

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

I.A. 2020 OF 2020

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Ankur Kumar

...Applicant/Liquidator

Vs.

Mr. Jitendra Kikavat & others

...Respondents

I.A. 1443 OF 2020

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Ankur Kumar

...Applicant/Liquidator

Vs.

Mr. Mahavir Link Associates & others

...Respondents

I.A. 1402 OF 2020

Under Section 43 & 44 of Insolvency &
Bankruptcy Code, 2016

Mr. Ankur Kumar

...Applicant/Liquidator

Vs.



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE.

Ms. Beena Kikavat & others

...Respondents

In the matter of

C.P.(IB) No. 2300/MB/2018

Bank of India

Financial Creditor

Vs.

Mahavir Roads and Infrastructure Private
Limited

Corporate Debtor

Order delivered on: 22.05.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Nahush Shah, Advocate

For the Respondent : None

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The Application(s) IA 1402/2020, 1443/2020, and IA 2020/2020 are filed by the Resolution Professional, Mr. Ankur Kumar, of M/s Mahavir

Roads and Infrastructure Private Limited (Corporate Debtor) on 18.07.2020 seeking reliefs against the Respondents named in each of Applications for transactions in terms of section 43 of Insolvency & Bankruptcy Code, 2016 ("Code").

2. It is submitted that the Corporate Insolvency Resolution Process ("CIRP") of Mahavir Roads & Infrastructure Pvt. Ltd. (Corporate Debtor) was commenced by an Order of this Bench vide order no. CP (I&B) 2300/NCLT/MB/2018 dated 21 February 2019, pursuant to insolvency petition filed by the Financial Creditor under Section 7 of the Code, wherein the Applicant was appointed as the Interim Resolution Professional, and was later on appointed as Resolution Professional of Corporate Debtor by the Committee of Creditors ("COC").

2.1. The Applicant states that in compliance with section 13, section 15 and other applicable sections of the Code read with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations'), a public announcement was made on 13th March 2019 inviting claims from the Creditors of the Corporate Debtors. The last date for submission of claims was with the Interim Resolution Professional was 26 March 2019.

2.2. The Applicant states that third COC meeting was held on 15 October 2019 wherein M/s. BKA & Company, Chartered Accountants was appointed to undertake transaction audit of the Corporate Debtor for the period from 01 April 2017 to 12 March 2019. Thereafter, M/s. BKA & Company had provided the draft transaction report highlighting the transactions under section 43 and section 66 of the Code. The Applicant had placed the said draft report before the COC in the fifth COC meeting held on 19 December 2019 and seventh COC meeting held on 04 February 2020, and informed the members that there are certain transactions as mentioned below which may

fall into category of preferential transactions and hence after receipt of final report necessary application will be filed with NCLT under Regulation 35A of the CIRP Regulations.

2.3. The list of related parties of the Corporate Debtor is detailed herein below for ready reference(as per Annual accounts of the corporate debtor): -

S.No.	Party Name	Nature of Relationship
1	Jitendra Kikavat	Director
2	Pankaj Kikavat	Director
3	Beena Kikavat	Relative of Director
4	Heena Kikavat	Relative of Director
5	Akshita Kikavat	Relative of Director
6	Kavita Kikavat	Relative of Director
7	Vasantlal Kikavat	Relative of Director
8	Nilesh Kikavat	Relative of Director
9	Ushaben Kikavat	Relative of Director
10	Karan Kikavat	Relative of Director
11	Pawan Kikavat	Relative of Director
12	Mahavir Stone Supplying Company	Partnership firm of promoters/Directors
13	Mahavir Link Associates	Partnership firm of promoters/Directors
14	PK Traders	Partnership firm of promoters/Directors
15	Supreme Mahavir	Joint Venture
16	Sanjose Supreme Mahavir	Joint Venture
17	NCC Limited Mytas Mahavir	Joint Venture
18	Relcon Mahavir	Joint Venture
19	RPS Preeti Mahavir	Joint Venture
20	Prakash Mahavir	Joint Venture

2.4. Thus, in the present case, upon scrutinizing the transactions entered into by the Corporate Debtor during the relevant time and on the basis of report of Transaction audit carried out by M/s BKA & Co. Chartered Accountants, the following is the summary of the preferential transactions entered between the Corporate Debtor with its related parties i.e. the suspended directors of the Corporate Debtor during the year 2017-2018 & 2018-2019 i.e. two years prior to commencement of the CIRP of the Corporate Debtor are supposed to fall within the ambit of Section 43 of the Code:

Transactions in IA 1402/2020

Summary of Preferential Transactions								
Sr. No.	Party	Relation with the Corporate Debtor	F.Y.	Particulars	Nature of Transaction & Section	Amount (in Rs.)	Remark*	Reference
1	Karan J. Kikavat	Related Party (son of Director)	2017-2018	Bank withdrawal	Preferential Transaction Section-43	1,63,328/-	Net amount withdrawn by Karan from CD and adjusted against various EMD and tender fees paid by Karan on behalf of CD. All EMD's are still o/s. in the books of accounts of CD	Page no. 23 and 27 of the Transaction Audit report.
2.	Becna Kikavat	Related Party (Relative of Director)	2017-2018		Preferential Transaction Section-43	41,502/-	Amount transferred to these parties from the CD bank a/c maintained at Bank of India (Sakinaka - MCC) A/c	Page no. 14, Sr. no. 4 of the Transaction Audit report.
3.	Akshita Kikavat	Related Party (Relative of Director)				1,70,000/-		
4.	Vasantlal Kikavat	Related Party (Relative of Director)	2018-2019		Preferential Transaction Section-43	3,50,000/-	Sum of Rs. 3,00,000 & Rs. 50000 from CD bank a/c with Axis Bank & Bank of India (Sakinaka - MCC) A/c respectively were transferred to Mr. Vasantlal Kikavat	Page no. 25 of the Transaction Audit report.
					Preferential Transaction Section-43	5,10,200/-		
5.	Nilesh Kikavat	Related party (Brother of Director)	2017-2019		Preferential Transaction Section-43	90,39,211/-	Net amount paid to Nilesh by CD towards loan repayment/adjustment	Page no. 23 & 26 of the Transaction Audit report.
6.	Pawan Kikavat	Related party (Brother of Director)	2017-2019		Preferential Transaction Section-43	27,25,857/-	Net amount paid to Pawan by CD towards loan repayment/adjustment	Page no. 23 & 28 of the Transaction Audit report.

Transactions in IA 1443/2020

Summary of Preferential Transactions							
Sr. No	Party	Relation with the Corporate Debtor	F.Y.	Nature of Transaction & Section	Amount (in Rs.)	Remark*	Reference
1	Mahavir Link Associates	Related Party (Partnership firm of promoters)	2017-2019	Preferential Transaction Section-43	1,37,01,406/-	Net amount paid by CD to Mahavir Link	Page no. 23 & 30 of the Transaction Audit report.
2	P.K. Traders	Related party (Partnership firm of Promoters)	2017-2019	Preferential Transaction Section-43	86,51,068/-	Amount paid to PK Traders and then adjusted with loan a/c	Page no. 23 & 31 of the Transaction Audit report.
3	Mahavir Stone Supplying Company (MSSC)	Related party (Partnership firm of Promoters)	2017-2019	Preferential Transaction Section-43	3,20,63,845/-	Net amount paid to related & non-related parties by MSSC on behalf of CD	Page no. 29 of the Transaction Audit report.

Transactions in IA 2020/2020

Sr. No	Party	Relation with the Corporate Debtor	F.Y.	Nature of Transaction & Section	Amount (in Rs.)	Remark*	Reference
1.	Jitendra Kikavat	(Related Party) Director	2017-2019	Preferential Transaction Section-43	1,39,14,085/-	Net amount paid by CD towards loan repayment/adjustment.	Page no. 23 and 24 of the Transaction Audit report.
2.	Pankaj Kikavat	(Related Party) Director	2017-2019	Preferential Transaction Section-43	1,25,92,386/-	Net amount paid by CD towards loan repayment/adjustment	Page no. 23 and 25 of the Transaction Audit report.
			2017-2018	Preferential Transaction Section-43	1,63,328/-	Net excess funds received by Pankaj on account of debit/credit adjustments	
			2017-2019	Preferential Transaction	1,16,10,953/-	Net amount paid by CD towards loan repayment/adjustment	

2.5. The Applicant further submits that sub regulation 35A of the IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 requires the Resolution professional to form an opinion whether the Corporate Debtor has been subjected to any transaction covered under section 43, 45, 50 or 66 of the Code. Section 43 of the chapter III deals with the preferential transactions and Section 44 casts duty upon the Resolution Professional to apply to the Adjudicating Authority under section 43(1) of the Code, in respect of preferential

transactions carried out by the Corporate Debtor under sub-section (4) of section 43 of the Code.

2.6. The Applicant states that related party of the Corporate Debtor i.e. the directors of the Corporate Debtor were well aware of the fact that the Corporate Debtor was in default to various Creditors. Therefore, the directors of the Corporate Debtor were fully aware that the Corporate Debtor was in the twilight zone and insolvency was imminent. The suspended directors of the Corporate Debtor ought to have exercised due diligence in minimizing the potential loss to its Creditors. However, evidently, directors of the Corporate Debtor despite being fully aware of the dues payable to the creditors of the Corporate Debtor entered into transactions, which prima facie are transactions to give benefit to its related parties. The said amounts could have been retained by the Corporate Debtor to generate cash that would have been sufficient to repay dues to the Creditors of the Corporate Debtor.

2.7. The Applicant, therefore submits that if the above said transactions are viewed after piercing the corporate veil, it would be found that the said transactions were preferential transactions within the meaning of sub-section (4) of section 43 of the Code.

2.8. That Section 43 (4) of the Code provides that a Corporate Debtor shall be deemed to have given preference if it is given to a related party. In the instant case, the Corporate Debtor has benefitted its related parties. The Applicant states that sub-section (1) of Section 25 of the Code casts a duty upon the Resolution Professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the Corporate Debtor. For this purpose, clause (j) of sub-section (2) of section 25 casts duty upon the Resolution Professional to apply before the Adjudicating Authority for the

avoidance of any such transaction in accordance with Chapter III of the Code.

3. The Respondents have filed an affidavit in reply dated 15.09.2021 stating that various adjustment entries were passed by the Corporate Debtor in its normal course of business and the same have been completely overlooked by in the Transaction Audit Report dated 31.05.2020. Thereby no reflecting the true status of the books of accounts of the Corporate Debtor.

3.1. It is submitted that the said Report is solely based on bank transactions which do not explain the purpose of the transactions. Further the same are duly reflected in the notes of accounts of the Corporate Debtor for the year ending 31 March 2020. It is pertinent to note that as per the notes of accounts of the Corporate Debtor for the year ending 31st March 2020, the amounts are is in fact due and payable to Respondents which is also confirmed by the Applicant herein. It is submitted that said Transaction have not caused any prejudice to the lender of the Corporate Debtor and were done in the normal course of business of the Corporate Debtor and therefore will not be covered under Section 43 of the Code. It is further submitted that during the period from 1st April, 2014, the Corporate Debtor was under financial crunch and the cycle of recovery from trade receivables was completely disturbed. It is during this time, that the Respondents gave unsecured loans to meet the financial crunch of the Corporate Debtor and the Corporate Debtor returned the said amounts after receiving funds from the debtors, hence the transactions are not covered under section 43 of the Code.

4. Heard Learned Counsel and perused the materials available on record.

4.1. Section 43 of the Code deals with preferential transactions and relevant time. Section 43 of the Code 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 subsection (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if —

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers —

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation.—For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if—

(a) it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.”

4.2. The Hon'ble NCLAT in the case of ***GVR Consulting Services Limited vs. Pooja Bahry 2023 SCC Online NCLAT 220*** at para 23 states that “*There is no need to prove any fraudulent intent for a preferential transaction. When we look into the scheme of Section 43 of the Code, sub-section (2), a clear statutory provision is that a corporate debtor shall be deemed to have given a preference if conditions as mentioned in paragraph ‘a’ and ‘b’ are fulfilled. When a provision provides for deeming fiction, ‘deeming fiction’ come into play on fulfilment of the requirement even if in fact it may not be so. In sub-section (3) of Section 43, certain exception has been provided. Thus those transactions which fall as exception under Sub-Section (3) can be taken out of sub-section 2 of Section 43, rest shall be covered by deeming fiction”.*

4.3. In the present cases, the Corporate Debtor has paid the amount towards the antecedent debt during the look back period to the named Respondents and the said payments have put the Respondents in favourable position than what they would have been

in case of distribution of assets in terms of section 53 of the Code. Accordingly, these transactions squarely falls within the deeming fiction provided in section 43(2) of the Code. The Section 43(3) of the Code, inter-alia, provides that the transactions undertaken in ordinary course of business shall remain out of the scope of section 43 of the Code. Further, the transaction should be in ordinary course of business of both the parties i.e. the Corporate Debtor as well as recipient of the preference. In the present case, it can not be said that it is in ordinary course of business of the recipient of the preference to realise their debts, particularly when the Corporate Debtor, a related party, is under financial stress. Hence, we do not find the explanation of the Respondent acceptable in the present case. However, we are of considered view that the net amounts received during the look back period shall only be said to be resulting into preference. Further, in relation to Karan J Kikavat Respondent in IA 1402/2020, the Applicant has explained that the amount withdrawn by this person was adjusted against the various Earnest Money Deposit (EMD) and tender fees paid by him on behalf of Corporate Debtor and all the EMD's are still outstanding in the books of accounts of Corporate Debtor, hence, this appropriation was in nature of reimbursements, and do not result into preference having been given to this person.

4.4. In view of the foregoing, the following transactions are held to be preferential in nature, and we consider to direct these parties to refund the money received in preference to the Corporate Debtor within 30 days.

S. No.	IA No.	Name of Respondent	Amount
1.	1402/2020	Beena Kikavat	41,502/-
2.	1402/2020	Akshita Kikavat	1,70,000/-
3.	1402/2020	Vasantlal Kikavat	8,60,200
5.	1402/2020	Pawan Kikavat	27,25,857/-

6.	1443/2020	Mahavir Associates	Link	1,31,01,406/-
7.	1443/2020	P.K. Traders		86,51,068/-
8.	1443/2020	Mahavir Supplying Company	Stone	3,20,63,845/-
9.	2020/2020	Jitendra Kikavat		1,39,14,085/-
10	2020/2020	Pankaj Kikavat		24,366,667/-

4.5. In view of foregoing, IA 1402/2020 is partly allowed, and IA 1443/2020 and IA 2020/2020 are allowed.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)



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