

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1356 of 2022

IN THE MATTER OF:

1. Mr. Saptarshi Nath,

(Erstwhile Director of Corporate Debtor)
Residence at: 7 Leedon Heights D Leedon,
#09-16 Singapore – 267953
Email: saptarshinath@gmail.com

2. Mr. Alexander John Souter,

(Erstwhile Director of Corporate Debtor)
39 Quadi D Anjou,
Paris 75004
Email: alex.souter@overcart.com

...Appellants

Versus

Kapil Dev Taneja,

Resolution Professional of Exit 10 Marketing Pvt. Ltd.,
56-C/BB, Janak Puri, New Delhi, 110058
Email: kapildtaneja@gmail.com exit10.ip@gmail.com

...Respondent

Present:

For Appellant: Ms. Mani Gupta, Mr. Aman Choudhary, Ms. Saumya Upadhyay, Advocates.

For Respondent: Mr. Ankur Mittal, Ms. Yashika Sharma, Mr. Bhaskar Pandey, Advocates

J U D G M E N T

ASHOK BHUSHAN, J:

1. This Appeal by two Erstwhile Directors of the Corporate Debtor has been filed challenging the order dated 12.09.2022 passed by the National Company Law Tribunal, New Delhi, Bench-VI (hereinafter referred to as “**The Adjudicating Authority**”) in C.A./786/2019 filed by Resolution Professional seeking avoidance of the transaction. The Adjudicating Authority vide Impugned Order allowed the Application holding that

Erstwhile Management indulged into preferential transaction. The Adjudicating Authority vide Impugned Order directed the Appellants to make total contributions of Rs. 20,09,821.50/- to the assets of the Corporate Debtor within two months from the date of the order. Aggrieved by the said order, this Appeal has been filed.

2. Brief facts of the case necessary for deciding this Appeal are:-

- ‘Corporate Insolvency Resolution Process’ (CIRP in short) was commenced against the Corporate Debtor-M/s. Exit 10 Marketing Private Limited by Order dated 14.09.2018 of the Adjudicating Authority.
- Resolution Professional invited ‘Expression of Interest’ on 11.12.2018. For conducting transaction audit of the Corporate Debtor, one Prateek Gupta & Company was engaged for carrying out the transaction audit of the Corporate Debtor.
- In the CIRP of the Corporate Debtor, Resolution Plan was submitted by Wow Ecarts Private Limited. Committee of Creditors in its meeting dated 06th June, 2019 noted that transfer of assets of certain creditors have resulted in putting them in beneficial position whereas other outstanding creditors were deprived of the same.
- An email dated 11.07.2019 was sent by Appellant No. 2 stating that he has signed on financial statement inadvertently.
- The Resolution Plan was approved by the Adjudicating Authority on 20.11.2019. The Resolution Professional filed C.A./786/2019 under Section 43, 44, 66, 67, 68, 71 and 73 of Insolvency and Bankruptcy

Code, 2016 (hereinafter referred to as “**The Code**”) arraying Appellants as Respondent Nos. 1 and 2.

- Notices were issued on the avoidance application filed by the Resolution Professional to which Reply was also filed by the Appellants. The Adjudicating Authority by the Impugned Order held that Erstwhile Management entered into preferential transaction which is fully proved by the Journal Voucher dated 31.03.2018 signed by the directors. The Adjudicating Authority after declaring the financial transactions as preferential directed the Appellants to contribute Rs. 20,09,821.50/-. Appellants aggrieved by the said order, has come up in this Appeal.

3. We have heard Ms. Mani Gupta, Advocate for the Appellants and Mr. Ankuar Mittal, Advocate for the Respondent.

4. Learned Counsel for the Appellants submits that although in the Appeal the ground was taken that after approval of the Resolution Plan, Resolution Professional has no authority to prosecute the avoidance application but said point is not being pressed in view of the Judgment of the Division Bench of Delhi High Court in **Tata Steel BSL Limited Vs Venus Recruiter Pvt. Ltd. & Anr., LPA No. 37/2021**. Learned Counsel for the Appellant however submits that the Adjudicating Authority committed error in directing the Appellant to make contributions of Rs. 20,09,821.50/- under Section 44 whereas under Section 44(1)(d) no such direction could have been issued to the Erstwhile Directors. There is no finding in the Order of the Adjudicating Authority that the Appellants have

indulged into any fraudulent or wrongful trading and there being no finding under Section 66 of the Code, direction for contribution is uncalled for. It is submitted that under Section 44, the Adjudicating Authority could have required the property transferred to creditors to the Corporate Debtor or further direct any person to return any benefits received by him from the Corporate Debtor whereas present case does not fall in any of the clauses (a) and (d) of sub-section (1) of Section 44 of the Code.

5. Learned Counsel for the Resolution Professional refuting the submissions of Learned Counsel for the Appellants, submits that Appellants have indulged into preferential transaction and they have filed the Appeal to cover up and circumvent their acts. It is submitted that ground taken by the Appellant that Resolution Plan does not provide for pursuing of avoidance application has no substance in view of the Judgment of the Delhi High Court in **Tata Steel BSL Limited Vs Venus Recruiter Pvt. Ltd. & Anr., LPA No. 37/2021**. It is submitted that Appellants' case that they have signed the entry in the financial statement inadvertently, has rightly been rejected by the Adjudicating Authority. The ground taken by the Appellants in the Appeal that transaction is not preferential transaction are baseless and have rightly been repelled by the Adjudicating Authority.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. We may first notice the prayers made in the avoidance application filed by the Resolution Professional. Resolution Professional after referring

to the transaction audit report prepared by Prateek Gupta & Company, Chartered Accountant has revealed that Erstwhile Directors have adjusted the assets of the Corporate Debtor against the balance of certain creditors. Journal Voucher dated 31.03.2018 being certified by the Erstwhile Management was relied in the Application, following prayers were made:

*“(a) Allow the present Application;
(b) Direct the Respondents to pay an amount of Rs. 20,09,821.50/- in terms of Section 44(1)(d) of Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor; and
(c) Pass an order for fine and punishment for falsification of books of Corporate Debtor /false representation to Creditors of Corporate Debtor in terms of Section 71 and 72 of the Insolvency and Bankruptcy Code, 2016;
(d) Pass any other order(s) as this Hon’ble Tribunal may deem fit in the facts and circumstances of the present case.”*

8. When we look into the prayers made in the Application and the Order of the Adjudicating Authority it is clear that prayer ‘b’ in the application has been allowed by the Impugned Order. By prayer ‘b’, direction was sought to the Respondents (appellants herein) to pay an amount of Rs. 20,09,821.50/- in terms of Section 44(1)(d) of the Code. Learned Counsel for the Appellants during the submission has challenged the Impugned Order on the ground that direction of contribution cannot be issued under Section 44(1)(d) of the Code. We may first notice the relevant provisions of the Code relating to preferential transactions and order in case of preferential transaction. Section 43 deals with preferential transactions and

relevant time. Section 44 bears heading “Orders in case of preferential transactions”. Section 44 of the Code is as follows:-

“44. Orders in case of preferential transactions. - *The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, 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:

Provided that an order under this section shall not—

(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;

(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Explanation I.—For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference,—

(i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;

(ii) is a related party,

it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.

Explanation II.—A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the

corporate insolvency resolution process has been made under section 13.”

9. We are of the view that findings recorded by the Adjudicating Authority after considering the transactions under the Code are well justified that Erstwhile Management indulged into preferential transactions. Thus, we proceed on the premise that ingredients of Section 43 were fulfilled and transactions which were entered by Erstwhile Management were a preferential transaction.

10. The only question to be answered is as to whether after transactions having been held to be preferential whether the direction of contribution to the Erstwhile Directors as contained in the Impugned Order could have been issued under Section 44(1)(d) of the Code?

11. The findings of the Adjudicating Authority are contained in paragraph 8 of the Impugned Order which is to the following effect:

“8. Hence, on perusal of Transaction Audit Report specifically para ii from page 28 to 30 page we are of the considered view that the Respondent No 1 and 2 have given preference to some of the creditors over other creditors whose details are not yet traceable. This constitutes preferential transaction as envisaged in section 43 of the Insolvency and Bankruptcy Code, 2016. Considering the above facts this Adjudicating Authority allows the prayer (b) of the application and directs the Respondent no 1 and 2 to make total contributions of 20,09,821.50/- to the assets of the Corporate Debtor within two months from the date of the order failing which necessary legal actions may be taken. With Respect to Respondent No 3 I.e. Mr. Parvesh Kumar Nath since at the

relevant period he was not acting as Director and no specific allegations were made against him we are of the view that he was not a party in said preferential transaction.”

12. The Adjudicating Authority has allowed prayer ‘b’ of the Application. Thus the limited question to be considered is as to whether the Impugned Direction fall within meaning of Section 44(1)(d) of the Code. Section 44 contains a heading “orders in case of preferential transactions”. Notes on Clauses of clause 44 specifies the orders that may be passed in relation to the avoidance or a preferential transaction. Notes on Clauses further states that orders are aimed at reversing the effects of the preferential transaction and requiring the person to whom the preference is granted to pay back any gains he may have made as a result of such preference. Clause 44 of notes on clauses on the Insolvency and Bankruptcy Bill, 2016 is as follows:

“Clause 44 specifies the orders that may be passed in relation to the avoidance of a preferential transaction. The orders are aimed at reversing the effects of the preferential transaction and requiring the person to whom the preference is granted to pay back any gains he may have made as a result of such preference.”

13. Hon’ble Supreme Court has occasion to consider provisions of Section 43, 44 of the Code in Civil Appeal No. 8512-8527 of 2019, **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited Etc. Etc., Civil Appeal Nos. 8512-8527 of 2019.** Hon’ble Supreme Court has held that under Section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending

preferential transaction. Paragraph 18 of the Judgment of the Hon'ble Supreme Court is as follows:

“18. In the backdrop of the foregoing, we may now scrutinise Sections 43 and 44 of the Code. Section 44 provides for the consequences of an offending preferential transaction i.e., when the preference is given at a relevant time. Under Section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The consequences of offending preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction. Looking to the contents, context and consequences, we are at one with the contentions urged on behalf of the respondents with reference to the decisions in Devinder Singh (supra) and other cited cases, that these provisions need to be strictly construed. However, even if we proceed on strict construction of Section 43 of the Code, the underlying principles and the object cannot be lost sight of. In other words, the construction has to be such that leads towards achieving the object of these provisions.”

14. We may also notice provisions of Section 66 of the Code which is as follows:

“Section 66: Fraudulent trading or wrongful trading.”-(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with

intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against

which initiation of corporate insolvency resolution process is suspended as per section 10A.”

15. Now reverting to the Section 44(1)(d), the provision contemplates a direction requiring any person to pay such sums in respect of benefits received by him from the Corporate Debtor as Adjudicating Authority may direct. Essential conditions need to be fulfilled for issuing direction under Section 44(1)(d). (i) The Adjudicating Authority may require any person to pay and (ii) Such sums in respect of benefits received by him from the Corporate Debtor. Thus as observed above, the provision of Section 44 is aimed at reversing the effects of preferential transactions when the effects of preferential transaction are, reversed the person who has received benefits from the transactions, can be required to pay the sum which is the power given under Section 44(1)(d) of the Code. The Order under Section 44(1)(d) thus is aimed to direct those who have received benefits from the preferential transactions to reverse the benefits to the Corporate Debtor. From the facts of the present case, it is clear that assets of the Corporate Debtor were given to the various creditors whose name are mentioned in the Journal Voucher dated 31st March, 2018. Thus journal voucher indicates that certain amounts were due to certain creditors from the corporate debtor and to score of same certain assets were transferred to the said creditors. The report of the transaction audit report indicates that there are no details of the assets which has been transferred to the said creditors nor in the avoidance application, there is any prayer to require that the assets to be vested in the corporate debtor. Provisions of Section 66 of the Code provides that the Adjudicating Authority may ask any

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person who were knowingly parties to the carrying on fraudulent trading or wrongful trading liable to make such contribution to the corporate debtor as the Adjudicating Authority may deem fit. Thus under Section 66 of the Code the Adjudicating Authority can very well direct the Erstwhile Management/Directors to make contribution to the assets of the Corporate Debtor to any preferential transaction. From the Application filed by the Resolution Professional and the Impugned Order, it does not appear that the Adjudicating Authority has returned any finding under Section 66 of the Code so as to issue any direction as contemplated under Section 66 of the Code. The Adjudicating Authority has simply allowed prayer 'b' of the Application of Resolution Professional which was prayer for issuing direction under Section 44(1)(d) of the Code. When Erstwhile Management indulged into fraudulent trading or unlawful trading which may also include any preferential transactions, order to make contribution by the Erstwhile Directors is very well contemplated under Section 66 of the Code but present is not a case where the Adjudicating Authority has returned any finding under Section 66 or exercised power and issued an order under Section 66 of the Code. The Adjudicating Authority has only issued direction under Section 44(1)(d) of the Code.

16. As observed above, Section 44(1)(d) contemplates a direction requiring any person to pay such sums in respect of benefits received by him from the Corporate Debtor. Thus direction can be given to a person who has received benefits from the Corporate Debtor. In the present case, it was creditors of the Corporate Debtor who have received the benefits by

way of assets of the Corporate Debtor, any direction very well could have been issued by the Adjudicating Authority against the creditors whose name are mentioned in the Journal Voucher dated 31st March, 2023 but in the Application which was filed by the Resolution Professional none of the creditors were party to the application nor there was any such prayer. Direction under Section 44 (1)(d) to the Appellants to contribute, is not sustainable within the meaning of Section 44(1)(d) of the Code.

17. We thus are satisfied that order passed by the Adjudicating Authority directing to make contributions Rs. 20,09,821.50/- is unsustainable. In result, the Appeal is allowed. Order impugned is set aside.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
18th September, 2023

Basant B.