

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1754 of 2025

(Arising against the impugned order dated 10.10.2025 passed by the National Company Law Tribunal, Mumbai Bench in IA No. 4504 of 2024 in C.P. (IB) No. 380 of 2021].

IN THE MATTER OF:

Suraksha Realty Limited

having registered address at
3, Narayan Building 23, L.N. Road,
Dadar (E), Mumbai 400 014
Email: legal.compliance0802@gmail.com

...Appellant

Versus

1. MR. VITHAL M. DAHAKE (RP),

The Resolution Professional of
Radius Estate Projects Private Limited,
having address at:
Flat No. 2C/22, Bella Building, C Wing,
Aditya Garden City Phase 1,
Near RMD Sinhgad College, Warje,
Pune, Maharashtra – 411058
Email: cirp.repl@gmail.com

2. Sanjay R Chhabria

The promoter and ex-director of
Corporate Debtor,
having address at:
Flat No. 13/14, 1st Floor, New Solitaries CHS,
Central Avenue Rd, Santacruz West,
Opp. Rose Manor High School,
Mumbai – 400054
Email: sanjay@radiusdevelopers.com

3. Ritu S Chhabria

The promoter and ex-director of
Corporate Debtor,

having address at:
Flat No. 13/14, 1st Floor, New Solitaries
CHS, Central Avenue Rd, Santacruz West, Opp.
Rose Manor High School, Mumbai – 400054
Email: sanjay@radiusdevelopers.com

4. Anil Chhabria

The promoter and ex-director of
Corporate Debtor,
having address at:
C-103, Guruprasad CHS, 2nd Cross Road,
Lokhandwala Complex, Azad Nagar, Andheri
(West) Mumbai, Maharashtra - 400053
Email: anilc@radiusdevelopers.com;
anilnchhabria@rediffmail.com

5. SukantMangal

The promoter and ex-director of
Corporate Debtor,
having address at:
C-147, SushantLok-II, Gurgaon
Sector 56 S.O., Gurgaon, Haryana – 122011
Email: sukantm@radiusdevelopers.com

...Respondents

Present:

For Appellant: Mr. Arun Kathpalia, Sr. Advocate with Mr. Gaurav Mitra, Ms. Ruby Singh Ahuja, Mr. Sagar Bansal, Mr. Dhruv Parwal, Ms. Varsha Himat Singka, Mr. Tribhuvan N. Singh, Ms. Diksha Gupta and Mr. Aditya Dhupar, Advocates.

For Respondent: Mr. Amir Arsiwala, Mr. Dhaval Deshpande and Ms. Neha Arya, Advocates for R1/RP.

Mr. Dharav Shah, Mr. Suyash Goverdhan, Mr. Pranay Goyal and Ms. Namki Grewal, Advocates for R2.

Mr. Darshan Naik, Advocate for R3, R4 & R5.

J U D G M E N T
(19th May, 2026)

INDEVAR PANDEY, MEMBER (T)

The present Appeal has been filed by **Suraksha Realty Limited/ Appellant** under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**Code**') assailing the Order dated 10.10.2025 passed by the Ld. National Company Law Tribunal, Mumbai Bench ('Adjudicating Authority') in I.A. No. 4504 of 2024 in C.P. (IB) No. 380 of 2021, whereby the application filed by **Mr. Vithal M. Dahake, Resolution Professional of Radius Estate Projects Private Limited/ Respondent No.1** under Sections 43, 45 and 49 of the Code came to be allowed. By the said Impugned Order, the Adjudicating Authority held that the Deed of Mortgage dated 29.07.2021 executed between **Radius Estate Projects Private Limited/ Corporate Debtor**, and the **Suraksha Realty Limited/ Appellant** constituted a preferential transaction, and consequently directed that the security interest created in favour of the Appellant be released and discharged. **Respondent Nos. 2-5 are the promoters and ex-Directors of the Corporate Debtor.** Being aggrieved by the said findings of Ld. Adjudicating Authority in particular the treatment of the mortgage as a preferential transaction, despite it being a perfection of security arising from the Debenture Subscription Agreement dated 18.12.2014, the present Appeal has been preferred before this Appellate Tribunal.

Facts of the Case

2. The brief facts of the case relevant for deciding the same are reproduced below: -

i. The Corporate Debtor/Radius Estate Projects Private Limited, had entered into a Memorandum of Understanding with Sumer Buildcorp Private Limited in or about December 2014 for joint development of a real estate project known as "Avenue 54" situated at Willingdon Catholic Colony, Bandra, Mumbai, envisaging development of approximately 10,00,000 square feet of saleable area, for which substantial financial assistance was required.

ii. In order to meet its financial requirements for acquisition of development rights and execution of the project, the Corporate Debtor approached the Appellant; pursuant to which a Debenture Subscription Agreement (DSA) dated 18.12.2014 came to be executed, under which the Appellant subscribed to 225 secured redeemable non-convertible debentures of face value Rs.50,00,000 each, thereby investing a total sum of Rs.1,12,50,00,000/- in the Corporate Debtor.

iii. The said Debenture Subscription Agreement, had a provision for creating a first charge by the Corporate Debtor in favour of the Appellant over approximately 50,000 square feet of saleable area in the project. The Corporate Debtor had further undertaken to execute necessary documents including mortgage deeds to perfect such security.

iv. The Corporate Debtor did not perfect the security in favour of the Appellant and, instead, subsequently availed financial assistance from Yes Bank Limited in or about December 2014 without obtaining any prior consent or No Objection Certificate from the Appellant. The Corporate Debtor created mortgage charges in favour of Yes Bank through registered deeds executed in December 2015 and May 2016 (read with a supplementary deed dated 06.02.2018), thereby creating a first charge over the project in favour of Yes Bank.

v. Thereafter, additional financial assistance was availed through a joint venture entity, Sumer Radius Realty Private Limited, which obtained funding of approximately Rs.350,00,00,000/- from Yes Bank in January 2016, further strengthening the encumbrances over the project assets and affecting the priority structure of charges.

vi. In July 2018, the Corporate Debtor and its joint venture entity approached DHFL for further funding, which was agreed to by DHFL subject to creation of a first charge over the entire project. A mortgage deed dated 30.07.2018 was executed in favour of DHFL creating a first charge over the project. Yes Bank had issued a conditional NOC for the creation of such charge on 31.07.2018, subject to the Corporate Debtor fulfilling the repayment conditions as prescribed in the aforesaid conditional NOC. As Corporate Debtor failed to fulfil its repayment obligations, the conditional NOC stood revoked. The DHFL charge was thereafter converted to second charge on the property of CD.

vii. Subsequently, due to the subsisting charges and lack of discharge of Yes Bank's dues, the Corporate Debtor and the Appellant agreed upon a commercial arrangement, whereby a second charge would be created in favour of the Appellant over the identified 61,803 square feet area, with a provision for its upgradation to a first charge upon satisfaction of prior charges. In furtherance of the aforesaid arrangement a registered Deed of Mortgage dated 29.07.2021 came to be executed, creating a second charge in favour of the Appellant over 29 identified units aggregating to 61,803 square feet carpet area, with an express stipulation that the said charge would be upgraded upon repayment of Yes Bank facilities, thereby formalizing and perfecting the pre-existing contractual security.

viii. The Corporate Insolvency Resolution Process of the Corporate Debtor was initiated by the order of Adjudicating Authority on 06.09.2021 and the Respondent No.1 was appointed as Interim Resolution Professional and subsequently confirmed as Resolution Professional.

ix. The Appellant submitted its claim in Form 'C' on 28.10.2021 for an amount aggregating to Rs.430,08,00,000/-, supported by relevant documents, asserting its status as a secured financial creditor on the basis of the Debenture Subscription Agreement and the registered mortgage. The Resolution Professional, by email dated 01.12.2021, provisionally admitted a part of the claim amounting to Rs.98,35,38,914/- as secured, while keeping the remaining amount

under verification. The Committee of Creditors was constituted and the Appellant was inducted as a secured financial creditor holding 3.74% voting share. The Resolution Professional included the Appellant in the list of secured creditors published on 07.03.2023 and again on 19.04.2023 on the IBBI website, thereby acknowledging its secured status at that stage.

x. The RP initiated a Transaction audit of the CD in April 2023 by an audit firm M/s Bagchi & Gupta, who ultimately classified the mortgage transaction in favour of the Appellant as a preferential transaction.

xi. Consequent to the findings of the Transaction audit, Resolution Professional revised the claim of the Appellant admitting Rs.1,02,05,26,027/- as unsecured debt and rejected a substantial portion of claim amounting to Rs.3,28,02,73,973/-.

xii. further, the Resolution Professional filed an avoidance application being I.A. No. 4504 of 2024 on 11.04.2024 seeking, inter alia, declaration of the mortgage as void and release of the security interest created in favour of the Appellant. Adjudicating Authority after hearing the parties passed the Impugned Order on 10.10.2025. The Adjudicating Authority held the Appellant to be an unsecured creditor prior to execution of the mortgage, and further held that the mortgage was executed within the look-back period and not in the ordinary course of business, and consequently treated the same as a

preferential transaction under Section 43 of the Code, thereby directing release of the security interest, which has led to the filing of the present Appeal.

Submission of the Appellant

3. Mr. Arun Kathpalia, Ld. Senior Counsel for the Appellant submits that the Learned NCLT has gravely erred in mechanically relying upon the judgment rendered by Hon'ble Supreme Court in "**Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited & Ors. (2020) 8 SCC 401**" without appreciating the completely distinguishable factual background involved in the present case. The factual matrix in *Anuj Jain (supra)* was fundamentally different and the ratio laid down therein cannot be applied in a blanket manner to every transaction involving creation or perfection of security interest within the look-back period.

4. He submitted that in *Anuj Jain*, the Corporate Debtor namely Jaypee Infratech Limited had created mortgage transactions solely for the benefit of its related party namely Jaypee Associates Limited ("JAL") in respect of antecedent debts owed by JAL to its own lenders. The mortgages were created not for securing any direct financial assistance availed by the Corporate Debtor itself but to indirectly secure obligations of a related entity. Consequently, the Hon'ble Supreme Court held that the transaction had the effect of placing JAL and its lenders in a more beneficial position to the detriment of other creditors of the Corporate Debtor.

5. Ld. Counsel submits that the present case stands on an entirely different footing. Here, the Appellant itself had directly advanced financial assistance of Rs.112.50 Crores to the Corporate Debtor under the DSA dated 18.12.2014. The security interest was not created for any third party or related entity. Rather, the Mortgage Deed dated 29.07.2021 was executed solely to perfect and formalise the security arrangement already contemplated under the DSA executed in 2014. Therefore, the basic foundation on which the judgment in *Anuj Jain* proceeded is wholly absent in the present matter.

6. He submits that the Learned NCLT erroneously held that since the Mortgage Deed was executed after a gap of seven years from the DSA, the same could not be regarded as a transaction in the ordinary course of business. In doing so, the Learned NCLT relied upon the maxim "*Vigilantibus non dormientibus jura subveniunt*", meaning that the law assists those who are vigilant and not those who sleep over their rights. However, the Learned NCLT completely failed to appreciate that under the DSA, the obligation to execute and perfect the Mortgage Deed was cast upon the Corporate Debtor itself and not upon the Appellant.

7. Ld. Counsel submits that a party cannot be permitted to take advantage of its own wrong. The Corporate Debtor having itself failed to perform its contractual obligations under the DSA cannot now derive benefit from such delay by contending that the security interest stood extinguished or that the perfection of such security constituted a preferential transaction. Reliance in this regard is placed upon the

judgment of the Hon'ble Supreme Court in "***Mrutunjay Pani & Anr. vs. Narmada Bala Sasmal & Anr.***, AIR 1961 SC 1353", wherein the Hon'ble Court recognised the principle embodied in the maxim "*Commodum ex injuria sua nemo habere debet*", namely that no person can derive advantage from his own wrong. Similar principles have also been reiterated in "***Indore Development Authority vs. Shailendra***, (2018) 3 SCC 412" and "***Indore Development Authority vs. Manoharlal & Ors.***, (2020) 8 SCC 129".

8. It is further submitted that the principle relating to delay and laches could never have been invoked against the Appellant in the present case. The Appellant never approached any court or tribunal seeking delayed enforcement of the Mortgage Deed after seven years. The Appellant consistently relied upon the assurances extended by the Corporate Debtor and the continuing recognition of the Appellant's security interest through subsequent documents and transactions. Therefore, the maxim relied upon by the Learned NCLT was wholly inapplicable.

9. The Appellant further submits that the documents placed on record conclusively establish continuous recognition of the Appellant's security interest much prior to the look-back period. The DHFL Sanction Letter dated 27.07.2018 specifically recorded that 61,803 sq. ft. area comprising 29 units stood earmarked for securing the Appellant's interest. Likewise, 29 allotment letters dated 01.08.2018 were issued in favour of the Appellant. These documents formed part of the official MCA records and were always within the knowledge and possession of the Resolution Professional.

10. It is submitted that these documents clearly demonstrate that the Appellant's security was already identified, earmarked and recognised by other lenders including DHFL much prior to the execution of the Mortgage Deed in 2021. Therefore, the Mortgage Deed merely formalised an already existing arrangement and cannot by any stretch be treated as a fresh transfer intended to prefer the Appellant over other creditors.

11. The Appellant submits that even in *Anuj Jain*, the Hon'ble Supreme Court itself recognised that every transaction falling within Section 43(2) does not automatically become preferential since Section 43(3) carves out specific exceptions including transactions entered into in the ordinary course of business or financial affairs of the Corporate Debtor. The Hon'ble Supreme Court specifically observed in paragraphs 21.2 to 21.4 and 25.4 that such exclusions remain available depending upon the factual circumstances of each case.

12. The Appellant submits that in the present case, the Mortgage Deed dated 29.07.2021 squarely falls within the exception carved out under Section 43(3) since the same merely perfected a pre-existing contractual security arrangement forming part of an ordinary commercial financing transaction originating in 2014. The transaction was bona fide, commercially documented, consistently recognised and supported by contemporaneous records. Hence, the same could never have been categorised as preferential.

13. The Learned Counsel submits that the conduct of Respondent No.1, namely the Resolution Professional, has been wholly unfair, arbitrary and contrary to the statutory obligations cast upon him under the Insolvency and Bankruptcy Code. Despite repeated opportunities and express directions issued by this Hon'ble Tribunal, Respondent No.1 deliberately failed to respond to the additional documents and contentions raised by the Appellant.

14. It is submitted that the Appellant had filed an Additional Affidavit dated 18.11.2025 placing on record several crucial documents including the DHFL Sanction Letter dated 27.07.2018, the allotment letters dated 01.08.2018 and the relevant Form CHG-1 documents evidencing earmarking and recognition of the Appellant's security interest. These documents clearly demolished the entire basis of the allegation that the Appellant's security was created for the first time in 2021. However, despite the significance of these documents, Respondent No.1 maintained complete silence and failed to file any meaningful response for several months even after directions dated 27.11.2025, 15.01.2026 and 25.02.2026 passed by this Hon'ble Tribunal. Such conduct, according to the Appellant, is not accidental or inadvertent, but deliberate and calculated.

15. It is submitted that the Resolution Professional was fully aware that the documents relied upon by the Appellant formed part of the MCA records and directly established prior recognition of the Appellant's security interest. Yet, the Resolution Professional consciously chose not to deal with these materials as the same completely undermined the theory of

preferential transfer advanced by him in the PUFEE proceedings. The Appellant submits that the silence maintained by the Resolution Professional becomes even more significant considering that after vacation of the stay order in ***Vistra ITCL (India) Ltd. vs. Vithal Madhukar Dahake, Company Appeal (AT) (Insolvency) No. 1110 of 2024*** the CoC was proceeding towards voting on the Resolution Plans. In such circumstances, the exclusion of the Appellant from the category of secured creditors and denial of voting rights had serious and irreversible consequences upon the Appellant's participation in the CIRP process.

16. The Appellant further submits that the Resolution Professional is duty bound to act fairly, transparently and in a balanced manner while conducting the CIRP. Suppression of material documents and strategic non-response to crucial factual assertions vitiates the entire process and erodes confidence in the fairness of the CIRP mechanism. The conduct of Respondent No.1 in deliberately ignoring the additional documents and avoiding adjudication on their effect raises serious doubts regarding the bona fides of the Resolution Professional and materially prejudices the rights of the Appellant.

17. The Ld. Counsel submits that Clause 13 of the DSA expressly classified the transaction documents, including the Deed of Mortgage, as "Critical Covenants", while Clause 16 clarified that no waiver could be effected in respect of such Critical Covenants. Therefore, the obligation to execute and perfect the security documents remained binding upon the

parties at all times and could not be treated as abandoned merely due to passage of time.

18. It is submitted that the Mortgage Deed dated 29.07.2021 merely perfected and formalised the pre-existing security arrangement already contemplated under the DSA dated 18.12.2014 and subsequently recognised through the DHFL Sanction Letter dated 27.07.2018 and the allotment letters dated 01.08.2018 earmarking 29 units in favour of the Appellant. Accordingly, the Mortgage Deed did not create any fresh or preferential right in favour of the Appellant, but only perfected an existing contractual security interest arising from a bona fide commercial transaction in the ordinary course of business and therefore falls within the protection under Section 43(3) of the Code.

19. Ld. Counsel submits that the Impugned Order proceeds on a fundamental jurisdictional error inasmuch as the Adjudicating Authority has assumed powers which are not vested in it under the Code. It is submitted that Section 60(5)(c) does not confer upon the Adjudicating Authority the power to adjudicate upon the validity, legality, or enforceability of contractual instruments such as the Deed of Mortgage dated 29.07.2021. The Adjudicating Authority has erroneously undertaken an exercise of examining the “veracity” and legitimacy of the mortgage transaction, which squarely falls outside its statutory domain. It is further submitted that the Hon’ble Supreme Court has consistently held that the NCLT, being a creature of statute, is confined strictly to the jurisdiction

conferred under the Code and cannot exercise powers akin to a civil court in adjudicating contractual disputes or title.

20. He submits that the Impugned Order erroneously concludes that the Mortgage Deed, executed seven years after the Debenture Subscription Agreement dated 18.12.2014, altered the position of the Appellant from an unsecured to a secured creditor within the look-back period and therefore could not be said to be in the ordinary course of business.

21. Ld. Counsel further submits that the Adjudicating Authority has failed to consider that the Resolution Professional has, in excess of its statutory powers, reclassified the Appellant from a secured to an unsecured creditor. Such reclassification amounts to an adjudicatory exercise, which is impermissible under the scheme of the Code. The Appellant was always a secured creditor in equity from the date of the DSA. The execution of the Mortgage Deed was merely an act of perfection and not creation of security. Therefore, the assumption underlying the Impugned Order is contrary to the express terms of the DSA and the contemporaneous record.

22. Ld. Counsel also submits that the reliance placed upon the Transaction Audit Report dated 26.03.2024 is wholly misconceived, as the said report proceeds in ignorance of settled legal principles governing priority of charges. It is submitted that under Section 48 of the Transfer of Property Act, subsequent charges are not rendered void merely due to absence of an NOC from the prior charge holder. Therefore, the entire foundation of the findings recorded in the Impugned Order is legally unsustainable.

23. He further submits that the Impugned Order proceeds on a complete misappreciation of the nature and origin of the transaction. It is submitted that the Mortgage Deed dated 29.07.2021 was not an independent or fresh transaction, but was a direct consequence of and envisaged under the Debenture Subscription Agreement dated 18.12.2014. The substantive rights of the Appellant, including the creation of security, arose at the time of execution of the DSA itself, when a sum of Rs.1,12,50,00,000/- was advanced to the Corporate Debtor. The mortgage merely perfected and formalised a pre-existing contractual security arrangement. The DSA clearly provided for creation of security, including first charge over specified project area and execution of mortgage and other security documents.

24. Ld. Counsel submits that it is a settled principle of law that where the underlying obligation and security arise prior to the look-back period, the subsequent perfection of such security does not attract Section 43. The Adjudicating Authority has failed to apply this principle and has instead mechanically treated the date of mortgage as the relevant date, which is legally untenable.

25. He submits that the finding of the Adjudicating Authority that the transaction was not in the ordinary course of business is wholly erroneous. It is submitted that the delay in execution of the mortgage was not due to any inaction or neglect on the part of the Appellant, but was occasioned by commercial realities, including subsistence of prior charges in favour of Yes Bank and conditional NOCs governing the financing structure of the project.

26. Ld. Counsel further submits that the Appellant is not a related party of the Corporate Debtor, and there is no material to suggest that the transaction was anything other than a bona fide commercial arrangement. The Impugned Order fails to demonstrate how the transfer of 29 units under the Mortgage Deed falls outside the ordinary course of business, particularly when the DSA itself does not prescribe any specific timeline for execution of securities.

27. Ld. Counsel states that the mortgage created only a second charge, which was expressly subordinate to the first charge of Yes Bank and conditional upon repayment of such facilities. Consequently, the Appellant did not derive any immediate or preferential benefit over other creditors. The conclusion of the Adjudicating Authority that the Appellant was placed in a beneficial position is therefore untenable and contrary to the structure of the transaction itself.

28. Ld. Counsel submits that the Impugned Order suffers from arbitrariness and discrimination inasmuch as it treats similarly placed creditors differently. It is submitted that the Adjudicating Authority has placed undue reliance on the Transaction Audit Report dated 26.03.2024, which itself is flawed and ignores material facts, including the absence of a valid NOC in favour of DHFL.

29. He submits that the Appellant stands on the same footing as DHFL, both having security interests in the project. Therefore, the Appellant ought to have been classified as a secured financial creditor and treated at par with DHFL. The failure to do so results in discriminatory treatment and is

contrary to the principles of equality embedded in the insolvency framework.

30. Ld. Counsel for the Appellant states that the Adjudicating Authority has failed to appreciate the chronological priority of the Appellant's rights. The Debenture Subscription Agreement dated 18.12.2014 was executed prior to the mortgage deeds created in favour of Yes Bank, including those dated 23.12.2015 and 12.05.2016. Therefore, the Appellant's rights are prior in time and cannot be subordinated to subsequent charges.

31. Ld. Counsel submits that in such circumstances, the obligation lay upon Yes Bank to obtain a valid No Objection Certificate from the Appellant before creating any subsequent charge. The failure to obtain such consent renders subsequent encumbrances legally untenable and incapable of overriding the Appellant's prior rights. He submits that the Adjudicating Authority has failed to recognise that the Appellant's security interest stood crystallised under the DSA prior to creation of subsequent encumbrances. Any subsequent mortgage without the Appellant's consent cannot dilute or override its existing security interest. The impugned finding effectively subordinates a prior secured creditor to a subsequent one, which is contrary to settled legal principles and commercial equity.

32. Ld. Counsel further submits that the misclassification of the Appellant as an unsecured creditor is in direct contravention of Sections 30(2) and 53 of the Code, which mandate equitable treatment of similarly placed creditors. The Impugned Order, by disregarding the Appellant's valid

security interest, distorts the priority of claims and undermines the scheme of the Code.

33. Ld. Counsel finally submits that the Impugned Order suffers from non-application of mind, as it fails to consider material documentary evidence including the DSA, the Mortgage Deed, the conditional NOC, and correspondence between the parties evidencing continuous efforts by the Appellant to perfect its security. The findings are contrary to the record and settled law on perfection of security, and have resulted in wrongful discharge of the Appellant's lawful security interest. Therefore, the Impugned Order is liable to be set aside as it suffers from errors apparent on the face of the record and proceeds on a complete misappreciation of facts and law.

Submission of the Respondent No.1/ RP

34. Mr. Amir Arsiwala Ld. Counsel on behalf of Respondent No. 1/ RP submits that the present appeal has been preferred by the Appellant assailing the order dated 10.10.2025 passed by the Hon'ble National Company Law Tribunal, Mumbai Bench in I.A. No. 4504 of 2024 in C.P. (IB) No. 380 of 2021. It is submitted that the said application had been filed by the Respondent No. 1, being the Resolution Professional of Radius Estate Projects Private Limited, under Sections 43, 45 and 49 of the Insolvency and Bankruptcy Code, 2016.

35. Ld. Counsel submitted that by way of the Impugned Order, the Learned Adjudicating Authority has rightly allowed the said application,

inter-alia holding that the Mortgage Deed dated 29.07.2021 executed between the Corporate Debtor and the Appellant, nearly seven years after the Debenture Subscription Agreement dated 18.12.2014, altered the status of the Appellant from an unsecured financial creditor to a secured financial creditor within the look-back period under Section 43(4) of the Code. It is submitted that the said transaction was correctly held to be preferential in nature and, accordingly, the security interest created in favour of the Appellant was directed to be released and discharged.

36. Ld. Counsel submits at the outset that the Mortgage Deed in question satisfies each and every statutory requirement of a preferential transaction as contemplated under Section 43 of the Insolvency and Bankruptcy Code. He submits that Section 43(1) clearly provides that a transaction shall qualify as a preferential transaction, if it satisfies the conditions laid down under Section 43(2) of the Code. It is submitted that Section 43(2)(a) lays down two essential requirements viz. that there must be a transfer of property or any interest therein of the Corporate Debtor in favour of a creditor, surety or guarantor, and that such transfer must be for or on account of an antecedent financial debt, operational debt or other liability owed by the Corporate Debtor prior to such transfer.

37. Ld. Counsel submits that in the facts of the present case, the first limb of Section 43(2)(a) stands fully satisfied inasmuch as the execution of the Mortgage Deed constitutes a transfer of an interest in property. It is submitted that a mortgage, by definition, involves transfer of an interest in specific immovable property for securing repayment of a debt. Therefore,

the Mortgage Deed squarely falls within the ambit of “transfer of an interest” as contemplated under the Code.

38. It is his submission that the second limb of Section 43(2)(a) is also satisfied, as the Mortgage Deed was executed for securing an antecedent financial debt. The Corporate Debtor had entered into the Debenture Subscription Agreement dated 18.12.2014 with the Appellant, however, no security interest was created for nearly seven years. It is only on 29.07.2021 that the Mortgage Deed was executed, and notably, no fresh disbursement was made at that stage. It is thus submitted that the Mortgage Deed was executed solely to secure pre-existing liabilities arising from the said agreement, thereby clearly satisfying the requirement of antecedent debt.

39. Ld. Counsel submits that Section 43(2)(b) is also clearly attracted in the present case, as the transaction had the effect of placing the Appellant in a more beneficial position than it would have occupied in the event of distribution of assets under Section 53 of the Code. It is submitted that prior to the execution of the Mortgage Deed, the Appellant was an unsecured financial creditor. It is further submitted that during the period 2015-16, the Corporate Debtor had already created a first charge in favour of Yes Bank over the entire project. In such circumstances, in the absence of the Mortgage Deed, the Appellant would have continued as an unsecured creditor. However, by virtue of the Mortgage Deed, the Appellant became a secured creditor, albeit a second charge holder, thereby improving its position in the statutory waterfall mechanism. This elevation clearly satisfies the requirement of “beneficial position”.

40. It is his submission that the Mortgage Deed does not fall within the exception provided under Section 43(3) of the Code, which pertains to transactions undertaken in the ordinary course of business. It is submitted that the transaction in question cannot be regarded as a routine commercial transaction.

41. Ld. Counsel submits that although the Debenture Subscription Agreement was executed in 2014 and contemplated creation of security, no steps were taken for nearly seven years to create or perfect such security. It is submitted that the Mortgage Deed was executed only two months prior to the commencement of CIRP, which clearly demonstrates that the transaction was not in the ordinary course of business, but was a belated attempt to secure the Appellant's position.

42. He submits that the Mortgage Deed created a second charge over a property already encumbered by a first charge in favour of Yes Bank, and no prior consent of the first charge holder was obtained. It is submitted that such non-compliance renders the transaction irregular and not in the ordinary course of business.

43. Ld. Counsel states that the Mortgage Deed cannot be said to be in furtherance of the Debenture Subscription Agreement, as the said agreement contemplated creation of a first charge, whereas the Mortgage Deed resulted in creation of a second charge, which was not envisaged therein. He further submits that the Mortgage Deed did not secure any fresh disbursement and merely secured an existing loan, which had already

become a non-performing asset. It is submitted that there was no commercial rationale for such a transaction except to improve the Appellant's position in the insolvency waterfall.

44. Ld. Counsel further submits that the creation of the Mortgage Deed was in violation of Section 186(5) of the Companies Act, 2013, as no resolution was passed at a duly convened Board meeting and no requisite approvals were obtained. It is submitted that such statutory non-compliance further establishes that the transaction was not undertaken in the ordinary course of business.

45. It is the submission of Ld. Counsel that the Mortgage Deed squarely falls within the look-back period prescribed under Section 43(4) of the Code, as it was executed merely two months prior to the commencement of CIRP. It is reiterated that despite the Debenture Subscription Agreement being executed in 2014, no security was created for seven years, and only immediately prior to initiation of insolvency proceedings was the Mortgage Deed executed. Therefore, the requirement under Section 43(4) stands fully satisfied.

46. Ld. Counsel places reliance upon the judgment of the Hon'ble Supreme Court in *Anuj Jain (supra)* wherein the Hon'ble Supreme Court has laid down the essential conditions to determine whether a transaction is preferential. It is submitted that the Hon'ble Court has held that the Tribunal must examine whether the transfer is for the benefit of a creditor, whether it is for an antecedent debt, whether it places the creditor in a

beneficial position, whether it falls within the look-back period, and whether it is excluded under Section 43(3).

47. Ld. Counsel submits that applying the aforesaid principles to the facts of the present case, all conditions are clearly satisfied. It is submitted that the Mortgage Deed was executed for the benefit of the Appellant, it secured an antecedent debt, it improved the Appellant's position in the waterfall mechanism, it was executed within the look-back period, and it does not fall within any exception.

48. Summing up his arguments Ld. Counsel states that in view of the aforesaid facts and settled legal position, the Mortgage Deed squarely falls within the ambit of a preferential transaction under Section 43 of the Insolvency and Bankruptcy Code and cannot be said to have been executed in the ordinary course of business. It is thus submitted that the Impugned Order passed by the Learned Adjudicating Authority is correct in law and deserves to be upheld.

ANALYSIS AND FINDINGS

49. We have heard both the parties at length and perused the documents on record. The appellant and Respondent No. 1 have also submitted their written submission. Respondent Nos. 2-5 are treated as Performa Respondents.

50. The only issue which arises for consideration in the present Appeal is:

Whether the registered Deed of Mortgage dated 29.07.2021 executed by the Corporate Debtor in favour of the Appellant amounts to a “preferential transaction” under Section 43 of the Insolvency and Bankruptcy Code, 2016?

51. The Appellant has argued that the Mortgage Deed merely perfected a pre-existing security which was already contemplated under the DSA and that no new benefit was created in its favour. According to the Appellant, the DSA itself contemplated creation of security over approximately 50,000 square feet of saleable area and, therefore, the subsequent Mortgage Deed was only a formal crystallisation of an already existing arrangement. The Appellant has further submitted that the mortgage was executed in the ordinary course of business, that it created only a second charge subordinate to Yes Bank, and that no preferential benefit was granted to the Appellant. It has also been argued that the Adjudicating Authority exceeded its jurisdiction while examining the transaction as a preferential transaction.

52. *Per contra*, the Resolution Professional/Respondent 1 has contended that for nearly seven years after execution of the DSA, no perfected security interest existed in favour of the Appellant. According to the Respondent, until execution of the Mortgage Deed dated 29.07.2021, the Appellant admittedly remained only an unsecured financial creditor. It has been submitted that the mortgage was executed merely two months prior to commencement of CIRP and solely for securing liabilities arising out of the

DSA of 2014. Therefore, according to the Resolution Professional, every ingredient of Section 43 of the Code stands fully satisfied.

53. The factual chronology in the present case assumes considerable importance. The DSA was executed on 18.12.2014 and accordingly a sum of Rs.112.50 crores was disbursed to the Corporate Debtor by the Appellant in consideration of Debentures issued by the Corporate Debtor. The Appellant itself has stated that the DSA contemplated further steps were required for perfection of the security, including execution of formal mortgage documents. The relevant clauses of Debenture Security Agreement (DSA) are extracted below:

*“1.1.20 **“Deed of Mortgage”** shall mean the deed of mortgage to be entered into among the issuer, Corporate Promoters, the Promoters and the Investor under the terms of this DSA;*

8. Securities

*For the consideration of the said Amount as aforesaid and as security for the repayment of the principal amount of the NCDs, payment of all interest, prepayment charges, liquidated damages, costs, charges and expenses and all other monies as may be payable under this DSA and all costs, charges and expenses, including but not limited to the costs, legal expenses, if any, of preserving the Securities and/ or enforcement thereof, incurred by the Investor in the performance of its duties and obligations under this DSA, **the Issuer shall within a period of 30 days from the date of this Agreement create the following Securities:***

8.2 Primary Charge

8.2.1 The Issuer hereby grants, conveys, assigns, assures, charges and transfer unto and in favour of the Investor, by way of a First charge in favour of the Investor, flats/premises consisting of Issuer

Premises in aggregate admeasuring approx. 50,000 sq. ft. saleable area and hypothecation of all the receivables accruing there from being constructed on the Project Security -1 and written TOGETHER WITH all the amenities and facilities attached and associated with the Issuer Premises, to subsist & continue until repayment by the Issuer to the Investor of the principal amounts of the NCDs in full and also payment of all interest and all other monies as may be payable under this DSA with a provision for redemption by way of re-transfer and release or otherwise upon conversion of NCDs in to Equity Shares at the conversion price as agreed between the Parties.

8.2.2 First Charge on the Security Premises 50% of the total development rights /F.S.I. and any saleable area -unsold units relating to following land parcels located at Santacruz, Mumbai comprising of approximately 5.38 acres of plot area.”

(Emphasis supplied)

54. Two things clearly arise from the aforesaid clauses of the DSA. Firstly, the security, thereby meaning mortgage of the property was to be done within 30 days from the date of DSA which was 18.12.2014. Accordingly, the Deed of Mortgage should have been executed by 17.01.2015. Secondly the security was to be the first charge on the property.

55. However, no registered mortgage, charge, or perfected security interest was created in favour of the Appellant for almost seven years thereafter. During this period, the Corporate Debtor created substantial first charges in favour of Yes Bank in the years 2015 and 2016 and thereafter further encumbrances in favour of DHFL in 2018. Despite all these developments, the Appellant did not take steps to ensure perfection of its alleged security. This prolonged delay cannot be ignored while

examining whether the later Mortgage Deed was merely a formal act or whether it materially changed the legal position of the Appellant.

56. The Appellant in its reply to IA No. 4304 of 2024 in Ld. NCLT had made the following averments:

“e. Pursuant to the execution of the DSA, the Corporate Debtor was in need of additional funds for the Project. Accordingly, the Corporate Debtor had approached Yes Bank Limited for the purpose of raising the additional funds. Yes Bank Limited was amenable to advance the additional funds to the Corporate Debtor. However, Yes Bank Limited had sought a first charge on the entire entitlement of the Corporate Debtor in the Project to secure the facilities to be availed by the Corporate Debtor. As the Corporate Debtor required the funds for the Project, the Corporate Debtor executed a Deed of Mortgage dated 23rd December 2015 as well as Deed of Mortgage dated 12th May 2016 read with Supplementary Deed dated 6th February 2018, in favour of Yes Bank Limited, thereby creating a first charge on its entitlement in the Project.

f. Pertinently, as per Clause 13 (f) of Schedule 7 of the DSA, the Corporate Debtor had undertaken that it shall not create any charge, lien or encumbrance (which included mortgages) whatsoever over the Securities or any part thereof in favour of any person/bank/financial institution other than Respondent No. 1. Furthermore, as per Clause 13 (h) of Schedule 7 of the DSA, the Corporate Debtor had undertaken that it shall not sell, transfer, assign, mortgage, alienate or otherwise dispose off any of the assets of Corporate Debtor which are charged in favour of Respondent No. 1 without its approval. Accordingly, upon learning about the execution of the said deed of mortgage in favour of Yes Bank Limited, Respondent No. 1 had approached the Corporate Debtor and sought its explanation for the same. Respondent No. 1 had further raised the issue that the said deed of mortgage was executed in favour of Yes Bank Limited without obtaining its

NOC/consent/prior approval. At the said time, the Corporate Debtor informed Respondent No. 1 that it was in urgent need of additional funds for the Project. The Corporate Debtor further represented and assured to Respondent No. 1 that the Corporate Debtor was committed in complying with its obligations under the DSA and that the Corporate Debtor would soon satisfy the facilities obtained from Yes Bank Limited and execute requisite deed of mortgage in favour of Respondent No. 1. The Corporate Debtor also represented to Respondent No. 1 that the Project had a lot of potential and that the Corporate Debtor would soon be in a position to satisfy the facilities availed from Yes Bank Limited as well as to comply with the Secured Obligations under the DSA. Relying upon the representations of the Corporate Debtor and believing it to be true, Respondent No. 1 waited for the Corporate Debtor to comply with its obligations under the DSA and to take steps for perfection of security interest (already created under the DSA) in favour of Respondent No. 1.

g. Post the execution of DSA, Respondent No. 1 was regularly following up with the Corporate Debtor. As a result, Respondent No. 1 was able to realize a sum of Rs.99,00,00,000/- (Rupees Ninety-Nine Crores Only) from the Corporate Debtor. However, the Corporate Debtor failed to honour the Secured Obligations under the DSA. Accordingly, Respondent No. 1 approached the Corporate Debtor and sought its explanation for the same. At the said time, the Corporate Debtor represented to Respondent No. 1 that the Project was slightly delayed due to factors beyond its control. At the said time, the Corporate Debtor reiterated its commitment to honour its obligations under the DSA, however, the Corporate Debtor requested Respondent No. 1 to be patient and to grant some additional time to the Corporate Debtor to comply with its obligations under the DSA. Being from the real estate industry, Respondent No. 1 was conscious that projects of such magnitude can get delayed. Respondent No.1 was further mindful of the fact that the Project had a lot of potential to enable the Corporate Debtor to meet its

obligations under the DSA. Accordingly, Respondent No. 1 waited for the Corporate Debtor to comply with its obligations under the DSA.”

(Emphasis Supplied)

57. It comes out very clearly from the above averments of Appellant before the Ld. Adjudicating Authority that it was aware of the fact that the Corporate Debtor has created the first charge on its entire entitlements of the project in favour of Yes Bank and in spite of awareness about its rights and obligations of Corporate Debtor in terms of the DSA, the Appellant did not take any legal action to perfect its security. The security is executed by the Corporate Debtor in July 2021 as second charge on the portion of the property, which has been held by Yes Bank as first charge from December 2015 onwards i.e. after a lapse of five and half years from the creation of first charge in favour of Yes Bank. More importantly such a security interest was created by the Corporate Debtor without NOC from the Yes Bank the first charge holder.

58. In this context of the factual matrix, and the relevant section 43 of the code, we now examine whether the execution of the Deed of Mortgage as second charge on a portion of the property of the Corporate Debtor on 29.07.2021 can be classified as preferential transaction. To answer this issue, it becomes necessary for us to examine: (i) the nature and timing of the Mortgage Deed; (ii) whether the mortgage was created for an antecedent debt; (iii) whether the transaction placed the Appellant in a more beneficial position in terms of Section 53 of the Code; (iv) whether the transaction falls within the statutory look-back period under Section 43(4); and (v) whether

the transaction can still be protected as one entered into in the ordinary course of business under Section 43(3) of the Code.

59. It is the submission of the Appellant that the genesis of the Deed of Mortgage dated 29.07.2021 is the Debenture Subscription Agreement dated 18.12.2014 (“DSA”). The execution of deed of Mortgage is also not disputed. The dispute before us is limited to the Mortgage Deed’s effect under the avoidance provisions of the Code. Therefore, while examining the impugned transaction, we are required to assess it not merely from the perspective of contractual rights between the parties, but from the broader object of insolvency law, namely preservation of the assets of the Corporate Debtor and equitable treatment of all creditors.

60. Section 43 of the Code deals with Preferential Transactions and the same is extracted below: -

“Section 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 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)

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

(a)

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

(Emphasis supplied)

61. Section 43(1) of the Code provides that a transaction shall be treated as preferential if it has been given by the Corporate Debtor in the manner prescribed in Section 43(2). As provided by Section 43(2)(a) it involves transfer of a property or interest thereof for the benefit of a creditor. In this case it involves execution of Deed of Mortgage in favour of Appellant who is a financial creditor, which is the transfer of interest and the same has been done for the benefit of a creditor to the Corporate Debtor. The second element of Section 43(2)(a) provides that such transfer of interest should be on account of antecedent debt, which is admittedly the case here. Appellant

had given a loan of Rs112.50 Crores under the DSA. Section 43(2)(b) provides that such a transfer has the effect of putting the said creditor in a beneficial position in case of distribution of assets under Section 53 of the code. In this case, the Appellant's status would change to secured creditor consequent to creation of security interest, instead of unsecured creditor which is the case at present and its share of liquidation estate would go up in priority u/s 53 of the code.

62. We note that prior to execution of the Mortgage Deed, the Appellant was admittedly an unsecured financial creditor. By virtue of the Mortgage Deed, the Appellant acquired the status of a secured creditor, though as a second charge holder. Under the waterfall mechanism provided under Section 53 of the Code, even a second charge holder occupies a significantly better position than an unsecured financial creditor. Therefore, the transaction undoubtedly improved the position of the Appellant in the event of distribution of assets under Section 53. This improvement itself is sufficient to satisfy the requirement of Section 43(2)(b).

63. Section 43(3) of the Code provides that the transfers made in ordinary course of business would not be treated as preferential transaction. And lastly Section 43(4) provides a look back period of one year for such transactions. It is an admitted fact that the alleged transaction took place just 2 months prior to initiation of CIRP proceedings, well within one year period provided in the section 43(4) and so it's covered by it. The only point of dispute in this case relates to whether the execution of aforesaid deed of

mortgage is in ordinary course of business and consequently covered by exception as provided u/s 43(3)(a).

64. In this case the conduct of the Appellant becomes relevant while examining the true nature of the impugned transaction. From the material placed on record, it is evident that although the DSA dated 18.12.2014 contemplated creation and perfection of security interest as first charge in favour of the Appellant was to be completed within 30 days, but it was not done. We further note that no effective steps were taken by the Appellant for more than six years seven months to ensure creation of a perfected first charge in its favour. During this prolonged period, the Corporate Debtor proceeded to create first charges in favour of Yes Bank in the years 2015 and 2016 and thereafter further encumbrances in favour of DHFL in 2018. Despite being aware of these subsequent transactions and despite claiming that the DSA contained restrictive covenants against creation of further encumbrances, the Appellant admittedly did not initiate timely proceedings for enforcement of its alleged contractual rights or for securing registration and perfection of its charge. Had the Appellant acted diligently and ensured creation of a perfected first charge at the relevant time, its position in law may have stood on a different footing. However, having remained unsecured for nearly seven years and having permitted subsequent lenders to acquire registered security interests over the project assets, the Appellant cannot now contend that the Mortgage Deed dated 29.07.2021 was merely a continuation of an already perfected security. It is also to be noted that the DSA provided for creation of First Charge on the property, but a second

charge was created on the same, without even a NOC from the first charge holder Yes Bank. The delayed creation of the mortgage immediately preceding commencement of CIRP materially altered the Appellant's position from that of an unsecured creditor to a secured creditor and therefore squarely attracts the mischief sought to be prevented under Section 43 of the Code.

65. In insolvency law, there is a clear distinction between a contractual promise to create security and an actually perfected security interest enforceable against third parties. The DSA may have contemplated future creation of security; however, until the Mortgage Deed dated 29.07.2021 was executed and registered, the Appellant did not possess a perfected secured interest capable of enforcement against the insolvency estate. As noted above the Mortgage Deed dated 29.07.2021 is also not in consonance with the DSA in view of execution beyond the time frame prescribed in the DSA and creation of second charge instead of first charge as contemplated by DSA. We are therefore unable to accept the submission of the Appellant that the mortgage merely "related back" to the year 2014. This aspect becomes clear from the **Clause 3 of the Deed of Mortgage dated 29.07.2021:**

*"3. In terms of the Debenture Subscription Agreement ("DSA") dated December 18, 2014 executed, Inter alia, between the Mortgagor and the Mortgagee, the Mortgagor had created a first ranking and exclusive charge in favour of the Mortgagee on certain area/flats/premises part of the Mortgagor's Share of Santacruz Project to secure the payment of the Secured Obligations (as. defined hereinafter) to the Mortgagee ("**Preliminary Mortgage in favour of Mortgagee**") and the Parties had agreed to execute a separate deed of mortgage to capture the detailed terms and conditions of the*

mortgage and the register the same. However, till date, the said separate deed of mortgage is yet not executed.

(Emphasis supplied)

66. We further find substance in the submission of the Resolution Professional that the Mortgage Deed was executed solely for securing antecedent debt, as no fresh loan or financial assistance was granted by the Appellant at the time of execution of the Mortgage Deed in July 2021. The mortgage was admittedly created only to secure liabilities arising under the DSA executed nearly seven years earlier.

67. The Appellant has repeatedly argued that the mortgage created only a second charge subordinate to Yes Bank and therefore no real benefit was conferred upon it. We are unable to accept this submission. Even a second charge constitutes a secured interest in law. The test under Section 43 is not whether the creditor became the highest-ranking secured creditor, but whether the creditor was placed in a more beneficial position, than it would otherwise have occupied under Section 53. In the present case, the answer to this question is clearly in the affirmative.

68. The timing of the transaction is also extremely significant. The Mortgage Deed was executed on 29.07.2021, whereas CIRP commenced on 06.09.2021. We have also verified the records of Ld. NCLT from its portal which shows that the Application for initiating CIRP against the Corporate Debtor was filed by a Financial Creditor SBICAP Trustee Co. Ltd. on 20/03/2021 and the same was registered on 22/04/2021. Thus, the impugned transaction which was entered into by the CD, 3 months after

the Sec. 7 Application against the Corporate Debtor was registered in NCLT and barely two months prior to commencement of CIRP and squarely falls within the statutory look-back period prescribed under Section 43(4) of the Code. The fact that the debt itself was nearly seven years old, but the mortgage securing the said debt was created just 3 months after the application under Sec. 7 is filed by a financial creditor against the CD and before commencement of insolvency proceedings, strongly supports the conclusion that the transaction was entered with the intention to secure the Appellant's interest and had the effect of improving the Appellant's position at the cost of other creditors.

69. We also do not find merit in the submission of the Appellant that the transaction falls within the exception of "ordinary course of business" under Section 43(3). The object of Section 43(3) is to protect routine and ordinary commercial transactions undertaken in the normal course of business. A mortgage executed seven years after disbursement of funds, securing an old debt, and executed after application under Sec. 7 of the Code is registered against the Corporate Debtor and only weeks before commencement of CIRP, cannot be treated as an ordinary commercial transaction. Such delayed creation of security is clearly distinguishable from ordinary financing transactions where security is created contemporaneously with the lending itself.

70. Further, as we have noted from the records that the DSA originally contemplated creation of a first charge. However, the Mortgage Deed ultimately created only a second charge arrangement over certain identified

units. This itself demonstrates that the Mortgage Deed was not merely a ministerial or mechanical continuation of the DSA, but was a fresh and substantially altered arrangement entered into under changed financial circumstances.

71. We also cannot ignore the broader purpose behind the avoidance provisions under the IBC. Sections 43 to 51 of the Code are intended to ensure that, during the twilight period preceding insolvency, the assets of the Corporate Debtor are not used to selectively improve the position of certain creditors at the expense of others. If creditors are permitted to obtain security for old unsecured debts immediately before commencement of CIRP merely on the basis of earlier contractual promises, the entire object of Section 43 would stand defeated.

72. The reliance placed by the Resolution Professional on the judgment of the Hon'ble Supreme Court in "*Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. Interim Resolution Professional vs. Axis Bank Ltd. & Ors.*" [(2020) 8 SCC 401] is also well founded. The Hon'ble Supreme Court in this case laid down that while determining whether a transaction is preferential, the Court must examine five questions: whether the transfer was for the benefit of a creditor; whether it related to antecedent debt; whether it improved the creditor's position under Section 53; whether it was within the statutory look-back period; and whether it was excluded under Section 43(3). Applying the above principles to the facts of the present case, we find that all the ingredients of Section 43 stand fully satisfied.

73. The Hon'ble Supreme Court in *Anuj Jain (Supra)* while analysing Section 43 of the Code has laid down 5 questions which have to be answered in order to arrive at the conclusion, whether a transaction is be classified as preferential under Section 43 of the Code or not. The facts of the present case have been analysed through the 5 questions of the aforesaid judgement:

- a) *whether such transfer is for the benefit of a creditor or a surety or a guarantor* – It is an admitted fact that the Appellant is a creditor of the CD and creation of security interest is for the benefit of the creditor.
- b) *whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor* –It is an admitted fact that such transfer is on account of an antecedent financial debt provided by the Appellant.
- c) *whether such transfer has the effect of putting such creditor surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with section 53* – Considering the fact that the *creation* of security interest in favour of the Appellant has changed the status of the Appellant from unsecured creditor to secured creditor thereby placing it on a much beneficial position in case of distribution of assets under Section 53 of the code.
- d) *if such transfer had been for the benefit of a related party (other than an employee), whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date* – It is admitted that the aforesaid security interest has been created within a period one year preceding the insolvency commencement date and therefore is deemed be preferential.
- e) *whether such transfer is not an excluded transaction in terms of sub-section (3) of section 43* –a transaction is excluded from being ruled

as preferential if the same is being carried out in the ordinary course of business of the Corporate Debtor as well the creditor. In this case, the transaction is being carried out 7 years from the date of underlying transaction, wherein the time period provided in the Debenture Security Agreement (DSA) was only 30 days. Such a transaction, by no stretch of imagination could be termed as being conducted in ordinary course of business.

74. It is clear from the discussion above that the Appellant is the financial creditor who is the beneficiary of such transaction; the transaction was executed in respect of antecedent debt; it materially improved the position of the Appellant under Section 53 of the Code; it was executed within the statutory look-back period; and it does not fall within the ordinary course of business exception under Section 43(3). It is therefore squarely covered by the ratio laid down in *Anuj Jain (Supra)*. Accordingly, we are satisfied that the Mortgage Deed dated 29.07.2021 constituted a preferential transaction within the meaning of Section 43 of the Insolvency and Bankruptcy Code, 2016.

75. The respondent has relied upon several cases which are discussed below:

(i) In "*Mrutunjay Pani & Anr. vs. Narmada Bala Sasmal & Anr.*", the Hon'ble Supreme Court discussed the principle that no person should be allowed to take advantage of his own wrong. The Appellant has relied upon this principle by arguing that since the Corporate Debtor was required under the DSA to perfect the security, the Respondents cannot now rely upon absence of perfected security.

However, the issue before us is not limited to contractual obligations between the parties. The issue is whether the Mortgage Deed dated 29.07.2021 amounts to a preferential transaction under Section 43 of the IBC. Even if the Corporate Debtor had originally agreed to create security, the admitted position is that no perfected mortgage or enforceable charge existed in favour of the Appellant for nearly seven years, even though the agreement provided a period of 30 days only. The avoidance provisions under the IBC are concerned with the effect and timing of the transaction on the insolvency process and on other creditors. Therefore, the equitable principle discussed in *Mrutunjay Pani (Supra)* cannot override the statutory provisions of Section 43. Accordingly, the said judgment is not applicable to the facts of the present case.

(ii) Similarly, *Indore Development Authority vs. Shailendra (supra)* and *Indore Development Authority vs. Manoharlal & Ors. (supra)* were rendered in the context of land acquisition matters and interpretation of rights under the Land Acquisition Act. The observations made therein regarding a party not being permitted to take advantage of its own wrong were made in a completely different statutory context. In the present case, the matter is governed by the special provisions of the Insolvency and Bankruptcy Code, particularly Sections 43 and 53. The question before us is whether the impugned transaction improved the position of the Appellant during the look-back period immediately preceding commencement of CIRP. Once the ingredients of Section 43

stand satisfied, general equitable principles cannot dilute the operation of the statutory provisions under the IBC. Therefore, the aforesaid judgments are clearly distinguishable and do not assist the Appellant.

(iii) The appellants reliance placed upon *Vistra ITCL (India) Limited (supra)* also misplaced. The proceedings in the said case related to interim arrangements concerning voting rights and participation during CIRP. The Adjudicating Authority did not decide the validity of the Mortgage Deed dated 29.07.2021, it did not question the authenticity of the same. The issue before us is whether the Mortgage Deed constitutes a preferential transaction under Section 43 of the code and whether the same is liable to be avoided under the Code. Merely because interim directions may have been passed regarding voting rights or participation in CoC meetings cannot amount to a final finding that the Appellant was a secured creditor for all purposes under the IBC. Further, the Appellant's argument that its participation as a secured financial creditor is necessary for ensuring fairness in CIRP cannot override the statutory provisions of Sections 43 and 53 of the Code. Once the transaction itself is found to be preferential and avoidable in law, the Appellant cannot claim continuation of secured status merely on the basis of participation in CoC proceedings. Therefore, the said judgment does not help the case of the Appellant.

76. In view of findings above, we do not find any infirmity in the Impugned Order. The Appeal, being devoid of merit, stands dismissed. No order as to costs. Pending IA's if any, are closed.

**[Justice Ashok Bhushan]
Chairperson**

**[Mr. Indevar Pandey]
Member (Technical)**

Place: New Delhi

Harleen/
Pragya (LRA)