

Innoventive Ventures Limited vs Dhinal Shah Liquidator Of Innoventive ... on 23 December, 2022

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Ins) No.102-104 of 2021

IN THE MATTER OF:

Innoventive Ventures Limited
Office No. 606, 6th Floor,
Nucleus Mall, 1 Church Road,
Camp, Pune - 411 001,
Maharashtra

...Appellant

Vs.

1.Mr. Trupal.J.Patel,
Liquidator of Innoventive Industries Limited
C/505-506,the First, B/h ITC Narmada,
Nr. Keshav Baug Party Plot,
Vastrapur, Ahmedabad, Gujarat 380015

...Respondent No.1

2.Innoventive Americas, INC
Office at 1000 North West Street,
Suite 1200
Wilmington, DE 19801

...Respondent No.2

3. Mr. Chandu Laxman Chavan
Promoter and Shareholder of Innoventive
Industries Limited,
Residing at C-20, Ambience Empyrean,
Sopan Baug, Ghorpadi, Pune
Maharashtra - 411 001

...Respondent No.3

Present:

For Appellant :

For Respondents :

Mr. Shikhil Suri, Ms. Madhu Suri, Advocates

Ms. Pooja Mahajan, Ms. Mahima Singh, Advocates

For R1

Company Appeal (AT) (Ins) No. 102- 104 of 2021

Page 1 of 39

J U D G M E N T

(23rd December, 2022) DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The Appellant has filed the appeal under Section 61 of the 'Insolvency and Bankruptcy Code 2016' (hereinafter referred as to 'the Code') against the two impugned orders dated 29.10.2020 passed by the 'National Company Law Tribunal, Mumbai Bench (hereinafter referred as to 'the Adjudicating Authority') in M.A No. 253 of 2018 in CP(IB) 01/NCLT/MB/2016 & 06.01.2021 in IA No. 2444 of 2020 in CP(IB) 01/NCLT/MB/2016.

2. The Appellant has sought the following reliefs:

- Set aside the impugned order dated 29.10.2020 and impugned order dated 06.01.2021 passed by the Adjudicating Authority in MA No. 253 of 2018 and IA No. 2444 of 2020 in CP(IB) 01/NCLT/MB/2016;
- In the alternative, modify the order dated 07.11.2020 so as to protect and recognize the pledge created in favour of the Applicant under Share Pledge Agreement dated 10.06.2014;
- Pass such appropriate directions to the Liquidator to not treat the pledge in favour of the Appellant as a preferential transaction during the pendency of the Appeal etc. Company Appeal (AT) (Ins) No. 102- 104 of 2021

3. The Ld. Counsel for the Appellant has submitted that the Appellant company is a listed company and majority owned and controlled by the Promoter of the Corporate Debtor (CD), Mr. Chandu Chavan (Respondent No.3 herein) and his relative. The Appellant has involved in activities auxiliary to financial intermediation, except insurance and pension fund. The Corporate Debtor, represented by the Liquidator is a company which is involved in the multiple sectors such as composite tubes, precision tubes and other innovations in tube manufacture.

4. It is submitted by the Ld. Counsel for the Appellant that the CD availed certain working capital facilities from SBI under which the Bank provided an additional cash credit facility of Rs. 20 Crores vide sanction letter dated 06.03.2013. Additionally, CD availed certain working capital facilities from RBL under which the Bank provided a cash credit facility of Rs. 50 Crore vide sanction letter dated 25.03.2013. Creditor facility Agreement dated 28.05.2013 was entered into between the CD and RBL. In order to secure the aforesaid agreement, the Appellant had pledged its own shares held in two companies, namely, Aim Filtertech Pvt. Ltd. & GeneOmbio Technologies Pvt. Ltd. in favour of SBI by way of agreement dated 11.11.2013. Vide another Pledge Agreement dated 20.11.2013, the Appellant created a pledge on its share held in Opal Luxury Time products Ltd. with RBL in order to secure CD's borrowings. In the year 2014, SBI & Company Appeal (AT) (Ins) No. 102- 104 of 2021 RBL both invoked their respective pledges and sold some shares belonging to the Appellant. Thus, liability of the CD towards the Appellant arose in 2014 and hence CD decided to pledge its shares held in R2 in favour of the Appellant. A share Pledge Agreement dated 10.06.2014 was executed between the CD as pledger, wherein the CD pledged its 85% shares held in R2 company in favour of the Appellant as pledgee for the purpose of securing an advance loan of Rs.2,56,00,000/- from the Appellant. The intention of such transaction was to ensure smooth and continuous functioning of the CD. It is an admitted fact that the said pledge is not under challenge. It is also an admitted fact that the Pledge Agreement of 2014 is a notarized agreement between the parties and, therefore,

authentic and genuine.

5. It is further submitted by Ld. Counsel for the Appellant that the CD vide letter dated 10.06.2014 informed about the share pledge agreement to Central Bank of India. The said letter records that the said shares are not pledge to consortium of bankers.

6. It is also submitted that the said Pledge Agreement gives right to the Appellant as a pledge to undertake the sale of shares as per Clause 10 upon event of default having occurred. It is further submitted that even default also includes insolvency, bankruptcy or winding up against the pledger. In continuation of the said document, another share pledge Company Appeal (AT) (Ins) No. 102-104 of 2021 agreement dated 25.11.2016 was executed wherein the CD gave additionally 15% of the its share held in R2 making 100% shares of R2 in favour of the Appellant for securing a loan/advance of Rs. 12,14,86,020/- from the Appellant. Apart from the shares of R2, Corporate Debtor also pledged shares held by it in Aim Filtertech Pvt. Ltd., GeneOmbio Technologies Pvt. Ltd. & Opal Luxury Time Products Ltd. under the same agreement.

7. It is also submitted that the said pledge agreement gives right to the Appellant as a pledge to undertake the sale of shares as per clause 10 upon event of default having occurred. It is submitted that both the share pledge agreements of 2014 and 2016 are identical and part of one transaction, rather than different and/or unconnected transactions/transfer. On 17.01.2017 the Adjudicating Authority has admitted the petition and appointed IRP and on 08.12.2017 the Adjudicating Authority has admitted to liquidation. As per Section 25(2) (j) and Regulation 39(2) of IBBI (Corporate Insolvency Resolution Process) Regulation 2016, RP have a duty to report such transactions to the CoC and to file applications to set them aside during CIRP period and suddenly now it becomes preferential transaction, this is an afterthought. The shares of Innoventive America's INC (Respondent No.2 herein) was the only asset/security which was unencumbered and free from tall charges that's Company Appeal (AT) (Ins) No. 102- 104 of 2021 why to secured Appellants debt, and to raise funds, CD created pledge as there was no other unencumbered security available with CD and business operation had shut down in 2014 only. The Appellant had been providing support the CD since June 2014 to keep the operations of CD running and also to ensure that interest of around 1200 workers employed by the CD is safeguarded and the continuation of the debtor as a going concern for the benefit of creditors and non-creditor third parties.

8. It is also submitted by Ld. Counsel for the Appellant that if this transactions or pledge agreement will be considered as preferential transaction then all the loan/pledge agreement where appellant has granted its guarantee or provided security for the CD's loan shall be considered as preferential transaction and if that happens then CD need to pay more money to Appellant.

9. It is also stated that the Appellant is of the view that while impounding the documents, the Adjudicating Authority went beyond the scope of Section 43 and the power conferred upon it by the provision for the above rea- sons. If this trend is set forth, then it would directly hamper the future proceedings and set a precedent which might allow the Ld. Adjudicating Authority to divulge into issues which do not materially hamper the case, in turn negating the legislative intent behind the Code. This transaction has already been taken place in June 2014 which is before the Company

Appeal (AT) (Ins) No. 102- 104 of 2021 commencement of Code. Section 43 is notified as on December 15, 2016. The Appellant was not aware that this transaction will be considered as preferential transaction otherwise would it have not granted any financial assistance to corporate debtor or would have stopped to continue supporting corporate debtor (distressed business) during the time when the Appellant's support was most required. Vide letter dated 04.01.2018, the Appellant informed the Liquidator that it was invoking the pledge as per Agreement. On 05.01.2018, the Appellant filed Form-D as Financial Creditor with the Liquidator an amount of Rs. 32,14,86,020/- as principal and Rs. 48,71,938/- as interest. It is however submitted that in all fairness, the Appellant could not bring on record that earlier pledge agreement dated 10.06.2014 with the Form D since all the records of the CD were under the control of the Liquidator. On 22.03.2018, the Liquidator preferred an application under Section 43 and 44 R/w Section 60(5) of the Code being MA No. 353 of 2018 in CP(IB) 01/NCLT/MB/2016 seeking to declare the share pledge agreement dated 25.11.2016 as preferential transaction and thereby to release the impugned pledge. The Appellant filed its Reply on 20.08.2018 bringing on record the earlier pledge agreement dated 10.04.2016. The Liquidator filed his Rejoinder to the Appellant's reply on 10.09.2018 before the Adjudicating Authority. The Appellant filed detailed written submissions before the Adjudicating Company Appeal (AT) (Ins) No. 102- 104 of 2021 Authority on 18.02.2020. The Appellant has subsequently filed an interim application no. 2444/2020 in CP(IB) No. 01/NCLT/MB/2016 seeking recall of the impugned order dated 29.10.2020 before Adjudicating Authority That subsequently, the company appeal (AT) (Ins.) No. 1132- 1133 filed by the Appellant before this Appellate Tribunal against the impugned order dated 29.10.2020 was listed and heard on 04.01.2021 vide which this Appellate Tribunal dismissed the said company appeal as withdrawn with liberty to assail the impugned order along with the order passed in Recall Application, if adverse to Appellant. Further, the said recall application was listed before the Ld. Adjudicating Authority on 06.01.2021 which was heard and dismissed in limine. Hence, being aggrieved, the Appellant is filing the present Appeal to challenge the impugned orders dated 29.10.2020 and 06.01.2021.

10. The ld. Counsel for the Respondent No.1 has submitted that Mr. Dhinal Shah, the erstwhile Liquidator of the CD, was originally arrayed as R1 in the appeal. By an order dated 24.12.2021 passed by the Adjudicating Authority, Mr. Trupal J Patel was appointed as Liquidator of the CD in place of Mr. Dhinal Shah. In the light of this by an order date 13.05.2022 in IA Nos. 804, 805 & 806 of 2022, this Tribunal allowed Mr. Trupal J Patel to be substituted in place of Mr. Dhinal Shah as the R1 in the appeal. Company Appeal (AT) (Ins) No. 102- 104 of 2021

11. It is submitted by ld. Counsel for the Respondent No.1 that the appeal has been filed by Innoventive Ventures Limited (IVL)- Appellant herein against the following two orders passed by the Adjudicating Authority:

- (i) Order dated 29.10.2020 by which the Adjudicating Authority allowed M.A No. 253 of 2018 filed by the Liquidator. The Adjudicating Authority held that share pledge agreement dated 25.11.2016 by which the CD was a preference transaction under Section 43 of the Code and thus, directed the Appellant to release the impugned pledge created by the CD in respect of Innoventive Americas Inc (IAI/R2) Shares and

to handover the share certificates to the Liquidator.

(ii) Order dated 06.01.2021 by which the Adjudicating Authority dismissed IA No. 2444 of 2020 filed by the Appellant seeking review/recall of the impugned order dated 29.10.2020.

12. It is also stated by Ld. Counsel for the Respondent No.1 that under the impugned 2016 pledge Agreement, the CD pledged its entire shareholding in Innovative Americas Inc./R2 in favour the Appellant. Hence, the CD transferred security interest in all its shares held by the CD in IAI/R2 in favour of Appellant which is a related party of CD. The chart of relationship between the parties is set out below:

Company Appeal (AT) (Ins) No. 102- 104 of 2021

13. It is also stated that the impugned order dated 29.10.2020 was passed after detailed hearing and consideration of arguments advanced by both sides. By two separate but concurring orders, the Adjudicating Authority arrived at the conclusion that the impugned pledge is a preference transaction covered under Section 43 of the Code. The Adjudicating Authority examined the submission made by the parties and gave detailed reasons as to why, in their view, the impugned pledge is a preference transaction hit by the provisions of Section 43 of the Code. Company Appeal (AT) (Ins) No. 102- 104 of 2021 Having separate arrived at the same conclusion, the Adjudicating Authority directed to the Appellant to release the impugned pledge created over IAI shares and handover the share certificates to the Liquidator. It is submitted that the preference application was filed in March 2018 and was initially reserved for order on 16.11.2018 and then on 06.03.2019, 19.09.2019 and eventually on 17.02.2020, after full and proper hearing. Written submission was also duly filed by parties before the Adjudicating Authority. Eventually, the Preference Application was allowed on 29.10.2020 by two separate but concurring orders in which contentions of Appellant have been duly noted and considered. This being so, it is incorrect and unfair for Appellant to contend in its appeal that it was not heard or that the gap between hearing and pronouncement of the which has resulted in some inaccuracies creeping in the impugned order. The Appellant has accepted that the pledge was created to secure its antecedent liability. However, it has taken two arguments. Firstly, that the pledge was created in the ordinary course of business; and secondly, that 2016 pledge is a continuation of 2014 pledge and hence beyond the look back period.

Company Appeal (AT) (Ins) No. 102- 104 of 2021

14. The Ld. Counsel for the Respondent has also cited the judgment of Hon'ble Supreme Court in Anuj Jain, IRP for Jaypee Infratech Limited Vs. Axis Bank Limited & Ors.1 para 28.6:

"28.6.The result of discussion in the foregoing paragraphs is that the transfers in question could be considered outside the purview of sub-section (2) of Section 43 of the Code only if it could be shown that same were made in the 'ordinary course of business or financial affairs' of the corporate debtor JIL and the transferees. Even if transferees submit that such transfers had been in the ordinary course of their business, the question would still remain if the transfers were made in the ordinary

course of business or financial affairs of the corporate debtor JIL so as to fall within the exception provided by clause (a) of sub- section (3) of Section 43 of the Code.

28.6.1. Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial (2020) 8 SCC 401 Company Appeal (AT) (Ins) No. 102- 104 of 2021 affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive....

28.6.2. Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of 'the undistinguished common flow of business done'; and is not arising out of 'any special or particular situation', as rightly expressed in Downs Distributing Co (supra). Though we may assume 43 vide State of Andhra Pradesh v. H. Abdul Bakshi and Bros.: 1964 STC 644 (at p. 647). that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the Company Appeal (AT) (Ins) No. 102- 104 of 2021 corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with Company Appeal (AT) (Ins) No. 102- 104 of 2021 some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, we have no hesitation in concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL. 25.7. The submissions that security was disclosed in the Annual Reports or that none of the creditors expressed dissent are of no effect because such disclosure or want of objection by creditors, by themselves, do not operate as estoppel against anybody nor would take the transaction out of the purview of the legal fiction predicated in Section 43, if it is otherwise of a preference at a relevant time. Similarly, the distinction between 'NPA' and 'wilful default'; the submission that NPA could be regularised; and further the submission that the mortgages were created before JIL was declared NPA, are hardly of any bearing on the question as to whether the impugned transactions had been in the ordinary course of business or financial affairs of JIL. Thus, reference to Company Appeal (AT) (Ins) No. 102- 104 of 2021 the decisions like that in Keshavlal Khemchand and Jah Developers (supra) is not of any consequence

and need not be dilated upon. The answer to this question, in our view, could only be in the negative. That is to say that the impugned transactions had not been in the ordinary course of business or financial affairs of JIL." Hence, in Anuj Jain case, a mortgage created by the CD in favour of the lenders of this related party was not treated as ordinary course transaction as the CD was not in the business of creating such mortgages which do not create any benefit for the CD.

15. It is also submitted by Ld. Counsel for the Respondent that merely because Clause 15 of the 'Memorandum of Association' (MoA) of the CD, which specifies objects incidental or ancillary to the attainment of the main objects, allows borrowing or raising money for the purposes of the company by pledge (among other instruments) does not mean that a company which was in the business of manufacturing precision steel tubes etc. can suddenly claim to be creating pledges as ordinary course of its business. Neither the Appellant nor the CD are in the business of creating pledges with a profit motive, as an ordinary part of their dealings. The reliance passed by the Appellant on MoA or the CD to justify that the impugned pledge was created in ordinary course of business is misplaced Company Appeal (AT) (Ins) No. 102- 104 of 2021 and liable to be rejected. It is submitted that the impugned pledge was created only to secure the Appellant for an antecedent (past) liability and does not fall within the exceptions under section 43 (3) of the Code as the same was neither in the ordinary course of the business or financial affairs of the CD and Appellant nor was it given to secure any new value.

16. It is also stated by Ld. Counsel for the Respondent that the entire case of the Appellant rests on contention that prior to the impugned 2016 Pledge Agreement, there was another pledge agreement dated 10.06.2014 under which it is claimed that 85% of the share held by the CD in IAI/Respondent No.2 were pledged in favour of Appellant in 2014 itself and that, subsequently, vide the impugned 2016 Pledge Agreement, the CD pledged the remaining 15% shares. It has also been contended by Appellant that the Alleged 2015 Pledge Agreement could not be produced by it initially due to "genuine difficulty and inadvertence". It is further contended that the said 2014 agreement was not challenged or disputed by the Liquidator and hence it has been accepted. In this regard, following may be noted:

a. The Alleged 2014 Pledge Agreement could not have been challenged in the first instance by the Liquidator in its Preference Application since a copy of the Alleged 2014 Pledge Agreement surfaced for the first time, in the reply to the Preference Application.

Company Appeal (AT) (Ins) No. 102- 104 of 2021 b. The Impugned 2016 Pledge Agreement was challenged by the Liquidator in its Preference Application since Innoventive Ventures Ltd (IVL)/Appellant had invoked 2016 Pledge Agreement by its notice dated 4 January 2018. In the notice sent by IVL Appellant (notice signed by Ms. Pournima Gadiya), only 2016 Pledge Agreement is invoked and there is no mention of Alleged 2014 Pledge Agreement. In fact, till date, there is no invocation of the Alleged 2014 Pledge Agreement.

c. In the Claim Form dated 5th January 2018 submitted by IVL/Appellant, there is no mention of Alleged 2014 Pledge Agreement. Notably, the Claim Form contains an affidavit by Ms. Pournima Gadiya (Director of IVL/ Appellant) stating the documents that have been relied upon in support of its claim as a financial creditor and affirming that the information is correct and no information has been withheld. The said affidavit mentions 2016 Pledge Agreement but does not mention 2014 Pledge Agreement.

d. The 2016 Pledge Agreement (signed, inter alia, by the Respondent No. 3 (Mr. Chandu Chavan) and Ms. Pournima Gadiya (for IVL)), repeatedly refers to "hereby" creating a pledge over the "entire equity stake" held by the CD in IAI and nowhere mentions the Alleged 2014 Pledge Agreement. If indeed there was an Alleged 2014 Pledge Agreement of 85%, it is incomprehensible that a subsequent Impugned 2016 Pledge Company Appeal (AT) (Ins) No. 102- 104 of 2021 Agreement, which is stated to be for balance 15% would not even mention the earlier Alleged 2014 Pledge Agreement. e. The Liquidator is not in custody of or aware of any such Alleged 2014 Pledge Agreement. In fact, upon the request of Respondent No. 3, the Liquidator even enquired from Central Bank of India. However, Central Bank of India also stated that it was not able to locate any such agreement in its records. In fact, when Central Bank of India enquired from Mr. Chandu Chavan (promoter of CD and IVL), he himself sent a scanned copy of the Alleged 2014 Pledge Agreement to Central Bank of India.

f. While IVL/ Appellant took adjournments from the Adjudicating Authority for filing reply to the Preference Application saying that it is trying to locate the Alleged 2014 Pledge Agreement, Mr. Chandu Chavan sent a scanned copy of the Alleged 2014 Pledge Agreement to Central Bank of India and only when this was specifically pointed out by the Liquidator, IVL/ Appellant filed its reply, bringing forth for the first time, the Alleged 2014 Pledge Agreement.

g. Till date the original of Alleged 2014 Pledge Agreement has not been produced. Other than the copy of the Alleged 2014 Pledge Agreement provided by IVL/Appellant itself, there are no surrounding circumstances and/ or documents which support the existence of such Company Appeal (AT) (Ins) No. 102- 104 of 2021 agreement. IVL/ Appellant has not produced or shown any other documents/ surrounding circumstances, such as financial statements, creditors' approval, RBI approval, any relevant communications etc., which may show that any such agreement was indeed executed by the CD. No record of this agreement is available.

h. When questioned by the Liquidator on RBI approval for the Impugned Pledge, Respondent No. 3 sent an email dated 18 March 2018 stating that the pledge is permitted without RBI approval on basis of an amendment to Regulation 18 of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2014 (FEMA Regulations). Interestingly, the said amendment to FEMA Regulations is dated 14 October 2014 (i.e., after 10 June 2014, the date of Alleged 2014 Pledge Agreement). It can, thus, be logically inferred that in its email dated 18 March 2018, Respondent No. 3 was referring to the Impugned 2016 Pledge Agreement and could not be referring to the Alleged 2014 Pledge Agreement.

i. In light of the above, the contention of IVL/Appellant in the Appeal that the Liquidator has not challenged or disputed the Alleged 2014 Pledge Agreement has no merit. When the copy of the said agreement surfaced for the first time in the reply filed by IVL/Appellant, the Liquidator took a specific plea in the rejoinders clearly stating that the Alleged 2014 Company Appeal (AT) (Ins) No. 102- 104 of 2021 Pledge Agreement appears to be fabricated to escape the look-back period under Section 43(4) of the Code. The suspicious circumstances in which the Alleged 2014 Pledge Agreement was suddenly and for the first time produced by way of IVL/ Appellant's reply to the Preference Application, was also highlighted by the Liquidator before the Adjudicating Authority and the Adjudicating Authority duly noted the same in the Impugned Order.

17. It is also stated by Ld. Counsel for the Respondent that the non-

production of the Alleged 2014 Pledge Agreement by IVL/Appellant in its Claim Form was not the result of any "difficulty" or "inadvertence" as claimed. Rather, the said agreement is nothing but a concocted document to deflect attention from the Impugned 2016 Pledge Agreement to escape the look back period (2 years in case of related party). Assuming without admitting the existence and/or validity of the Alleged 2014 Pledge Agreement, it has been rightly held by the Adjudicating Authority that the Liquidator has questioned the execution of the Impugned 2016 Pledge Agreement dated 25th November 2016 which was executed at the relevant time i.e., two years before the initiation of CIRP and by which the CD pledged 100% shares held by it in IAI/ Respondent No. 2 in favour of IVL/ Appellant. Thus, if at all, there was any such agreement as the Alleged 2014 Pledge Agreement under which it is claimed that 85% of IAI Shares Company Appeal (AT) (Ins) No. 102-104 of 2021 were pledged in favour of IVL/ Appellant, the said alleged agreement would stand substituted/ subsumed/ superseded by the Impugned 2016 Pledge Agreement by which the CD pledged its entire (100%) equity stake in IAI/ Respondent No. 2 in favour of IVL/Appellant. Further, as rightly held by the Adjudicating Authority, since IVL/Appellant did not make any reference to the Alleged 2014 Pledge Agreement either in the pledge invocation letter or in its Claim Form and only relied upon the Impugned 2016 Pledge Agreement, IVL/ Appellant is estopped by conduct from making any claims based on the Alleged 2014 Pledge Agreement.

18. It is stated by Ld. Counsel for the Respondent that the Appellant has also submitted in its Appeal that there is "no element of dishonesty or unfairness in the present transaction". As held by Anuj Jain case, the question of intention is not relevant for the purpose of determining whether a transaction is a preferential transaction under Section 43 of the Code. Section 43 of the Code is in stark contrast to Section 531 of the Companies Act 1956 which contained provisions regarding 'fraudulent preference'. Section 53(1) entailed element of fraud and hence, the question of intention was material thereunder. On the contrary, Section 43 of the Code creates a deeming provision wherein, once the ingredients of Section 43 are satisfied, it is deemed that a preference is given, irrespective of whether the transaction was in fact intended or even Company Appeal (AT) (Ins) No. 102- 104 of 2021 anticipated to be so. In view of the above, any reference to the erstwhile regime under the Companies Act, 1956, provisions of the Indian Contract Act, 1872 and principles governing Chapter XI proceedings in USA is wholly misplaced and irrelevant and do not support the case of IVL/Appellant. Notably, no other surrounding circumstances and/ or documents have been shown or produced, which may support the valid execution of either the Impugned 2016 Pledge

Agreement or the Alleged 2014 Pledge Agreement. Neither of the pledge agreements are supported by -

- any board resolutions or registrations, despite the fact that the CD was a listed company and would need to make adequate disclosures and take approvals of board of directors for related party transactions;
- any RBI approval or any filings made under the FEMA Regulations or Companies Act, 2013. For instance, the FEMA Regulations require reporting of all transactions relating to foreign subsidiaries, in Form ODI, to the Authorised Dealer Bank within 30 days from the date of transaction;
- any consent taken from existing lenders, given that the CD had created non- disposal undertakings in respect of the IAI Shares and all assets of the CD were charged in favour of the existing lenders. Company Appeal (AT) (Ins) No. 102- 104 of 2021 No document has been produced to show that any approvals or no objection certificates were taken by the CD from such existing lenders, prior to creation of the pledge over IAI Shares. The scan copy of the Alleged 2014 Pledge Agreement suddenly emerged for the first time in the reply filed by IVL/ Appellant to the Preference Application before Adjudicating Authority and appears to be concocted since even Central Bank of India (security trustee) did not have any knowledge of the Alleged 2014 Pledge Agreement and informed the Liquidator that a scanned copy of the said agreement was in fact provided to Central Bank of India by Respondent No. 3 himself.

19. It is also submitted by Id. Counsel for the Respondent that in stead of complying with the order of the Adjudicating Authority directing IVL/ Appellant to release the Impugned Pledge and hand over IAI Shares certificates to the Liquidator, despite repeated requests, IVL/ Appellant filed Recall Application on 5 December 2020 as a dilatory tactic and in an evident attempt to save limitation for filing appeal before this Appellate Tribunal. Further, after filing of the Recall Application, on 21 December 2020, Company Appeal (AT) (Insolvency) No. 1132-33 of 2020 was filed by IVL/Appellant challenging the Impugned Order dated 29 October 2020. This appeal was dismissed as withdrawn with liberty to assail the Company Appeal (AT) (Ins) No. 102- 104 of 2021 Impugned Order dated 29 October 2020 in the Preference Application along with the order passed in the Recall Application, if adverse to IVL/ Appellant. Subsequently, the Adjudicating Authority dismissed the Recall Application by the Impugned Order dated 6 January 2021. All this while, IVL/ Appellant did not handover the share certificates to the Liquidator, which was clearly in non-compliance of the Impugned Order dated 29 October 2020 and, as a result, the Contempt Application was filed by the Liquidator. However, in view of the stay order dated 17 February 2021 passed in the Appeal, the Contempt Application has simply been adjourned from time to time. It may be noted that the IAI Shares constitute one major asset block which remains to be liquidated. While a highest bidder has been identified (who has paid the earnest money), the payment of the balance amount and conclusion of sale of the shares is dependent on the release of the Impugned Pledge and hand over of the share certificates. There is also complete lack of visibility regarding IAI/ Respondent No. 2 and its downstream operating entity, Salem Steels, and there are genuine apprehensions that the value of the IAI Shares may be deteriorating due to actions of the erstwhile promoter/director (Respondent No. 3). The Erstwhile Directors of CD, among others, have failed to

assist the Liquidator with respect to providing proper and complete information and one of the reasons cited for not providing the Company Appeal (AT) (Ins) No. 102- 104 of 2021 required information is the pending litigation around the Impugned Pledge. By way of the Recall Application, IVL/ Appellant did not seek rectification/ modification of any clerical errors or accidental slip or omission apparent from the record but, in fact, sought to re-agitate issues which were already examined and decided by the Adjudicating Authority by the Impugned Order dated 29th October 2020 in the Preference Application. It is humbly submitted that the Recall Application was rightly dismissed as it is settled law that the Adjudicating Authority does not have power to review its own order/ judgment but can only correct any mistake apparent from the record. Reliance in this regard is placed on Deepak Kumar v M/s Phoenix ARC Pvt. Ltd, Review Application No. 09 of 2020 in Company Appeal (AT) (Insolvency) No. 848 of 2019 (Ref: Para 25, 26 and

28); Peoples General Hospital Pvt. Ltd. v Alliance Industries Limited & Ors., Company Appeal (AT) No. 105 of 2018 (Ref: Para 11, 12, 13, 14 and 18); and Mrs. Mallina Bharti Rao v Gowthami Solvents Oil Limited, Company Appeal (AT) No. 387 of 2018 (Ref: Para 5 and 8). This being so, the Impugned Order dated 6 January 2021 dismissing the Recall Application also does not warrant any interference by this Appellate Tribunal. In light of the above submissions, it is prayed that this Appellate Tribunal may dismiss the Appeal with exemplary costs.

Company Appeal (AT) (Ins) No. 102- 104 of 2021

20. We heard at length the parties and have carefully gone through the pleadings of the parties, available material on record and we are having the following observations:

A. The history of the case reveals followings:

- i. The Appellant is a listed company.
- ii. The CD availed certain working capital facilities from SBI as also

from RBL in 2013. A pledge agreement was created for the Appellants share held in two companies with SBI and RBL.

- iii. SBI and RBL invoked the Pledge in 2014.
- iv. The available records reveals that the Appellant has filed a claim

of Principal amount of Rs.32,14,86,020/- alongwith interest and reference made of Pledge Agreements.

v. The Appellant is aggrieved that while they have filed the claim in October, 2018 appearing at page No.7 of the Appeal Paper Book for a principal amount of Rs. 32,14,86,020 and Rs. 48,71,938/- as interest appearing at page 201 of the Appeal Paper book, thereafter, the Liquidator has filed M.A No. 253 of 2018 under Section

43 and 44 for avoidance under the category of preferential transactions. These transactions relate to the release of pledge on the shares of Innoventive America Inc. - Respondent No.2 which is a wholly owned subsidiary of the CD. The Appellant Company Appeal (AT) (Ins) No. 102- 104 of 2021 invoked the Pledge Agreement and notified to the same to the Liquidator vide email dated 04.10.2018.

vi. The RP who has filed the Petition under Section 43 & 44 of the Code against the Appellant, is the RP since inception of the CIRP of the Appellant Company in terms of the order of Adjudicating Authority dated 17.01.2017 appearing at page no. 174 of the Appeal paper book.

B. No body has disputed that the amount has not been paid by the Appellant to the Respondent No.1 as payment is through banking channels as per submission made by the Appellant and not countered by the Respondents. Nor there is any dispute on having a share pledge agreement made on 25.11.2016 between the Appellant Company and the R1/Innoventive Ventures Limited and confirming party Innoventive America Inc./ R2. This Pledge Agreement appearing at page 159 vide para 2 of the Appeal paper book also provides details of other pledges. To bring a clarity on this, a scanned copy of page 158-164 is reproduced herein below:

Company Appeal (AT) (Ins) No. 102- 104 of 2021 Company Appeal (AT) (Ins) No. 102- 104 of 2021 Company Appeal (AT) (Ins) No. 102- 104 of 2021 Company Appeal (AT) (Ins) No. 102- 104 of 2021 Company Appeal (AT) (Ins) No. 102- 104 of 2021 Company Appeal (AT) (Ins) No. 102- 104 of 2021 Company Appeal (AT) (Ins) No. 102- 104 of 2021 C. This pledge agreement has been in the record of the CD which as RP, it may have been examined by erstwhile Liquidator before auctioning the shares of R2 hold by R1.

D. The issue of attracting preferential transaction arising only after the Appellant has filed the claim. It was also brought to the notice by the Appellant that R1 carried out the auction despite knowing that the Appellant has lodged this claim in January, 2018 and has also accepted EMD money from a third party. The Appellant is suspecting that R1 has filed the application under Section 43 of the Code at a later stage being afterthought in order to save the illegal auction carried out by him.

E. However, the Form-D proof of claim submitted by the Appellant reflects the Pledge Agreement dated 24.11.2016 and other Pledge Agreements but no where it reflects the pledge agreement of 2014. Even glancing at 2016 pledge agreement it no where reflects about 2014 agreement appearing at page 158 to 167 of the Appeal paper Book. F. All the problem has erupted from the fact that the Appellants have mentioned about the share pledge agreement of November, 2016 as an extension of earlier share pledge agreement dated 10.06.2014 wherein the substantial portion of shares have been pledged as contemplated by the Appellants.

Company Appeal (AT) (Ins) No. 102- 104 of 2021 G. It is also a matter of fact to be recorded that since 2017, Respondent No.1 was having the full knowledge of share pledge agreement of 2016 but he chooses to file Section 43 application after a delay of one year. This reflects, no doubt, that filing of petition under Section 43 of the Code alleging that Share Pledge Agreement dated November 2016 is at belated stage by the R1 to deny the Appellant of their status or rights as financial creditor. This tribunal has noted vide its order dated 13.05.2022 based on IA No.804 of 2022, 805 of 2022 & 806 of 2022 in CA(AT) (Ins) No. 102-104 of 2021 that a new Liquidator has been appointed in place of erstwhile Liquidator - Mr. Dhinal Shah. The name of new Liquidator is Mr. Trupal.J.Patel who was appointed as Liquidator in terms of order dated 24.12.2021 passed by the Adjudicating Authority. At page 13 of the relevant I.As reflect that the Liquidator desired to start his practice and therefore, was interested in surrendering his registration as an IP and practice as only an Advocate and he has also surrendered on 01.07.2021 his certificate of practice to the ICAI.

H. Now coming to the main issue, it is apparently very much clear that all the companies (Innoventive Ventures Limited, Innoventive Industries Limited and Innoventive America Inc.) involved in this case are related Company Appeal (AT) (Ins) No. 102- 104 of 2021 party as also Promoter of the CD and Chairman & MD of Innoventive Ventures Limited - Mr. Chandu Chavan.

I. Incidentally, impugned pledged largely satisfied all ingredients of Section 43 of the Code. The impugned order dated 29.10.2020 although passed by two separate orders but in concurring orders both the Ld. Members arrived at the conclusion that the impugned pledge is a preferential transaction covered under Section 43 of the Code. The approach of the Appellant to give the colour of pledge as in the ordinary course of business is no longer res integra as per the law laid down under the Code. (2020) 8 SCC 401 - Anuj Jain, IRP for Jaypee Infratech Limited Vs. Axis Bank and Anr. Para 28.6 as stated supra. J. This Pledge Agreement even of 2016 only reflects that the IVL/Appellant does not hold merit for the impugned pledge created during the ordinary course of business. Circumstantial evidence also suggests that there is no another pledge agreement dated 10.06.2014. Even the 2016 pledge agreement does not have backing a board resolution or registration which is a requirement for a listed company. No approval of RBI is available for 2016 pledge agreement. Hence, the Adjudicating Authority has rightly held in the impugned order dated 29.10.2020 that it is a preferential transaction covered under section 43 of the Code. Company Appeal (AT) (Ins) No. 102- 104 of 2021 K. Hence, we are constrained to uphold the impugned order dated 29.10.2020 & 06.01.2021 and so also with the order of 07.11.2020 of the Adjudicating Authority.

L. As a result, the Appeal deserves to be dismissed and is dismissed. No order as to costs.

Pending application, if any, stands disposed of.

[Justice Rakesh Kumar] Member (Judicial) [Dr. Ashok Kumar Mishra] Member (Technical)
Raushan Company Appeal (AT) (Ins) No. 102- 104 of 2021