

# Ramesh Kumar Suneja & Ors vs Arun Chadha Liquidator Of Pawan ... on 9 May, 2023

NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 747 of 2021  
&  
I.A. Nos. 1983 & 1984 of 2021

(Arising out of the Order dated 30th July, 2021 passed by the Learned  
Adjudicating Authority (National Company Law Tribunal, New Delhi  
Bench - II), in IA No. 2499/2020 and I.A. No. 2496/2020 in CA  
No.365/C-II/ND/2019 in CP No. (IB) - 197/ND/2018)

IN THE MATTER OF:

Mr. Arun Chadha  
Liquidator of Pawan Buildwell Pvt. Ltd.

...Appellant

Versus

1. Ramesh Kumar Suneja  
DIN: 01660912  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Respondent No. 1

2. Savitri Suneja  
DIN: 01660899  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Respondent No. 2

3. Pankul Suneja  
DIN: 02460954  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Respondent No. 3

4. Bajaj Finance Limited  
10th Floor, Aggarwal Metro Heights,  
Plot no. E-5, Netaji Subhash Palace,  
Pitampura, New Delhi - 110034.

Also at:  
Mumbai-Pune Road, Akurdi,  
Pune, Maharashtra - 411035.

...Respondent No. 4

5. SAKS Developers LLP  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Respondent No. 5

6. Skyland International Private Limited  
59A, Lane C 8, Central Avenue

Sainik Farms, New Delhi - 110020.

...Respondent No. 6

7. S. Kumar & Company Private Limited

59A, Lane C 5, Central Avenue

Sainik Farms, New Delhi - 110062.

...Respondent No. 7

Present

For Appellant:

Mr. Abhishek Anand and Mr. Nipun Gautam,  
Advocates.

For Respondents:

Mr. Pulkit Deora and Mr. Sanjay Visen,  
Advocates for R-1 to R-3.  
Mr. Harsh Sinha with Mr. Abhishek Sharma,  
Advocates for R-4.

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 748 of 2021

&

I.A. Nos. 2125, 2126 & 3016 of 2022

(Arising out of the Order dated 30th July, 2021 passed by the Learned  
Adjudicating Authority (National Company Law Tribunal, New Delhi  
Bench - II), in IA No. 2499/2020 and I.A. No. 2496/2020 in CA  
No.365/C-II/ND/2019 in CP No. (IB) - 197/ND/2018)

IN THE MATTER OF:

1. Ramesh Kumar Suneja  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Appellant No. 1

2. Savitri Suneja  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Appellant No. 2

3. Pankul Suneja  
DIN: 02460954  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Appellant No. 3

Versus

Comp. App. (AT) (Ins.) Nos.747 & 748/2021

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1. Mr. Arun Chadha  
Liquidator of Pawan Buildwell Pvt. Ltd.  
(Corporate Debtor)  
R/o. 727, Brahmipuri,

Meerut - 250002, Uttar Pradesh.

...Respondent No. 1

2. Bajaj Finance Limited  
10th Floor, Aggarwal Metro Heights,  
Plot no. E-5, Netaji Subhash Palace,  
Pitampura, New Delhi - 110034.

...Respondent No. 2

3. SAKS Developers LLP  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Respondent No. 3

4. Skyland International Private Limited  
59A, Lane C 8, Central Avenue  
Sainik Farms, New Delhi - 110020.

...Respondent No. 4

5. S. Kumar & Company Private Limited  
59A, Lane C 5, Central Avenue  
Sainik Farms, New Delhi - 110062.

...Respondent No. 5

Present

For Appellant:

Mr. Pulkit Deora and Mr. Sanjay Visen,  
Advocates.

For Respondents:

Mr. Abhishek Anand and Mr. Nipun Gautam,  
Advocates.  
Mr. Harsh Sinha with Mr. Abhishek Sharma,  
Advocates for R-2.

#### JUDGEMENT

(09.05.2023) [Per: Dr. Alok Srivastava, Member (T)] Comp. App. (AT) (Ins.) Nos.747 & 748/2021

1. Two Appeals, namely Company Appeal (AT) (Ins.) No.747/2021 ("Appeal

- I") and Company Appeal (AT) (Ins.) No.748/2021 ("Appeal - II"), are being disposed of through this common judgement.

2. The above-stated Appeals have been filed under Section 61 of the Insolvency and Bankruptcy Code ("IBC"), assailing order dated 30.07.2021 ("impugned order") passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi), whereby I.A. No.2499/2020 and I.A. No.2496/2020, both filed in the Company Petition No. (IB) - 197(ND)/2018 preferred under section 7 of the IBC.

3. The impugned order has concluded that the charge on the property of the corporate debtor with respect to the two Agreements in form of Bajaj Finance Ltd. (Respondent in both the Appeals) has not been created with an intent to defraud the creditors of the corporate debtor and hence the said

transactions regarding creation of charge over the property bearing No. K - 3, 5th Floor, Brahm Datt Tower, Sector 18, Noida ("mortgaged property") is not a fraudulent transaction. Additionally, a transaction amounting to Rs.1,02,09,360/- between the corporate debtor and Respondent - SAKS Developers LLP is a preferential transaction and therefore refund of this amount by Respondent - SAKS Developers has been directed to be made to the corporate debtor.

4. The facts in Appeal - I are that the corporate debtor went into insolvency on 04.04.2018, and since no resolution of its insolvency could be achieved in the prescribed time period, an order for liquidation was passed on Comp. App. (AT) (Ins.) Nos.747 & 748/2021 05.02.2020. During the liquidation proceedings, the liquidator filed I.A. No. 2499 of 2020 for declaring the security interest created by the corporate debtor by mortgaging the property bearing No. K-3, 5th Floor, Brahm Datt Tower, Sector 18, Noida, as being a preferential/fraudulent transaction. In the Impugned Order, the Adjudicating Authority held that the creation of the said security interest in favour of Bajaj Finance Ltd. is not a preferential or fraudulent transaction and the liquidator is aggrieved by this part of the said Impugned Order.

5. The Appellant has stated that the corporate debtor along with some individual co-borrowers, who are Mr. Ramesh Kumar Suneja, Mrs. Savitri Suneja and Mr. Pankul Suneja and also the companies Skyland International Private Ltd. and S. Kumar and Company Private Ltd. took two loans, namely

(i) Loan Account No. 401 FSP 35751847, for an amount of Rs.3,46,62,656/-; and (ii) Loan Account No. 401 FSP 35716264, for an amount of Rs.5,81,32,553/- vide two separate loan agreements dated 28.02.2017 and the corporate debtor created security interest by mortgaging his property No. K-3, 5th Floor, Brahm Datt Tower, Sector 18, Noida ("Mortgaged Property") in favour of Bajaj finance Ltd. (Respondent No. 4 in Appeal - I). He has further stated that the mortgage on this immovable property was created for the benefit of the three individuals Mr. Ramesh Kumar Suneja, Mrs. Savitri Suneja, Mr. Pankul Suneja who actually benefited from the said loans even though the property was in the ownership of the corporate debtor Pawan Buildwell Private Limited. He has submitted that in this manner, a fraud was Comp. App. (AT) (Ins.) Nos.747 & 748/2021 perpetrated to the detriment and disadvantage of the creditors of the corporate debtor.

6. Insofar as the facts of Appeal - II are concerned, the Appellants Mr. Ramesh Kumar Suneja, Mrs. Savitri Suneja and Mr. Pankul Suneja have claimed that a Memorandum of Understanding ("MoU") was executed between the corporate debtor and SAKS Developers Pvt. Ltd. (Respondent No. 3 in Appeal - II) on 30.08.2018 at which time no moratorium on account of section 14 of the IBC was in force, and on the basis of the MoU, an amount of Rs.1,02,09,360/- was transferred by the corporate debtor to SAKS Developers Private Limited, which was in the ordinary course of business and not a preferential transaction as held in the impugned order. He has further submitted that this transaction was for the benefit of the corporate debtor as, according to the MOU, 50% of the funds to be infused by the corporate debtor would result in profits for the corporate debtor once development of the project took place.

7. We heard the arguments advanced by the Learned Counsels for all the parties and also perused the records of both the Appeals.

8. The issue about impleadment of the financial creditor was taken up by this bench and an order was passed on 29.08.2022 by this tribunal in I.A. No. 3007 of 2022 directing for impleadment of the financial creditor, Sri Brij Mohan Sahani as a party.

9. The Learned Counsel for the Appellant/Shri Arun Chadha Liquidator initiated his arguments by referring to the two loan agreements dated Comp. App. (AT) (Ins.) Nos.747 & 748/2021 28.02.2017 in Appeal - I that were entered into between Bajaj Finance Ltd. as Lender and Respondents No. 1, 2, 3, 6 & 7 (who are jointly referred to as "Beneficiary Respondents") and the Corporate Debtor as Borrowers, whereby security interest in respect of the "Mortgaged Property" was created in favour of Bajaj Finance Ltd. He has further submitted that the security interest was collusively created by Respondent Nos. 1 to 3 for their and Respondents No. 6 & 7's benefit even though no money for the use/benefit accrued to the corporate debtor from the said loans. He has submitted that the Adjudicating Authority has held that since Bajaj Finance Ltd./Respondent No. 4 is not a 'related party', therefore for the transaction regarding creation of security interest entered into on 28.02.2017, the lookback period should be one-year period as stipulated under Section 43(4)(b) of the IBC, and therefore such a transaction would not come under the category for preferential transaction as it pertains to a date that is earlier than the lookback period. He has argued that the "Beneficiary Respondents" are 'related parties' to each other and also to the corporate debtor and therefore a transaction done for their benefit with Respondent No. 4 whereby security interest was created in the "Mortgaged Property" for the benefit of the "Beneficiary Respondents" and hence look back period ought to have been two years as stipulated in Section 43(4)(a) of the IBC.

10. In the above connection, the Learned Counsel for the Appellant/Liquidator has cited the judgement of Hon'ble Supreme Court in the matter of Anuj Jain, Interim Resolution Professional for Jaypee Infratech Vs. Axis Bank Ltd. & Ors., [(2020) 8 SCC 401] to contend that, Comp. App. (AT) (Ins.) Nos.747 & 748/2021 in the present case, even though the lender (Bajaj Finance Ltd.) in whose favour the security interest was created, is not a related party of the corporate debtor, the decisive question is whether the ultimate beneficiaries of the two loans are related parties of the corporate debtor.

11. The Learned Counsel for Appellant (in Appeal - I) has rebutted the argument of the "Beneficiary Respondents" that the security interest was created in the ordinary course of business. In support he has referred to the judgement of the Hon'ble Supreme Court in the matter of Anuj Jain (Supra) to point out that one should look at the scheme and intent of the provisions of the IBC and purposive interpretation to come to the correct conclusion. He has further argued that the transaction was for the benefit of the "Beneficiary Respondents" and as the proceeds of the loan were siphoned off/diverted to their advantage, Respondents No. 1, 2 and 3, namely Mr. Ramesh Kumar Suneja, Mrs. Savitri Suneja & Mr. Pankul Suneja have defrauded the creditors of the corporate debtor, a fact which has also been highlighted in the report of the Independent Statutory Auditor wherein it is recorded that the amount of guarantee provided by the corporate debtor was in excess of 60% of the share capital, reserve and surplus as stipulated under section 185 and 186 of the Companies Act, 2013. He has also pointed out that in the matter of Anuj Jain (Supra) it is held that any such transaction which has an adverse bearing on the financial health of the corporate debtor or which turns the scales in favour of one or few of its creditors at the cost of others is enough to show that

there was an intent to defraud the creditors. Comp. App. (AT) (Ins.) Nos.747 & 748/2021

12. The Learned Counsel for the Appellant has thus contended that the two loans given by Respondent No. 4 Bajaj Finance Ltd. were for the benefit of the related parties of the corporate debtor namely the "Beneficiary Respondents"

and these beneficiaries of the loan are related parties of the corporate debtor.

He has also pointed out that in accordance with the ratio laid down in Anuj Jain (Supra) judgement the creation of security interest in favour of Bajaj Finance Ltd. is squarely covered within section 43(2) and since the "Beneficiary Respondents" are 'related parties' of the corporate debtor the lookback period would be two years from the date of initiation of CIRP which is 04.04.2018, and therefore the said transaction is within the relevant time as laid down in section 43(4).

13. The Learned Counsel for "Beneficiary Respondents" has argued that the Adjudicating Authority had considered the issue of security interest in I.A. No. 367 of 2019, wherein it was held that if the security offered by the corporate debtor is sought to be released, then the RP has to take into consideration the claim of Bajaj Finance Ltd. before the security can be released, and this order which was not appealed against has achieved finality. He has pointed out that the judgement in the Anuj Jain (Supra) case came on 26.02.2020 which was after the order of the Adjudicating Authority in I.A. 367 of 2019 and hence the ratio of Anuj Jain judgment would not apply in the present case.

14. The Learned Counsel for "Beneficiary Respondents" has referred to the judgement of Hon'ble Delhi High Court dated 17.08.2021, wherein after Comp. App. (AT) (Ins.) Nos.747 & 748/2021 placing reliance on the order dated 03.01.2020 of the Adjudicating Authority the matter regarding security interest was firmly and finally settled, and the Appellant/Liquidator cannot now raise this issue again through I.A. No. 2699 of 2020. He has also pointed out that for section 43 of the IBC to be attracted, there has to be an antecedent debt, but there is no antecedent debt regarding which the said security interest has been created, and therefore the transaction relating to the "Mortgaged Property" is not a preferential transaction. He has also claimed that the appeal is pre-mature with regard to the application of section 66 as no pleadings have been made regarding any fraudulent transactions by the Appellant/Liquidator. He has added that the mortgage created for the Noida Property was for a fresh loan and is not in continuation with respect to any past loan. He has also contended that in the instant case neither the "Beneficiary Respondents" nor Bajaj Finance Ltd. have been put in any beneficial position due to creation of security interest and therefore the related transaction of mortgage of property is not a preferential transaction.

15. With regard to Appeal - II, the Learned Counsel for Appellants has argued that the relief granted by the Adjudicating Authority through the impugned order goes out of the scope of section 43 of the IBC since the said transaction regarding Rs.1,02,09,360/- was done in the ordinary course of business. In clarification, the Learned Counsel has pointed out that the order admitting the section 7 application was passed by the NCLT on 4.4.2018, whereafter the NCLAT passed order in appeal on 07.08.2018 setting aside the order the initiation of CIRP, and Hon'ble Supreme Court vide order

dated Comp. App. (AT) (Ins.) Nos.747 & 748/2021 30.11.2018 set aside the order of NCLAT and restored the order of NCLT and thus the moratorium came into force again. He has submitted that the MOU was signed between the corporate debtor and SAKS Developers 30.8.2018 when the moratorium was not in force since the NCLAT's order had closed the CIRP. He has added that the MOU was signed for the benefit of the corporate debtor and the amount of Rs. 1,02,09,360/- was transferred in the ordinary course of business without infringing any moratorium, since there was no moratorium in force on 30.8.2018 (when the MOU was signed). He has argued that the Impugned Order directs Respondent No. 5/SAKS Developers LLP to make a contribution of Rs.1,02,09,360/-, whereas section 44 of the IBC does not provide for passing of any contributory order. In this connection he has referred to the judgement in the case of Hasham Abbas Sayyad Vs. Usman Abbas Sayyad & Ors., [(2007) 2 SCC 355] wherein it is held that any order given without jurisdiction will be a nullity.

16. The Learned Counsel for Bajaj Finance Ltd. has presented his arguments in Appeal - I (CA AT Ins. 747 of 2021) to point out that Bajaj Finance Ltd. is not a related party of the corporate debtor and since the two said loans given on 28.02.2017 were loans given to various co-borrowers along with the corporate debtor, Bajaj Finance Ltd. committed no wrong in accepting mortgage of the corporate debtor's property located in Sector - 18, Noida ("Mortgaged Property"). He has further argued that the adjudication provided by the adjudicating authority in I.A. 367 of 2019 dated 03.01.2020 is quite clear about the correctness of the security interest created in favour of Bajaj Finance Ltd. and since the resolution professional did not accept the Comp. App. (AT) (Ins.) Nos.747 & 748/2021 claim of Bajaj Finance Ltd. as a financial creditor, the security interest should be considered as valid and to be protecting the interest of Bajaj Finance Ltd. vis-à-vis the two said loans given on 28.02.2017. He has argued out that Bajaj Finance Ltd. is not a 'related party' of the corporate debtor, and therefore the lookback period for the transaction regarding creation of security interest would be one year, and as the said mortgage took place on 28.02.2017, it is clearly outside the one-year period from the date of initiation of CIRP which is 04.04.2018.

17. We first examine the issue whether the creation of the security interest by way of mortgage of the "Mortgaged Property" located at Noida (being Property No. K-3, Brahm Datt Tower, Sector 18, Noida) is a preferential transaction under section 43 or a transaction intended to defraud the creditors of the corporate debtor which is covered under section 66 of the IBC.

18. We note section 43 of the IBC, which is as follows:

"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 Comp. App. (AT) (Ins.) Nos.747 & 748/2021 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.

Comp. App. (AT) (Ins.) Nos.747 & 748/2021 (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."

19. Section 66 of the IBC, which is regarding fraudulent trading or wrongful trading, is as follows:

"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."

20. We note the fact that Respondent No. 4 in Appeal - I, Bajaj Finance Ltd. gave two loans viz. Loan Account No. 401 FSP 35751847 for a loan amount of Rs.3,46,62,656/- and Loan Account No. 401 FSP 35716264 for a loan of Rs.5,81,32,553/- in favour of the following borrowers, namely (i) Mr. Ramesh Kumar Suneja, (ii) Mrs. Savitri Suneja. (iii) Mr. Pankul Suneja, (iv) Skyland International Pvt. Ltd., (v) Pawan Buildwell Pvt. Ltd., and (vi) S. Kumar and Company Pvt. Ltd.

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20. We also note that information was sent by the corporate debtor by letter dated 28.02.2017 (attached at page 166 of Appeal Paper Book in Comp. App. (AT) (Ins.) No.747/2021) regarding the mortgage of property with details No. K-3, 5th Floor, Brahm Datt Tower, Sector 18, Noida - 201301 as security interest debtor in favour of Bajaj Finance Limited for the two loans as mentioned above. We further note that this creation of security charge was registered in Form No.CHG-1 (attached at pp 167-172 of Appeal Paper Book in Comp. App. (AT) (Ins.) No. 747 of 2021).

21. Further, it is also noted that in clause 12(d) of Form CHG-1 the following was stated by the corporate debtor regarding the extent and operation of the charge:-

"First and exclusive charge by way of equitable mortgage over the mortgaged property to secure the loan amount along with all other dues payable by borrowers. The loan shall in all circumstances rank superior to any subsequent mortgage/charge on the mortgage property".

22. We also note that in clause 14 of Form CHG - 1 it is very clearly stated that the property regarding which charge is created is 'immovable property' situated at Plot No. K - 3, Commercial Space on 5th Floor, Sector - 18, Noida

- 201301. This charge has been created for the loan of amount 3,46,62,656/- . A conjoint reading of Form CHG - 1 and the letter of the corporate debtor dated 28.02.2017 regarding mortgage in respect

of the Noida Property in favour of Bajaj Finance Ltd. makes it clear that for the two loan accounts as stated above the corporate debtor provided security charge on its said property located at No. K-3, 5th Floor, Brahm Datt Tower, Sector - 18, Noida. Comp. App. (AT) (Ins.) Nos.747 & 748/2021

23. The Hon'ble Supreme Court has held as following in the Anuj Jain (Supra) case:

22.2.1. As noticed, 9-8-2017 is the insolvency commencement date in this case. The transactions in question, even if of putting the properties concerned under mortgage with the lenders, carry the ultimate effect of working towards the benefit and advantage of the borrower i.e. JAL who obtained loans and finances by virtue of such transactions. It is true that there had not been any creditor-debtor relationship between the lender banks and corporate debtor JIL but that will not be decisive of the question of the ultimate beneficiary of these transactions. The mortgage deeds in question, entered by the corporate debtor JIL to secure the debts of JAL, obviously, amount to creation of security interest to the benefit of JAL.

25.3. Needless to reiterate that if the transfer is examined with reference to the ordinary course of business or financial affairs of the transferee alone, it may conveniently get excluded from the rigour of sub-

section (2) of Section 43, even if not standing within the scope of ordinary course of business or financial affairs of the corporate debtor. Such had never been the scheme of the Code nor the intent of Section 43 thereof. It has rightly been contended on behalf of the appellants that for the purpose of exception under clause (a) of sub-section (3) of Section 43, the intent of legislature is required to be kept in view. If the ordinary course of business or financial affairs of the transferee (lenders of JAL in the present case) would itself be decisive for exclusion, almost every transfer made to the transferees like the lender banks/financial institutions would be taken out of the net, which would practically result in frustrating the provision itself. 25.5. Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, we have no hesitation in accepting the submissions made on behalf of the appellants that the said contents of clause (a) of sub-section (3) of Section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives.

Therefore, the expression "or", appearing as disjunctive between the expressions "corporate debtor"

Comp. App. (AT) (Ins.) Nos.747 & 748/2021 and "transferee", ought to be read as "and"; so as to be conjunctive of the two expressions i.e. "corporate debtor" and "transferee". Thus read, clause (a) of sub-section (3) of Section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of "or"

as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of

the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities.

(emphasis supplied)

24. Section 43 of the IBC stipulates that if 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 on an account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor, such a transaction would be considered a preferential transaction. Moreover, if the transaction is with a 'related party' then the lookback period will be two years and if it is a party other than a 'related party' the lookback period would be one year preceding the insolvency commencement date as per sub-section 4 of section 43. Further, as stated in the previous paragraph, the Hon'ble Supreme Court has held in the matter of Anuj Jain (Supra) that mortgage deeds entered by the corporate debtor JIL should be considered alongwith the fact as to who are the real beneficiaries of the transaction.

25. The Hon'ble Supreme Court has thus held that if there is a transfer of property or interest thereof of the corporate debtor for the 'benefit of related parties' and not necessarily be the corporate debtor, then the look back period would be two years and such a transaction will be considered as a transaction Comp. App. (AT) (Ins.) Nos.747 & 748/2021 which infringes sub-section (2) of section 43. Moreover, the said creation of security charge is not in the ordinary course of business nor the corporate debtor through the two loan agreements dated 28.02.2017 has benefitted for the said loans. Admittedly the said loans were utilized by the Respondent namely Mr. Ramesh Kr. Suneja, Mrs. Savitri Suneja and Mr. Pankul Suneja.

26. It is thus clear that while the corporate debtor was in default of its financial creditors, it entered into the said transaction of mortgaging its property for the benefit of the "Beneficiary Respondents", and these "Beneficiary Respondents" who are all related parties of the corporate debtor stood to benefit by creation of such security interest even though the corporate debtor did not revive any benefit out of the loan agreements.

27. Moreover, the creation of security interest, particularly in the light of para 12(d) points the Form CHG-1, uploaded on the website of Ministry of Corporate Affairs by the corporate debtor makes it clear that the Respondent Bajaj Finance Ltd. has 'first and exclusive charge' over the mortgaged property and 'the loan shall in all circumstances run superior to any subsequent mortgage/charge on the mortgaged property'. It is thus clear that by creation of the mortgage on the property of the corporate debtor and in the event of default, the mortgaged property would have provided benefit to all the related parties of the corporate debtor to the detriment and disadvantage of the actual creditors of the corporate debtor by diminishing the liquidation estate of the corporate debtor.

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28. We also note the argument of the Learned Counsel for the Appellant that the Independent Auditor's Report (at para 4(i) of the Report on pg. 113A of the Appeal Paper Book, CA(AT)(Ins) 747 of 2021) that the corporate debtor has given advances and its guaranteed for certain loans taken by

its associates/related Person in terms of section 185 and 186 of the Companies Act, 2013, and the corporate debtor has not received counter-guarantees of equivalent amount from the respective related parties/co-applicants and has created guarantee in excess of 60% of its share capital and reserve and surplus in terms of the section 186 of the Companies At, 2013. Looking at the mortgage of the "Mortgaged Property" provided by the corporate debtor in the instant case we tend to agree with the observation of the Independent Auditor and are of the view that the corporate debtor should have taken note of this observation of the Auditor and made necessary corrections, which it did not do, and thereby put the creditors of the corporate debtor at a clear disadvantage. We are also of the opinion that the corporate debtor, working through the Respondents No. 1, 2 and 3, did not take any corrective action on the basis of the Independent Auditor's Report as they stood to derive advantage from the security charge created through the "Mortgaged Property"

being beneficiaries of the two said loans.

29. Therefore, it is amply clear that the transaction relating to creation of security charge on the "Mortgaged Property" by the corporate debtor was clearly and unambiguously for the benefit of its related parties, namely Mr. Ramesh Kumar Suneja, Mrs. Savitri Suneja, Mr. Pankul Suneja, Skyland International Pvt. Ltd. and S. Kumar and Company. The relevant time with Comp. App. (AT) (Ins.) Nos.747 & 748/2021 regard to look back period is two years for the date of initiation of CIRP i.e., 04.04.2018 and therefore a creation of security charge on 28.02.2017 is well within the two years look back period. Therefore, the said transaction of creation of security interest on mortgaged property in favour of Bajaj Finance Ltd. infringes section 43 for which an order can be made under section 44 of the IBC.

30. We, therefore, come to the conclusion that the Adjudicating Authority erred in holding that the security interest created in the "Mortgaged Property"

was correct and we accordingly set aside this part of the Impugned Order and hold that the mortgage created on the "Mortgaged Property" and which is registered by Form CHG-1 shall be cancelled and the said property shall become a part of the assets of the corporate debtor in an unencumbered form, available in the liquidation estate of the corporate debtor for the benefit of its creditors.

31. With regard to the transfer of Rs.1,02,09,360/- by the corporate debtor in favour of SAKS Developers LLP, we note that an MoU was signed between the corporate debtor and SAKS Developers on 30.08.2018 (attached at pp 121

- 127 of the appeal paper book, Comp. App. (AT) (Ins.) No.747 of 2021). Notably, Mr. Ramesh Kumar Suneja as director of the corporate debtor and Mr. Pankul Suneja as managing partner/partner of SAKS Developers signed this MoU who are father and son respectively. Moreover, this MoU was executed on a non-judicial stamp paper purchased in Uttar Pradesh (where stamp papers in hard copy as against e-stamp paper could be purchased) Comp. App. (AT) (Ins.) Nos.747 & 748/2021 even though the corporate debtor and SAKS Developers have their registered offices in New Delhi. It is also noted that in New Delhi only e-stamp papers can be purchased.

Moreover the MOU is neither notarized or registered. Therefore the veracity about the signing of the MoU on the date claimed cannot be firmly established.

32. Be that as it may, we note the following from the Recitals and the Profit Sharing clauses of the MoU:-

"And Whereas the Developer has shared with the Collaborator, the relevant details of the Project, including the project architectural plans, estimated cost of land, constructions etc. and thereafter the Collaborator has inclined to invest in the Proposed Project as Financial Partner in the Proposed Project".

"2. Profit Sharing 2.1. The profit sharing of the Collaborator in the project shall be in the ratio of the amount provided by the Collaborator to the total cost of the Proposed Project.

xxx xxx xxx 2.3. The final profit - sharing ratio (in percentage terms) of the Collaborator shall be determined based on the finalized project cost vis-à-vis of the financial continuation by the Collaborator & Developer."

33. A close perusal of the recital and profits sharing clauses of the MoU reproduced above shows that while on one hand the Developer had ostensibly shared with the Collaborator the relevant details of project including architectural plans, estimated cost of land and constructions etc. and after due consideration the Collaborator had agreed to invest in the proposed project, the clauses in the "Profit Sharing" section as extracted above show that the plans and final project cost etc. are not yet clear and therefore the Comp. App. (AT) (Ins.) Nos.747 & 748/2021 actual profit sharing ratio and the total cost of the proposed project are not indicated in the MoU. The absence of these details in the MoU shows that the MOU was perhaps executed in a hurry. The intention of the Developer and Collaborator for development of the proposed project also then appears either half-baked or suspicious. It stands to reason as to why the Collaborator would agree to invest a sizeable amount in the Project when the details including the actual cost of the project are not clear to him. We are therefore inclined to accept the contention of the Learned Counsel for the Liquidator that the MoU was entered into in a hurried manner, during a 'small window of time' that was available to the corporate debtor fortuitously, when after the NCLAT order setting aside the NCLT order on 07.08.2018 was set aside by Hon'ble Supreme Court vide its order dated 30.11.2018. We find that the MoU was executed on 30.08.2018 in this 'small window of time' that luckily got available to the Developer/SAKS Developers LLP and the Collaborator/ Pawan Buildwell Pvt. Limited primarily to siphon off the R. 1,02,09,360/- from the corporate debtor to another family concern SAKS Developers LLP.

34. From the above, it is clear that when the corporate debtor was experiencing insolvency, it still chose to transfer an amount of Rs.1,02,09,360/- to a related party SAKS Developers LLP and which is also a family concern of Mr. Ramesh Kumar Suneja to siphon off the said amount from the corporate debtor to SAKS Developer LLP even though it could have used the said amount to pay off its debtors and resolve its insolvency. This act of transferring the said amount to SAKS Developers

LLP is clearly to the Comp. App. (AT) (Ins.) Nos.747 & 748/2021 disadvantage of the creditors of the corporate debtor and a definite violation of section 43(2) of the IBC.

35. We are therefore in agreement with the observation of the Adjudicating Authority made in paragraph 46 of the impugned order and hold that even though the said MoU was signed and the transfer of Rs.1,02,09,360/- was made during the period when the moratorium was technically and legally not in force, the fact that after the NCLAT had set aside the order of NCLT regarding admission of section 7 application, an appeal had been filed before Hon'ble Supreme Court which could have gone either way, there was no imminence or urgency for the corporate debtor to enter into an MoU for development of a property held by another company and take on further commitments when the sword of insolvency was hanging over its head.

36. Even if we consider that the said MoU was signed during the period when the moratorium under section 14 was strictly not in force for bonafide reasons, the fact that the admission order against the corporate debtor was restored on 30.11.2018 by the order of Hon'ble Supreme Court makes the signing of MoU on 30.08.2018 by the corporate debtor with a 'related party' SAKS Developers LLP an act that clearly infringes section 43(2) of the IBC since the MoU was signed within the lookback period of two years as stipulated in section 43(4). Thus the transfer of Rs. 1,02,09,360/- on account of the said MoU is clearly a preferential transaction under section 43.

37. In order to rebut the argument of the Respondents Ramesh Kumar Suneja and Others that there is no specific pleading of fraud, the Learned Comp. App. (AT) (Ins.) Nos.747 & 748/2021 Counsel for Appellant has cited the judgment of this Tribunal in the matter of CA(AT)(Insolvency) No. 405, 369 and 412 of 2022 to rebut the contention of the Respondents. In the said judgment, it is held as hereunder:-

"54. What has been emphasized by the Hon'ble Supreme Court is that ingredients of Section 43, 45 and 66 are different and Resolution Professional is expected to keep such requirement in view while making motion to the Adjudicating Authority. When we look into the Application which has been filed in the present case the Resolution Professional has in the avoidance application in his application has dealt with preferential transaction undertaken by the Corporate Debtor and undervalued transaction undertaken by the Corporate Debtor as well as fraudulent transaction in different heads i.e. 'i', 'ii' and 'iii' thus allegations and averments were separately made and filing of composite application does not lead to any infirmity in the Application. We are not persuaded to accept the submission of the Appellant that since the composite Application was filed it ought to have been rejected."

38. While following the above judgment, we note that the Appellants had specifically pleaded the issue of fraud in paragraphs 18, 20 and 27 of IA No.2499/2020 and again in IA No. 2496/2020 in paragraphs 12, 13 and 14.

39. We also note the argument of the Learned Counsel for the Appellants (in Appeal - II) that this MoU was signed in the 'ordinary course of business'. Regarding this argument, we are of the view

that when the corporate debtor itself was under the throes of insolvency and was unable to take care of its debts, it is certainly curious as to why it would decide to get into an MOU for development of land that was owned by another party SAKS Developers and parting with a handsome amount of Rs.1,02,09,360/- without even being clear about the various parameters of the project. This act of the corporate Comp. App. (AT) (Ins.) Nos.747 & 748/2021 debtor arouses suspicion which is strengthened by the fact that both SAKS Developers LLP and the corporate debtor are owned and run by members of the same family, and which have their registered offices at the same address which is 59 - A, Lane C-5, Central Avenue, Sainik Farms, New Delhi - 110062.

40. On the basis of the detailed discussion as above, we come to an inescapable conclusion that the amount of Rs.1,02,09,360/- which was transferred by the corporate debtor to the related party SAKS Developers LLP during the lookback period of two years was in clear violation of section 43 of the IBC. Therefore, the order made by the Adjudicating Authority directing SAKS Developers LLP to repay/refund the amount of Rs.1,02,09,360/- to the corporate debtor is correct and does not require any interference.

41. On the basis of discussion in this judgement regarding the creation of security interest in "Mortgaged Property" owned by the corporate debtor and transfer of Rs.1,02,09,360/- transferred by the corporate debtor to SAKS Developers LLP, we come to the following conclusion that:

(i) The order of the Adjudicating Authority holding that the security interest created in the "Mortgaged Property" by the corporate debtor is not a violation of section 43 of the IBC is erroneous. Therefore the mortgage on property K - 3, 5th Floor, Brahm Datt Tower, Sector 18, Noida, which is registered in Form CHG -1 should be cancelled and the property, in unencumbered form, shall revert into the assets of the corporate debtor. The impugned order is therefore set aside to this extent.

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(ii) The transfer of Rs.1,02,09,360/- which is directed to be refunded by SAKS Developers LLP to the corporate debtor is correctly held so by the Adjudicating Authority and the part of the impugned order relating to repayment/refund of this amount by SAKS Developers LLP to the corporate debtor is held to be correct thereby not requiring any interference.

42. With the above modifications in the impugned order, we allow the appeal.

43. There is no order as to costs.

[Justice Rakesh Kumar Jain] Member (Judicial) [Dr. Alok Srivastava] Member (Technical) New Delhi 09.05.2023 himanshu Comp. App. (AT) (Ins.) Nos.747 & 748/2021