he has observed from the bank statement that Rs. 0.19 crores stood withdrawn from the account of the Corporate Debtor maintained by the Respondents and was utilised to clear the dues against one particular unsecured lender rather than utilising the same for repaying the dues of the secured lenders.
- 4.2. The Applicant submits that during the period 28 June 2018 to 28 June 2019 (look back period of one year in terms of the provisions of section 43 of the Code) the Respondents have selectively repaid an amount of Rs. 0.19 crores to Capital First Limited towards the unsecured loan while the secured lenders remained unpaid.
- 4.3. The Respondents have given preference to the said beneficiary for reasons best known to them and under the circumstances they ought to be held responsible for contributing the said amount back to the account of Corporate Debtor.
- 4.4. The Applicant / RP submits that the Respondent No. 1 has been absconding since 03 October 2018 when a FIR was lodged in the matter and as on the date of this application the police administration has not been able to trace Respondent No. 1 since then.
5. The Applicant further submits that the Respondents herein have clearly not adhered to their fiduciary duties towards the interest of the Corporate Debtor and its various creditors and stakeholders vis-à-vis transactions contemplated herein and have not borne the best interest of the Corporate Debtor in mind whilst undertaking the aforesaid transactions. The actions of the Respondents herein evidently demonstrate gross negligence, wilful misconduct and wilful default and showcase complete lack of exercise of due diligence as would be reasonably expected of a person carrying out the same functions.

6. Accordingly, this Tribunal may under the provisions of Section 43 and 44 pass appropriate orders against the Respondents herein including requiring Respondents to make an aggregate contribution to the account of the Corporate Debtor **an amount of Rs. 5.74 crores [Transaction 1 Rs. 5.55 crores + Transaction 2 Rs. 0.19 crores]**
7. Heard learned counsel and perused the materials available on record.
8. 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;*

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*(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.”*

8.1. On perusal of the statement of clause 7.1 of the Transaction Audit Report we note that the Transaction Auditor has listed 17 accounts under inter corporate deposits and 11 accounts of unsecured lenders. It is further noted that transactions auditor has summed the debit and credit of these parties and without taking into accounts the credits received from these parties has made out a case of preferential

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payment for a sum of Rs.5.55 Crores in relation to inter corporate related parties and Rs. 0.19 Crores in relation to unsecured lender parties. We note that total credits from inter creditor deposit parties during the relevant period amounts to Rs.2.9 Crores, similarly in case of unsecured lender parties i.e. Capital First Limited, the aggregate of debits is equivalent to debit of credits during the relevant period which is Rs.1.41 Crores. This clearly indicates that there has been disbursement as well as repayment both happening during the look back period.

8.2. The Applicant has not annexed ledger account of these parties to have objective consideration of the transactions with these parties. Even though Section 43 is a deeming fiction and 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 Section 43(3) provides certain exception to this deemed fiction and one of the section excludes the transaction undertaken in ordinary course of business from its purview. The Applicant has not made out how the transaction is not in the ordinary course of business. Instead the Applicant has mechanically reproduced the provisions of Section 43(2) to claim these transactions as preferential transaction. Even the Transaction Auditor report has proceeded on submission of debits and credits. Even if we agree or concur with the findings of transaction audit report, we of the considered view that total debit of Rs.5.55 Crores has to be reduced by the credits of Rs.2.9 Crores which also happened during the same period. Accordingly, the preference of the net amount i.e. Rs.2.65 Crores in aggregate for all the parties can only be said to have been given.

8.3. In this Application, the creditors who are alleged to have been given preference in terms of Section 43 of the Code are not arrayed as party respondents and the prayer has been sought against the suspended Board of Directors who are Respondent No.1 and 2 in the



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Application. Section 44 of the Code provides that this Tribunal may by an order :

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;*
- (b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;*
- (c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;*
- (d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;*
- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;*
- (f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and*
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.”*

8.4. In the present case it is undisputed fact that the benefit of the payment in preference to the creditors goes to the creditors who is paid by the Corporate Debtor and no benefit accrues to the

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suspended board. Accordingly, no order can be passed against the Suspended Board in relation to the avoidance of transaction as prayed in the Application.

9. In view of aforesaid, the I.A. 2410/2020 is disposed of as dismissed.

Sd/-

**Prabhat Kumar**  
Member (Technical)

Sd/-

**Justice V.G. Bisht**  
Member (Judicial)