

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH

INTERLOCUTORY APPLICATION NO. 3126 OF 2023

IN

INTERLOCUTORY APPLICATION NO. 2524 OF 2020

IN

COMPANY PETITION (IB) NO. 4258/MB/2019

*Application u/s 60(5)(c) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the
N.C.L.T. Rules, 2016.*

In the matter of:

Black Rock Financial Services Private Limited
...Applicant

Versus

Piramal Capital & Housing Finance Limited
(Formerly known as Dewan Housing Finance
Corporation Limited)
...Respondent

In the matter of

Piramal Capital & Housing Finance Limited
...Applicant

v/s.

Kapil Wadhawan & Others ...Respondents

In the matter of

Reserve Bank of India Petitioner

v/s

Dewan Housing Finance Corporation Limited
.... Corporate Debtor

Order pronounced on 04.01.2024.

Coram:

Shri. Kuldip Kumar Kareer : Member Judicial.

Shri. Anil Raj Chellan : Member Technical.

Appearances (in physical mode)

For the Applicant: Adv. Nikhil Sakhardande a/w Rishika Harish a/w
Adv. Ashish Venugopal and Adv. Riya.

For the Respondent: Sr. Counsel Mr. Vikram Nankani a/w Chitra
Rentala and Adv. Manikanda Prabhu.

ORDER

Per: Coram

1. This is an application under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Rule 11 of the N.C.L.T Rules, 2016 filed by the Applicant for relief that the Applicant be permanently deleted from the array of Respondent parties in underlying I.A. No. 2524/2020 (**‘Avoidance IA’**) in CP(IB) No. 4258/2019 for the purposes of section 43 of the Code and declaration that an action u/s 43 will not lie against it for the same transaction for which the Hon’ble Tribunal has already deleted the Applicant from the array of parties pursuant to the Substitution Order dated 09th February, 2023.

Facts of the case as pleaded by the Applicant

2. This Tribunal admitted the above-captioned Company Petition filed by the Reserve Bank of India ('RBI') against the Corporate Debtor, M/s. Dewan Housing Finance Corporation Limited ('DHFL') and confirmed the appointment of the erstwhile Administrator to perform all functions of the resolution professional under the provisions of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "the Code" for the sake of brevity).
3. During the corporate insolvency resolution process ('CIRP') of the Corporate Debtor, the erstwhile Administrator filed the Avoidance IA impugning certain transactions between the Applicant and the Corporate Debtor, *inter alia*, under Sections 43 and 66 of the Code. As per the Avoidance IA, the Corporate Debtor fraudulently disbursed loans to the Applicant herein, who in turn transferred the said loan amounts to the respondent parties in the Avoidance IA for purchase of non-convertible debentures of DHFL.
4. On 07.06.2021, the Hon'ble Tribunal approved the resolution plan of erstwhile Piramal Capital & Housing Finance Limited ('erstwhile Piramal') u/s 31 of the Code. The entire resolution plan came to be fully implemented by virtue of which the erstwhile Piramal merged into with DHFL. Thereafter, on 03.11.2021, the name of DHFL was changed to Piramal Capital & Housing Finance Limited ('PCHFL').
5. On the basis of approved resolution plan, PCHFL preferred a substitution application in the Avoidance IA praying for substituting itself in the place of the erstwhile Administrator for prosecuting the Avoidance IA. This Hon'ble Tribunal vide Order dated 09.02.2023 ('Substitution Order') allowed PCHFL

to be substituted in place of the erstwhile Administrator and thereby pursue the Avoidance IA.

6. Pursuant to the reverse merger of the Respondent with the Corporate Debtor in accordance with the Resolution Plan approved by this Tribunal, the Respondent had filed CP(IB) No. 29/AHM/2023 before the Hon'ble NCLT, Ahmedabad Bench u/s 7 of the Code on the ground of alleged failure of the Applicant to comply with its obligations under certain loan agreements. While the above-mentioned Company Petition was pending for adjudication, the parties therein had amicably settled their disputes by filing Consent Terms dated March 14, 2023. By an Order dated 15.03.2023 (**'Settlement Order'**), the Hon'ble Tribunal disposed of the above-mentioned Company Petition as withdrawn in view of the settlement arrived at between the parties.
7. The Applicant was deleted from the array of Respondent parties in the Avoidance IA for the purposes of transaction classified u/s 66 of the Code. However, despite the same, PCHFL continues to maintain that the Applicant has not been deleted from the array of parties for the same transaction u/s 43 of the Code.
8. Hence, the present Application.
9. **Reply filed by Respondent:**
 - i. The Respondent has averred that this Hon'ble Tribunal has already passed an Order dated 09.02.2023 (**9 February Order**) whereby the Applicant, who was arrayed under Section 66 of the Insolvency & Bankruptcy Code, 2016 ('IBC') has been deleted from the array of parties

for the purpose of Section 66. The 09.02.2023 Order does not address the issue of whether the same parties arrayed under Section 43 of the IBC will also stand deleted. Hence, the issue as identified in the Application is a matter of adjudication as and when the underlying Avoidance IA is decided.

- ii. It is further submitted that the requirements under Sections 43 and 66 of the Code are wholly different. The requirement under Section 43 is that preferential transaction in question should have been given by the Corporate Debtor for the benefit of a creditor or a surety or a guarantor. On the other hand, as stated by this Hon'ble Tribunal in its 9 February Order, section 66 should be considered only against the persons responsible for carrying on of the business of the corporate debtor in a fraudulent manner. The Respondent has vehemently denied that the transaction between Dewan Housing Finance Corporation Limited (erstwhile Corporate Debtor/ DHFL) and the Applicant cannot be classified as a transaction under Section 43 of the IBC as the Applicant is not a creditor of DHFL.
- iii. The Respondent hereby clarifies that the consent terms executed between the parties is not in relation to the avoidance applications which were filed by the Administrator of the erstwhile Corporate Debtor but only pursuant to the continuing right recognized by this Hon'ble Tribunal under the Order dated 09.02.2023.
- iv. In the end, the Respondent has prayed for the dismissal of the application.

FINDINGS

10. We have heard the Counsel appearing for the Applicant and the Counsel appearing for the Respondent at length. We have also taken due note of the submissions put before us and documents placed on record.
11. Counsel for the Applicant brought to the notice of the Tribunal the admitted fact that the Applicant had settled the matter with the Respondent in CP(IB) No. 29/AHM/2023 in respect of the loan liability for a sum of Rs. 53,83,63,130/- and accordingly, the said petition was withdrawn on consent terms filed by the parties and recorded by the Hon'ble Tribunal in its Order dated 15th March, 2023 in the aforementioned Company Petition. Therefore, the learned Counsel for the Applicant submits that since the loan amount due to the Respondent has been returned, the underlying Avoidance Application (i.e. I.A. No. 2524 of 2020) as against the Applicant herein has become infructuous and, therefore, the Counsel for the Applicant prays that the proceedings u/s 43 of the Code against the Applicant be dropped and the name of the Applicant may be deleted from the array of respondents in the Avoidance Application.
12. The learned Counsel for the Applicant has further relied upon the Order of this Tribunal dated February 09, 2023 (hereinafter referred to as "the Substitution Order") in I.A. No. 532 of 2022 and I.A. 2982/2021, wherein it had allowed Piramal Capital and Housing Finance Limited ('PCHFL') i.e. the Respondent herein, to be substituted in place of the erstwhile Administrator and thereby pursue the Avoidance IA. Counsel for the Applicant further submits that in the Substitution Order also it was held that section 66 of the Code should

be considered only against the persons responsible for carrying on the business of the Corporate Debtor in a fraudulent manner. Since the Applicant herein was not responsible for carrying on the business of Corporate Debtor, the Applicant was discharged and the Tribunal ordered the Applicant's name to be deleted from the array of the parties in the underlying IAs so far as section 66 was concerned. Therefore, in view of the Substitution Order as well as the fact that the controversy in respect of the loan liabilities has been settled between the parties herein in Ahmedabad Petition, the Counsel for the Applicant has contended that the underlying IA against the Applicant has become infructuous and, therefore, the name of the Applicant be deleted from the IA No. 2524/2020.

13. Per contra, the Counsel for the Respondent submits that the Substitution Order only discharged the Applicant from the scourge of Section 66 and not from the rigours of the provisions of Section 43 of the Code and the same is evident upon bare perusal of the Substitution Order. The Counsel for the Respondent argues that the present application is pre-mature as the question of whether loans to the Applicant by the erstwhile Dewan Housing Finance Corporation Limited amounts to preferential transaction or not, is a question of fact which needs to be determined while adjudicating the underlying IA/Avoidance Application and those questions cannot be gone into at this stage.
14. We have weighed and analyzed the aforesaid submissions made on behalf of the Applicant and the Respondent. We have also examined the facts of the matter carefully and the documents available on record.

15. On perusal of the application, it emerges that the Applicant seeking a declaration that I.A. No. 2524 of 2020 (**‘Avoidance Application’**) has become infructuous as against it and consequently, the name of the Applicant should be deleted. I.A. No. 2524 of 2020 is an avoidance application filed by the erstwhile Administrator, which is now being prosecuted by the Respondent herein against, inter-alia, the Applicant u/s 43, 45, 60(5) and 66 of the Code in respect of certain transactions between the Applicant and the Corporate Debtor, wherein it was alleged that the Corporate Debtor had fraudulently disbursed loans to the Applicant who, in turn, transferred the said loan amounts to the Respondent Nos. 01 and 02 (i.e. the promoters of DHFL) in the Avoidance Application for purchase of non-convertible debentures of Dewan Housing Finance Corporation Ltd (**‘DHFL’**). Vide Order dated 09.02.2023, the Tribunal had ordered deletion of the Applicant from the memo of parties in the Avoidance Application solely under section 66 but the aforementioned Order did not discharge the Applicant from the rigours of Section 43 and 45 of the Code.
16. In our considered view, merely because the proceedings u/s 66 of the IB Code has been dropped against the Applicant, it would not by itself be sufficient to relieve the Applicant from the rigours of Section 43 of the Code. Further, merely because the Applicant has settled the matter with the Respondent with regard to the loan transaction in proceedings u/s 7 of the Code, this by itself would not be sufficient to drop the proceedings u/s 43 of the Code. The import and domain of section 43 of the Code is altogether different and distinct from the proceedings u/s 7 of the Code. In the proceedings u/s 43 of the Code, it has yet to be determined as to whether the transaction in question, when effected,

was preferential in nature or not. Since the Applicant was a party to the said transaction, it's presence would be utmost necessary at the time when the application u/s 43 is heard and adjudicated upon.

17. In our considered view, the controversy involved in the application u/s 43 of the Code cannot be efficaciously adjudicated in the absence of the applicant as it was a party to the transaction and the alleged loan, which is being claimed as preferential transaction, was advanced to the Applicant. We again wish to reiterate that merely because the Applicant has settled the matter with regard to the said loan does not ipso facto absolve it of the insinuations or allegations made in the application u/s 43 of the Code. We are further of the view that it would be untimely and inopportune to exonerate the Applicant of the allegations made against it in the said application which is yet to be heard and decided on merits. Besides, settlement with the Respondent in proceedings u/s 7 of the Code does not or cannot have the effect of drawing curtains over the proceedings u/s 43 of the Code which are altogether different and distinct.

18. The question whether the principal loan of Rs. 120 crores disbursed by the Respondent (i.e. formerly known as DHFL) to the Applicant herein (i.e. Black Rock Financial Services Private Limited) at the rate of 10.15% p.a. without obtaining adequate collateral security amounts to fraudulent preference or not, will be considered and decided when I.A. No. 2524/2020 would be heard on merits. The fact that the parties herein had arrived at a settlement in CP(IB) No. 29/AHM/2023 for a consideration of Rs. 53,83,63,130/- will also be considered and taken into account while adjudicating the Avoidance Application u/s 43 and 45 of the Code, if at all it has any bearing in the matter.

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. NO. 3126 OF 2023
IN
I.A. NO. 2524 OF 2020
IN
CP(IB) NO. 4258/MB/2019

19. In view of the foregoing discussions and aforesaid findings, we are of the considered view that this application, being pre-mature, should be dismissed and hence, we hereby **dismiss I.A. No. 3126 of 2023** in I.A. No.2524 of 2020 in CP(IB) No. 4258/MB/2019 with no order as to costs.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)