

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**
**(Exercising powers of Adjudicating Authority under
The Insolvency and Bankruptcy Code, 2016)**
(Through Physical/Video – Conferencing/Hybrid Mode)

IA No. 26 of 2022 in

C.P. (IB)No.196/BB/2020

U/s. 43,44 & 60(5) of the Insolvency and Bankruptcy Code, 2016

R/w Rule 11 of National Company Law Tribunal Rules, 2016

In the matter of:

Hari Babu Thota

Resolution Professional of Shree Aashraya Infra-Con Limited

Having Office At #41/1, 2nd Floor, 11th Cross

8th Main, 2nd Block, Jayanagar

Bengaluru – 560 011

...Applicant

Versus

1. Mr. Guruprasad Venkatesh Hishobkar
Audumbar Sawali, 322, Roy Road,
Tilakwadi, Belgaum- 590006
...Respondent No.1
2. Mr. Venkatesh Arjunrao Hishobkar
322, Roy Road,
Tilakwadi, Belgaum- 590006
...Respondent No.2
3. Mrs. Laxmi Venkatesh Hishobkar
322, Roy Road,
Tilakwadi, Belgaum- 590006
...Respondent No.3
4. Mrs. Annapurna Hishobkar
322, Roy Road, Audumbar Sawali,
Tilakwadi, Belgaum- 590006
...Respondent No.4
5. Mrs. Shradha Venkatesh Hishobkar
322, Roy Road, Audumbar Sawali,
Tilakwadi, Belgaum- 590006
...Respondent No.5

Order Delivered on: 30.04.2024

Coram: 1. Hon'ble Shri. K.Biswal, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the RP/Applicant : Shri Chandramouli P.
The RP : Shri Hari Babu Thota

For the Respondent : Dr. K.S. Ravichandran with
Ms. Manjula Devi

ORDER

Per: K.Biswal, Member (Judicial)

1. The present Application is filed on 17/01/2022 by Mr. Hari Babu Thota, the Resolution Professional of Shree Aashraya Infra-Con Limited (hereinafter referred to as "the Applicant") under section 43, 44 and 60 (5) of the IBC, 2016, interalia praying that this Tribunal may direct the Respondent Nos.1 to 5 under Section 44(1)(a) of the Insolvency and Bankruptcy Code, 2016 transfer an amount of Rs.1,70,74,000/- to the bank account of the Corporate Debtor against the transactions done by giving the preference to the related parties and unsecured financial creditors over secured financial creditor;
2. The facts of the case are mentioned below:
 - a) The Corporate Insolvency Resolution Process of the Corporate Debtor commenced on 06.04.2021 vide the order of this Hon'ble Tribunal dated 06.04.2021 in C.P (IB) No. 196/BB/2020, filed under Section 7 of the Code and the applicant was appointed as the Interim Resolution Professional. Further, by way of Order dated 13.08.2021, this Hon'ble Tribunal in I.A No. 203/2021 directed to act as the Resolution Professional (RP).
 - b) It is submitted that the Interim Resolution Professional has given public announcement (Form A) on 11.04.2022 to the creditors of

Corporate Debtor regarding initiation of Corporate Insolvency Resolution Process (CIRP) and to receive the claims from them within the time limit as prescribed under the provisions of the Code.

- c) Further, it is submitted that in the First meeting of Committee of Creditors (CoC) was held on 7th May 2021, the Interim Resolution Professional gave Consent to become the Resolution Professional.
- d) The 2nd Committee of Creditors (COC) of the Corporate Debtor held on 29.06.2021 resolved to appoint Forensic Auditor. Accordingly, the RP in consultation with the COC appointed the Mazars Business Advisors Private Limited as forensic auditor to examine the books of accounts of the Corporate Debtor.
- e) It is also submitted the resolution plan for revival of the Corporate Debtor is received from the Promoters (Mr. Guruprasad V. Hishobkar jointly with Ms. Laxmi V Hishobkar and Mr. Venkatesh A Hishobkar) being the Corporate Debtor an MSME, on 23rd October 2021. Further, the reviewed the said resolution plan and sought additional details/documents from the resolution applicant on 30th October 2021. The additional documents have been submitted by the resolution applicant on 2nd November 2021, as addendum to the resolution plan. The scheduled a meeting of CoC to place the resolution plan before the members on 9th November 2021. However, the members suggested to wait for the Forensic audit report and the matter was deferred.
- f) The transaction/ forensic auditors duly carried out the Transaction audit of the Corporate Debtor and submitted their final report on 24.12.2021. Based on the findings and observations made by the forensic auditor, the RP is of the opinion that there are certain transactions made by the Corporate Debtor are Preferential in nature in connection with the other creditors as per Section 43 of the Insolvency and Bankruptcy Code, 2016.

3. Below are the details of the Preferential transactions:

- i. During the period under review, the Corporate Debtor has made payment of Rs.11,50,000/- to Mrs. Laxmi V Hishobkar; Respondent No.3 and Director of the CD; which is extracted from the ledger of the Corporate Debtor as under:

Particulars	Amount (in Lakhs)
Opening Balance as on 1 st April 2016	(11.99)
Add: Payment	11.50
Less: Receipt	(2.75)
Add : Adjustment entry (Debit)	-
Less: Adjustment entry (Credit)	-
Closing Balance as on 6 th April 2021	(3.24)

The Corporate Debtor did not make any repayment to the secured financial creditor Shree Aashraya Souhard Credit Society Limited since April 2016 towards the outstanding debt of Rs.7,75,62,000/- However, if repaid the loan of Mrs.Laxmi V Hishobkar, Director of the Corporate Debtor. Thereby preference was given to Mrs.Laxmi V Hishobkar over the secured financial creditor.

- ii. Transaction between the Corporate Debtor and Mr. Guruprasad V Hishobkar, Respondent No.1 Director of the Corporate Debtor: During the period under review, the Corporate Debtor has made payment of Rs. 17,92,000/- to Mr. Guruprasad V Hishobkar, which is extracted from the ledger of the Corporate Debtor as under:

Particulars	Amount in Lakhs
Opening Balance as on 1 st April 2016	-
Add: Payment	17.92
Less: Receipt	(69.60)
Add : Adjustment entry (Debit)	-
Less: Adjustment entry (Credit)	(3.92)
Closing Balance as on 6 th April 2021	(55.60)

The Corporate Debtor did not make any repayment to the secured financial creditor Shree Aashraya Souhard Credit Society Limited since April 2016 towards the outstanding debt of Rs.7,75,62,000/- However, it repaid the loan of Mr. Guruprasad V Hishobkar, Director of the Corporate Debtor; thereby preference was given to Guru Prasad Hishobkar over the secured financial creditor.

iii. Transaction between the Corporate Debtor and LELE Project:

The Corporate Debtor availed unsecured loan from Mr. Rajendra Mutagekar and Mr. Sunil S Pujari for an amount of Rs.1,41,32,000/- and paid an advance to Mr. Vishwas Vishnu Lele; who refused to sell the land to the Corporate Debtor as agreed. Subsequently, the said unsecured loan of Rs.1,41,32,000/- was repaid to Mr. Rajendra Mutagekar and Mr. Sunil S Pujari by the Corporate Debtor during the period April 2016 to April 2021. Thereby preference was given to the unsecured financial creditors over the secured financial creditor by repaying this Loan.

In nutshell, following are the transactions in which the Corporate Debtor repaid the unsecured loan:

Sl. No	Name of the unsecured creditor	Amount in INR in lakhs
1	Mrs. Laxmi V Hishobkar	Rs.11,50,000/-
2	Mr. Guruprasad V Hishobkar	Rs.17,92,000/-
3	Mr. Vishwas Vishnu Lele and Mr. Rajendra Mutagekar & Mr. Sunil S Pujari	Rs.1,41,32,000/-
	Total	Rs.1,70,74,000/-

The RP has stated that the Corporate Debtor has made payment to the unsecured creditors and related parties as specified above in preference to repayment of secured loan to Shree Aashraya Souhard Credit Society Limited amounting to Rs.7,75,62,000/- which is not repaid from April 2016. The RP further states that as the Board of Directors are responsible for the transaction

undertaken by the Corporate Debtor, the Directors of the Board shall be liable to make good the loss occurred to the stakeholders of the Corporate Debtor due to the preferential transactions. Hence, this application.

4. The Respondents has filed objections vide diary no: 1654 dated 20.04.2022 and reiterated in written submissions filed vide diary no: 954 dated 12.02.2024 by contending as follows:

a. TRANSACTION BETWEEN CORPORATE DEBTOR AND RESPONDENT

NO.3:

Firstly, in Para R(i), the Applicant prays for an order to recover from Respondent No. 3 a sum of Rs.11,50,000/-. The Applicant relies on Page No. 21 of the forensic report (Page No. 51 of the Application) wherein the Forensic Auditor covers a period commencing from 01st April 2016 to 6th April 2021. The Applicant has borrowed certain information from the report submitted by the forensic auditor which is obviously for a period of 5 years. Since Respondent No.3 is a “related party”, the relevant period is two years prior to 06th April 2021. Therefore, a perusal of Page No.13 of the objection will show that “there was no transaction at all during the relevant period” with Respondent No.3 except the sum brought by her for meeting business needs of the Corporate Debtor. In fact, even the Forensic Auditor in Page No.51 does not say it so many words. It is not clear as to how such repayment of unsecured loans during a 5 years period reviewed by Forensic Auditor will form the cause of action for a transaction with related party in the light of limitation specified in Section 43(4) of the Code. As such, the Application is liable to be dismissed as against Respondent No.3.

b. TRANSACTION BETWEEN CORPORATE DEBTOR AND RESPONDENT

NO.1:

Since Respondent No.1 is a related party, the relevant period is two years prior to 6th April 2021. In Para No. R(ii) of the Application states that, the Corporate Debtor has repaid a sum of Rs.17,92,000/- to Respondent No.1. A perusal of Page No. 23 of the forensic report (Page No. 53 of the

Application), will show that Rs.4,50,000/- was only paid to Respondent No.1 even as per the forensic report during the period of April 2019 – 2021. The Applicant has not explained as to how he is claiming Rs.17,92,000/- when that was not even the case as per the forensic report. Even Rs.4,50,000/- is only repayment covered under Section 43(3) of the Code as a transaction made in ordinary course of business. Even such payment cannot constitute a preferential transaction at all since infusion of funds by a director to meet business exigencies and when need ends and if funds available taking back the same cannot be termed as preferential transaction by any stretch of imagination. As already stated, in MSME sector, directors bring funds from time to time for meeting business needs. Therefore, these in the ordinary course of business. That is why Companies Act too exempts directors' loans from being treated as "deposits". When business position improves or liquidity permits, directors draw certain sums without prejudice to the interests of the Corporate Debtor. Such withdrawal of funds cannot be termed as "transaction" falling within the meaning of Section 3(33) of the Code in the first place. It is not clear as to how repayment of unsecured loans during a 5 years period reviewed by Forensic Auditor will form the cause of action for a transaction with related party in the light of limitation specified in Section 43(4) of the Code. The contention that Since a sum of Rs.7.75 Crores was outstanding from the Corporate Debtor to a Financial Creditor, the payment of the paltry sum of Rs.4.5 lakhs to Respondent No.1 should be treated as preferential transaction defies even business common sense. As such, the Application is liable to be dismissed as against Respondent No.1.

TRANSACTION BETWEEN THE CORPORATE DEBTOR AND LELE PROJECT:

- i. The Applicant claims Rs.1,41,32,000/- which are alleged payments made to certain parties named in the Application, i.e. Rajendran Mutagekar and Mr.Sunil S Pujari who are not Related Parties.

- ii. Therefore, the relevant period is one year prior to 6th April 2021. During this period, no payment has been made to the above persons at all. Pages 23 and 24 of the Counter makes it clear that the returning of loans given by them happened prior to 31st March 2019. And that too, the Corporate Debtor had made gains to the tune of Rs.28 Lakhs.
 - iii. A Perusal of Page No. 30 of the forensic report (Page No.60 of the Application), the Lele Project involved in purchase of land pursuant to an agreement dated 12th August 2010 (Page No.14 to 21 of the Counter) entered between the Corporate Debtor and one Mr.Vishwas Vishnu Lele. The seller had committed a breach of contract and he did not register a property in the name of the Corporate Debtor. A suit was filed against the seller for specific performance being Suit in O.S.No.307/2012. In relation to the said contract, the company had borrowed funds from two persons namely Mr. Rajendran Mutagekar and Mr.Sunil S Pujari in order to show to court that money is ready for purchasing the property.
 - iv. It is only upon seeing the fact that the Corporate Debtor as Purchaser is ready with funds not only for the price specified in the sale agreement but also for additional sale contract of Rs.28,00,000/- demanded by the defendant, the Hon'ble Court had ordered specific performance.
 - v. The defendant as a losing party has preferred an appeal before Karnataka High Court, Dharwad Bench. The appeal resulted in compromise decree. In fact, the Corporate Debtor was benefited by the transaction to the tune of Rs.28,00,000/- after being able to return the money received from Mr.Rajendran Mutagekar and Mr. Sunil S Pujari.
 - vi. A perusal of invoice and ledger of the transaction in Page No.22 to 24 of the Counter, shows that the transaction was prior to 31st March 2019. These payments were made by the Corporate Debtor much prior to relevant period. Being a company engaged in the real estates and property development business, they were purely in commercial in nature.
5. The respondent placed their reliance in the matter of Anuj Jain, IRP for Jaypee Infratech Ltd. vs. Axis Bank Ltd & others 2020 SCC OnLine SC 237,

(Refer Para No. 32.1). Further, relied on Ajay Agarwal vs. Venkatasankaranarayanan 2019 SCC OnLine NCLT 28488 (Refer Para No. 12 and 13).

6. The RP has filed written submissions vide diary no. 3650 dated 11.07.2023 stating that based on the Transaction Audit Report the RP is of the opinion that the transactions are preferential in nature as per section 43 of the Code. Further, in para 5 of the written submission the RP stated that though the Code envisages for verification of transactions of 2 preceding years from the date of insolvency commencement date, as there were no transactions with the said period, the audit period was extended and the same was also noted by the CoC at their 2nd meeting held on 29th June 2021.
7. Heard Learned Counsel for the Applicant and perused the records available. This Tribunal has also perused the Transaction Audit report attached along with the application.
8. It is seen that the CIRP against the Corporate Debtor commenced on 6th April 2021. As per the report of the transaction auditor the transactions happened between April 2016 to April 2021. Thus, the contents of the Transaction Audit Report as well as the observations made by the Auditors are not within the review period. The transactions should also satisfy the conditions given in Section 43(4) of the Code. For the transactions with related parties the review period, is two years preceding from the commencement of CIRP; and for unrelated parties, it is one year. For the transactions of Corporate Debtor with Respondent No.1, who is a Director and a related party; it is stated *that the payment of INR 17.92 Lacs has been made out of which payment amounting to INR 4.50 Lacs was made during the period April 2019 to April 2021*. It has been explained in the objection that the ledger account shows the particular transaction during the relevant period of time i.e., between April 2019 to April 2021 has been made during the ordinary course of business. It was simply a loan from the Director the repayment of which was continuously going on during the period. A perusal of the ledger account of the Respondent No.1 in the books of the corporate debtor which has been enclosed as Annexure-1 to

the objection filed on 20.04.2022 clearly indicate ordinary business transactions. For example, after the repayment of the amount of Rs. 2,50,000/- to the Respondent No.1 on 02.01.2020, immediately there were receipts of Rs.1 lakh each on 04.01.2020 and 08.01.2020 from the Respondent No.1. Similarly, two other repayments were made for Rs.1 lakh each on 21.09.2020 and 07.12.2020 and immediately thereafter the amount were received back from Respondent No.1 on 10.12.2020 and 18.12.2020. Thus, it reveals that there were frequent and regular transactions going on between Respondent No.1 and the Corporate Debtor at short intervals of time. Therefore, this is held to be during the ordinary course of business.

9. In respect of the transactions of the Corporate Debtor with the Respondent No.3, nothing has been brought on record to show that the impugned transaction of Rs. 11,50,000/- paid to the Respondent No.3 has occurred during the relevant period of two years prior to the CIRP commencement date. Thus, this does not fall within the purview of Preferential Transaction since the condition under Section 43 (4) of the IBC is not fulfilled.
10. In respect of the third transaction related to Lele Project, which is for repayment of loan amounting to Rs.1,41,32,000/- to Mr. Rajendra Mutthere and Mr. Sunil S Pujary, the Respondent in the objection filed vide Dy. No.1694 has attached the copy of the ledger account pertaining to the loan repayment. It clearly shows that the transactions for the two loan repayments were made on 18.01.2019. These two persons were unrelated parties, hence the relevant period of time is within one year of CIRP commencement date. Accordingly, the transactions clearly falls outside the relevant period of time as provided under Section 43 (4) of the IBC 2016.
11. It is rather strange that the RP has filed this I.A for declaration of the transaction as Preferential transaction, whereas, the transactions clearly fall outside the relevant period of time given under Section 43 (4) of the IBC. Moreover, in the written submission filed on 11.07.2023 vide Dy. No.3590 the RP has admitted as under:

“The undersigned states that thought the Code envisages for verification of transaction of 2 preceding years from the date of

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insolvency Commencement date, as there were no transactions within the said period, the audit period was extended and the same was also noted by the committee of Creditors at their 2nd meeting held on 29th June 2021.”

12. The admission made by RP in his written submission is untenable and it cannot be accepted. The transactions are not within the relevant period of time so that the provisions of Section 43 could be attracted. In such a case, the RP on its own cannot extend the period of review from period of two years to the period of five years. This is absolutely incorrect and illegal. Moreover, it is also not understood as to why the Respondents No.2 & 5 were made as Respondents in this I.A.
13. In view of the above discussions, it is held that the application bearing **I.A No.26 of 2022** filed under Section 43 of the IBC 2016 is not maintainable as the conditions under Section 43 (4) of the IBC 2016 are not satisfied and accordingly the IA is hereby **dismissed**.

-Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

-Sd/-

**(K.BISWAL)
MEMBER (JUDICIAL)**