

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT)(CH) (Ins.) No. 195/2023

(Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 against the order dated 27.04.2023 passed by the Hon'ble Adjudicating Authority (NCLT, Kochi Bench, Kerala) in IA (IBC) 182/KOB/2022 in IBA No. 37/KOB/2020)

In the matter of:

Ashique Ponnamparambath **...Appellant**
Suspended management of the Corporate Debtor,
Having his address at: Ponnamparambath House,
Konad Beach, West Hill Post,
Calicut-673005.

Vs.

Vibin Vincent, **.....Respondent**
Liquidator of M/s. Koyenco Autos
Having address at:
Chakiath House, Elavoor P.O. Angamaly,
Ernakulam-683 572.

Present :

For Appellant : Arjun Sheth, Advocate

For Respondents : Vibin Vincent (Party-in-Person)

Judgment
(Date: 21.9.2023)
(Virtual Mode)

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[Per.: Dr. Alok Srivastava, Member (Technical)]

1. This appeal CA(AT)(CH)(Ins) No. 195/2023 has been filed under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short “IBC”) by the Appellant who is aggrieved by the order dated 27.4.2023 (in short “Impugned Order”) in IA (IBC) 182/KOB/2022 in IBA No. 37/KOB/2020 passed by the Adjudicating Authority (NCLT, Kochi Bench).

2. Briefly, the facts of the case are that Corporate Insolvency Resolution Process(“CIRP”) was initiated vide order dated 6.10.1021 against the corporate debtor in a petition filed under section 7 of the IBC by BMW India Financial Services Private Limited and Sankar P. Paniker was appointed as the Interim Resolution Professional. Subsequently, Vibin Vincent was appointed as Resolution Professional vide order dated 17.1.2022, who at the time of filing of IA(IBC) 182/KOB/2022 was working as Liquidator of the corporate debtor.

3. In view of many anomalies in the books of accounts of the corporate debtor, by order of the Committee of Creditors a forensic audit for the period 1.4.2016 to 06.10.2021 was carried out by forensic auditor Mr. Krishna Raj M, Chartered Accountant, who submitted report on 15.6.2022. The forensic audit report found that

certain transactions made by the Appellant Ashique Ponnamparambath to be infringing section 43 of the IBC. Therefore, the liquidator Vibin Vincent filed application IA (IBC) 182/KOB/2022 before the Adjudicating Authority (NCLT, Kochi Bench) seeking orders regarding these preferential transactions.

4. The Appellant has stated in the appeal memo that an amount of Rs.36,03,970.50 was due to him from the corporate debtor and an amount of Rs.28,55,932.00 was transferred by the appellant from the account of the corporate debtor, which was utilized for payment of instalments with respect to a loan availed from IDBI Bank. Thus, the transactions regarding which the Liquidator had filed IA 182/2022 were done in the ordinary course of business. After hearing the parties viz. the Liquidator and the Appellant, the Adjudicating Authority came to the conclusion that the transactions in question in IA (IBC) 182/KOB/2022 were 'preferential transactions' and further the appellant was directed to pay a sum of Rs.7,81,352.00 to the corporate debtor within one month from the date of the Impugned Order, failing which the amount will carry a simple interest @ 12% p.a. from the date of the Impugned Order to the date of realization of the said amount.

5. We heard the arguments put forth by the Learned Counsels for rival parties and perused the record.

6. The Learned Counsel for Appellant has argued that the Appellant is an ex-Director of the corporate debtor and an amount of Rs.36,03,970.50 due to be paid to him by the corporate debtor as on 6.10.2019 and he withdrew certain amounts from the corporate debtor account since certain amount was due to him legitimately. He has further argued that a total amount of Rs.8,79,357 was withdrawn by him for taking care of various expenses in normal course of business. These amounts were withdrawn on various dates, which are given in the chart below:-

No.	Ledger Account Details/Party name	Date of payment	Amount (INR)	Mode of payment by corporate debtor
1	P.P.Ashique	08.07.2021	2,44,352.00	Through SBI
2	P.P.Ashique	22.06.2021	37.000.00	Through SBI
3	P.P.Ashique	24.06.2021	50.000.00	Through SBI
4	P.P.Ashique	14.09.2021	2,70,000.00	Rent – Showroom
5	P.P.Ashique	30.09.2021	1,80,000.00	Rent – Showroom
6	Platino Classic Motor India Pvt. Ltd.	18.11.2019	98,005.00	Through SBI
Total:-			8,79,357.00	

7. The Learned Counsel for Appellant has brought to our attention that section 43 of the IBC requires satisfaction of twin conditions viz. any transfer for the benefit of a creditor, surety or guarantor, which is done for an account of anticipated liability owed by the corporate debtor, which improved the position of such creditor, surety or guarantor in the waterfall for payments set out in section 43 of the IBC and that the transaction should have been done with related party during two years preceding the insolvency commencement date would be preferential transaction. He has argued to that in the present case, as per exception recognized under the IBC, the amount of Rs.7,81,352.00 that is considered as preferential transaction carried out by the corporate debtor in the 'relevant period' in favour of the Appellant would not be a preferential transaction, as during the same period, amounts to the tune of Rs. 49 lakhs have been transferred by the Appellant to the account of the corporate debtor. Moreover, as these amounts are not in regard to any antecedent debt owed by the corporate debtor.

8. The Learned Counsel for the Appellant has further submitted that section 43 of the IBC is not attracted and therefore, no order under section 44 of the IBC could have been given.

9. We perused the IA 182/2022 filed by the Liquidator as also the reply dated 1.10.2022 thereon, submitted by the Appellant before the Adjudicating Authority. We note the following which is stated by the Appellant in his reply before the Adjudicating Authority, particularly paragraphs 12, 14 and 15: it is noticed:-

“12. The Respondents submit that these transactions do not fall within the anvil of Section 43 of the Code as these amounts which have been transferred are not in regards to any antecedent debt which is owed by the Corporate Debtor to the suspended management and further it has not improved the position of the Respondent with respect to other creditors.

xx xx xx xx

14. It is submitted that the abovementioned condition is not fulfilled in the present case as during the relevant period that is two years prior to the insolvency commencement date the Respondent has transferred huge amounts to the account of the Corporate Debtor approximately to the tune of Rs. 49 lakhs. The summary of all the transactions undertaken is annexed hereto and marked as Annexure A to the present Affidavit-in-Reply. The bank statements of the Respondent to substantiate the said transactions are annexed hereto and marked as Annexure B to the present Affidavit-in-Reply.”

15. Thus no question arise as to the amount to the tune of Rs. 7,81,352.00.00 being a preferential transaction as much more amounts have been transferred by the Respondent No. 1 to the account of the Corporate Debtor.

10. In the above-extracted reply of the Appellant a claim has been made that the twin conditions i.e. benefit to a creditor, surety or guarantor on account of the antecedent liability owed by the corporate debtor and the transaction having taken place within the ‘relevant

period' of two years with the further condition that it should not be made in the ordinary course of business should be satisfied before a case under section 43 is made out. We note from paragraph 12 extracted above that the Appellant has carefully used the word "antecedent debt", but avoided the mention of any 'liability' owed by the corporate debtor towards the Appellant. We further note that the Appellant has also not made it clear as to why the amounts which were transferred by the corporate debtor through State Bank of India which amount to Rs.7,81,352, were transferred to the Appellant. Furthermore, the Appellant's claim that he has transferred amounts totaling approximately Rs. 49 lakhs to the account of the corporate debtor and therefore, the question of Rs.7,81,352 being preferential transactions does not arise is not at all legally tenable.

11. It is useful to reproduce sub-section (2), (3) and (4) of section 43 of the IBC, which relate to 'preferential transaction' which is applicable in the present case hereunder:-

"43. Preferential transactions and relevant time. –

xx xx xx xx

(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. 1 Ins. by Act No.26 of 2018, sec. 27 (w.e.f. 6-6-2018). 52

(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. A plain reading of sub-section (2) of section 43 makes it clear that if the transfer of a property or an interest of the corporate debtor is made for the benefit of a creditor or a surety or a guarantor, such transaction would be ‘preferential transaction’, if it puts such creditor or surety or guarantor in a beneficial position and if such transactions are made within the ‘relevant period’. We note that the transactions which are the subject of the Impugned Order were made during the period 18.11.2019 to 30.9.2021. Out of these, the transactions made between 22.6.2021 to 30.9.2021 which total Rs. 7,81,352 were all made within a period of two years immediately preceding the insolvency commencement date which is 6.10.2021. Therefore, and quite clearly, all these transactions are within the ‘relevant period’. We further note

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that in the absence of any reason provided by the Appellant as to why such transfers were made in his favour from the account of the corporate debtor, it would be a safe and logical conclusion that he considers that the corporate debtor owed him these amounts. Therefore, in accordance with clause (a) of sub-section (2) of section 43, such transactions are clearly 'preferential transactions'. Further, the exception that is carved out in clause (a) of sub-section (3) of section 43 that if the transfer is made in the 'ordinary course of business' of the corporate debtor, such transactions would be considered outside the ambit of 'preferential transactions'. The Appellant in his reply before the Adjudicating Authority has not given any clarity or reason as to why such transactions were made and therefore, the benefit of this exception of the transactions having been made in the 'ordinary course of business' cannot be provided to the Appellant.

13. In the light of the detailed discussion in the preceding paragraphs, and in the background of the report of 'Forensic Audit' of the 'Corporate Debtor', it is quite clear that the said transactions amounting to Rs.7,81,352 are 'preferential transactions', as defined under section 43 of the IBC. Therefore, we conclude that the Impugned Order does not suffer from any infirmity and we find no reason to interfere with the said order. We also make it clear that the interest on the amount directed to be paid i.e. Rs.7,81,352 shall be calculated @

12% per annum from the date of the Impugned Order i.e. 27.4.2023 till the date of realization of the amount. The appeal is found to be devoid of any merit and is accordingly dismissed.

14. No orders as to costs.

(Justice M. Venugopal)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

21st September, 2023

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