

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 370 of 2019

[arising out of Order dated 12th March, 2019 by NCLT, Mumbai Bench,
in M.A. No. 874 of 2018 in CP (IB) No(s). 1371 &
1372/I&BP/NCLT/MAH/2017]

In the matter of :

ICICI Bank Ltd.

Through its Authorized Signatory
ICICI Bank Towers,
Bandra Kurla Complex, Bandra (East),
Mumbai-400 051

... Appellant

Versus

- 1. Mr. Shailendra Ajmera,**
the Resolution Professional of
Ruchi Soya Industries Limited
301 Mahakosh House,
7/5 South Tukoganj, Nath Mandir Road,
Madhya Pradesh, India.
Indore- 452 001

- 2. Committee of Creditors**
Through IDBI Bank

...Respondents

Present:

For Appellant : **Mr. Arun Kathpalia, Senior Advocate with
Mr. Shantanu Chaturvedi, Mr. Nikhil Mathur,
Advocates**

Respondents: **Mr. Abhinav Vasisht, Senior Advocate with
Mr. Swapnil Gupta, Ms. Ankita Sinha, Ms.
Akshita, Ms. Rajdipa Behura and Mr. P. Kani,
Advocates for Respondent No.1
Mr. Nakul Sachdeva, Ms. Ambika Singh
Pratiyush and Mr. A. Sahay, Advocates for
Respondent No. 2**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process against M/s. Ruchi Soya Industries Limited (Corporate Debtor), the ‘Resolution Professional’ filed an application under Section 43(1) of the ‘Insolvency & Bankruptcy Code, 2016 (for short, ‘the I&B Code’) for seeking reversal of the amounts debited from the account of the ‘Corporate Debtor’ maintained with the ‘ICICI Bank Limited’ before the ‘insolvency commencement date’ and alleged to have been utilised against the payment of dues made by the ‘Corporate Debtor’ in favour of the ‘ICICI Bank Limited’ pursuant to ‘Letter of Credit (LoC) issued by the ‘ICICI Bank’. The said application having allowed by impugned order dated 12th March, 2019 the Appellant has challenged the same.

2. The present proceeding relates to transactions dated 8th December, 2017; 11th December, 2017 and 14th December, 2017 which were the transactions undertaken by the Appellant pursuant to the ‘Working Capital Consortium Agreement’ dated 15th May, 2013 entered into between the Appellant and the ‘Corporate Debtor’ and the ‘Renewal Credit Arrangement’ dated 20th June, 2017 executed between the Appellant and the ‘Corporate Debtor’ providing overall limit of ‘Letter of Credit’ facility for the period ending 15th December, 2017.

3. The main plea taken by the Appellant – ICICI Bank is that the ‘Resolution Professional’ before filing an application under Section 43(1) of the I&B Code formed no opinion independently nor afforded an opportunity to the Appellant to explain about the transactions in question.

4. It was submitted that three transactions aforesaid were not 'preferential transactions' and were made in usual course of the business. It was submitted that none of the correspondence made between the Appellant and the Respondent, 'Resolution Professional' alleged that the aforesaid three transactions are 'preferential transaction'. On the contrary, vide an *e-mail* dated 26th December, 2017, the 'Resolution Professional' requested the Appellant to grant 'Letters of Credit' or in the alternative, transfer the funds to other banks, who would be willing to issue 'Letters of Credit'.

5. It was also submitted that only on Appellant's refusal to do so by *e-mail* dated 27th December, 2017, on account of reasons as stated above, the 'Resolution Professional without forming any opinion or communication to the Appellant filed an application under Section 43(1) of the 'I&B Code' alleging the three transactions aforesaid as 'preferential transactions', which according to Appellant is an after thought.

6. It was further submitted that the 'Resolution Professional' as also the Adjudicating Authority have failed to notice the transactions, in question, do not come within the ambit of Section 43(2) of the 'I&B Code' and were made in usual course of the business.

7. Learned counsel for the Appellant relied on Clause 10 (iii) of the Agreement, which stipulates :

“iii) Without prejudice to the said Bank remedies for recovery of the aforesaid amounts, they shall be entitled to debit such amounts to any of the Cash credit Account(s) or other Account(s) and the same shall bear interest at the rate(s) applicable to such Facilities and

all such amounts shall be and always to deemed to have been secured by the securities agreed to be created for the said Facilities.”

Therefore, according to the learned counsel for the Appellant, it has a contractual right under clause 10.3 of the Agreement to debit any amount which is lying in the current accounts of the ‘Corporate Debtor’. Further, according to him, there is no application filed by the ‘Corporate Debtor’ to renew or to issue fresh ‘Letters of Credit’ under the agreement and, therefore, the ‘Resolution Professional’ cannot take advantage of the fact that the Appellant justifiably refused to issue fresh ‘Letters of Credit’.

8. Learned counsel for the ‘Resolution Professional’ submitted that for deciding whether a transaction is ‘preferential transaction’ under Section 43, following four ingredients are to be considered :

- a) The ‘Corporate Debtor’ makes a transfer in respect of an existing ‘financial debt’ or other liability;
- b) As a result of the payment made by the ‘Corporate Debtor’ the person to whom the payment is able to recover than he would have in the waterfall provided under Section 43 of the I&B Code’
- c) The transfer or payment has been made in the relevant period i.e. 2 years in case of related parties and one year otherwise and
- d) However, if the transfer is made in the ordinary course of business of the ‘Corporate Debtor’, it would not be treated as a preferential transaction.

9. It was submitted that the 'Corporate Debtor', 'ICICI Bank' and 20 other Banks had entered into a 'Working Capital Consortium Agreement' on 15th May, 2013. In terms of said agreement, each bank sanctioned a limit for the 'Corporate Debtor' to draw on for working capital requirements including issuance of 'Letters of Credit' to make various purchases of raw material required by the 'Corporate Debtor'. Vide a sanction letter dated 20th June, 2017, the 'Letter of Credit' limit was renewed and extended to Rs. 563 Crores by the 'ICICI Bank'. The Appellant's Bank agreed to provide 'Letter of Credit' within the limit of Rs. 563 Crores. It was submitted that as per the ordinary course of business between the 'Corporate Debtor' and the Appellant's Bank once a payment is made under a 'Letter of Credit', subject to funds available with the 'Corporate Debtor', it could repay the Bank. According to him, in ordinary course of business the 'Letter of Credit' limits were nearly fully utilized by the 'Corporate Debtor' between July, 2016 to November, 2017. It was submitted that the application under Section 7 was admitted and order was pronounced on 15th December, 2017. Therefore, according to the 'Resolution Professional' after the commencement of 'insolvency resolution process' it was not open to the Bank to take steps pursuant to 'Letter of Credit' exposing the 'Corporate Debtor' towards other liabilities. 'Letter of Credit' for Rs. 540,40,41,255 Crores were given on 8th December, 2017, similarly a sum of Rs. 483,63,38,646 Crores was received pursuant of 'Letter of Credit' dated 15th December, 2017 and additional amount of Rs. 65.98 Crores were also deposited. Learned counsel for the 'Resolution Professional' referred to Section 5(12) which provides the 'insolvency commencement date' and Section 14, pursuant to which the order of 'moratorium' was passed by the

Adjudicating Authority prohibiting realization of the asset of the 'Corporate Debtor'.

10. Relying on Section 43 which relates to 'preferential transactions' it was submitted that three transactions in question were made prior to the 'insolvency commencement date' i.e. prior to appointment of 'Interim Resolution Professional'.

11. Section 43 relates to 'preferential transactions and relevant time', as quoted below :

"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 sub-section (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.”

12. Sub-section (3) (a) of Section 43 of the 'I&B Code' makes it clear that 'preferential transaction' does not include transfer made in the ordinary course of the business or financial affairs of the 'Corporate Debtor' or the transferee.

13. As per sub-section (4) of Section 43 of the 'I&B Code' preference shall be deemed to be given at a relevant time, if it is given to a related party during the period of 2 years ***preceding the insolvency commencement date; or a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.*** In the present case, the transactions were made by the Appellant Bank on 8th December, 2017, 11th December, 2017 and 14th December, 2017, as per 'Renewal Credit Arrangement Letter' letter dated 20th January, 2017 which was valid up to 16th December, 2017.

14. Admittedly, the Appellant Bank is not a related party and, therefore, for the purpose of relevant time clause (b) of sub-section (4) of Section 43 of the I&B Code can be said to be applicable i.e. period of one year of 'insolvency commencement date'.

15. From *e-mail* dated 26th December, 2018 sent by 'Resolution Professional', we find that on behalf of the 'Corporate Debtor', he requested

the Bank to allow the 'Corporate Debtor' to purchase the goods on the basis of 'Letter of Credit'. 'Letters of Credit' were earlier provided by the Bank enabling the 'Corporate Debtor' to purchase goods allowing the Bank to debit the amount from the account of the 'Corporate Debtor'.

16. From the aforesaid fact, it is evident that all the transactions made on 8th December, 2017; 11th December, 2017 and 14th December, 2017 were so made in the ordinary course of business of the Bank as per request of the 'Corporate Debtor'.

17. From the record, we find that the application under Section 7 was admitted on 8th December, 2017 and the 'Resolution Professional' was appointed on the said date. The order was passed on 8th December, 2017 and was pronounced on 15th December, 2017, and uploaded in the website.

Though Code of Civil Procedure, 1908 (CPC) is not applicable, Order XX Rule 1 relates to pronouncement of judgment. As per proviso to Rule 1 (3) therein, where a judgment is pronounced by dictation in open Court than transcript of the judgment so pronounced after making necessary corrections and if signed by the Judge, in such case it will date back to the date when it was originally pronounced in the open court, which is 8th December, 2017 in the present case.

18. Section 5(12) defines 'insolvency commencement date' means 'the date of admission of application' for initiation of 'corporate insolvency resolution process'. As per proviso thereto where the 'Interim Resolution Professional' is not appointed on the date of admission, the 'insolvency commencement date' is treated as the date on which the 'Interim Resolution Professional' is appointed by the Adjudicating Authority, as quoted below:

“5. **Definitions.**

In this Part, unless the context otherwise requires, -

“(12) *“insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;*

“Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;”

19. In the present case the application under Section 7 of the ‘I&B Code’ was admitted on 8th December, 2017 and the ‘Interim Resolution Professional’ was appointed on the same date. Therefore, we hold that ‘corporate insolvency resolution process’ commenced on 8th December, 2017.

20. We have already held that all the three transactions, in question, were made in ordinary course of business. This apart, we find that the transactions made on 8th December, 2017; 11th December, 2017 and 14th December, 2017 are either on the date of commencement of the ‘corporate insolvency resolution process’ or during the pendency of ‘Corporate Insolvency Resolution Process’.. Therefore, in terms of sub-section (4) of Section 43 of

the 'I&B Code' the transaction, in question, cannot be treated to be made 'one year preceding the insolvency commencement date'.

21. The Adjudicating Authority has failed to notice the fact that all the transactions were made on or after the date of commencement of the 'corporate insolvency resolution process' and in ordinary course of business and in view of such position the impugned order dated 12th March, 2019 cannot be upheld. We accordingly set aside the impugned order dated 12th March, 2019 and allow the appeal. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi

22nd August, 2019

/ns/