NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT-III

I.A. No. 2414 of 2020
IN
C.P.No.579/IB/MB/C-III/2018

Anil Goel

Liquidator of M/s Birla Cotsyn (India) Limited,

E-10A, Kailash Colony, New Delhi 110048

…..**Applicant**

Vs.

1. Sona Cotsyn Private Limited …..**Respondent No.1**

2. Melstar Information Technologies Limited
   Melstar House, G-4, MIDC Cross Road, "A",
   Andheri (East), Mumbai.

....Respondent No.2

3. Amadeus Retail LLP
   148, OM Tower Pur Road
   Bhilwara, Rajasthan 311001

....Respondent No.3

4. Rohstoffe Internatinoal Private Limited
   1304, Regent Chambers,
   Jamnalal Bajaj Road, Nariman Point
   Mumbai, 400021

....Respondent No.4

5. Wendt Corporate Services Private Limited
   1304, Regent Chambers,
   Jamnalal Bajaj Road, Nariman Point
   Mumbai, 400021

....Respondent No.5

6. Wendit Holding Private Limited
   1304, Regent Chambers,
   Jamnalal Bajaj Road, Nariman Point
   Mumbai, 400021

....Respondent No.6

In the matter of

Edelweiss Asset Reconstruction Co. Ltd.

....Financial Creditor

Vs.

M/s Birla Cotsyn (India) Limited

.....Corporate Debtor

Order Pronounced on: 20.11.2023

Coram:

MS. LAKSHMI GURUNG, HON'BLE MEMBER (J)
SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

Appearance:

For the Liquidator:	Adv. Prashansha Agrawal
For the Respondent Nos. 1 & 4:	Mr. Gaurav Joshi, Senior Advocate a/w Adv. Umang Mehta & Adv. Aamir Attari
For the Respondent No.5:	Adv. Nausher Kohli a/w Adv. Umang Mehta

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Per Corum

ORDER

1. This application has been filed by the Liquidator of M/s Birla Cotsyn India Limited (hereinafter referred as **"Applicant"**) seeking certain transactions to be declared as preferential transactions covered under section 43 of the Insolvency and Bankruptcy Code, 2016 (**IBC/Code**) and consequential directions to the Respondents to contribute the amount of total transactions.
2. Ms. Prashansha Agrawal, Ld. Counsel for the Applicant made following submissions:-

   2.1. Respondent No 1 and Respondent No.4 is one and the same entity as Rohstoffe International Pvt. Ltd. was earlier known a Sona Cotsyn Pvt. Ltd.

   2.2. On the basis of the legal advice, the Applicant has dropped the allegation of Respondents being 'related party' resulting in reduction of look back period and consequential reduction in the amount claimed.

   2.3. Applicant is not pressing prayers against Respondent No. 2 and Respondent No. 6.

   Therefore, as per the Applicant many of the transactions initially claimed as preferential transactions are excluded from the ambit of section 43 of IBC and only prayers sought are against R-1, R-3 and R-5 which are discussed in subsequent paragraphs.

Brief background facts

3. M/s Birla Cotsyn (India) Limited (hereinafter referred as "**Corporate Debtor/CD**") was incorporated under the Companies Act, 1913 on 24.09.1941 and was doing well in the past. But due to unfavorable circumstances, huge losses were incurred during the financial year 2012-13 and consequently all bank accounts of the Corporate Debtor

were declared as non-performing asset by the banks, though the Corporate Debtor continued as a going concern.

4. On an Application filed by Edelweiss Asset Reconstruction Company Limited (**"Financial Creditor"**) under Section 7 of the Insolvency and Bankruptcy Code, 2016, the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (hereinafter referred as "**CIRP**") vide Order dated **20.11.2018** and Ms. Sujata Chattopadhyay was appointed as the Interim Resolution Professional**.** Thereafter, the Interim Resolution Professional was appointed as the Resolution Professional (**"RP"**) in the 14th Meeting of Committee of Creditors ('**COC**') on 20.12.2018.

5. The RP appointed M/s IIRIS Consulting as the Forensic Auditor vide engagement letter dated 20.02.2019 consequent to which the Forensic Auditor had submitted its report dated **15.04.2019** (**"Forensic Report"**). From the said forensic report, the RP did not form an opinion or determination that the corporate debtor had been subjected to any transaction covered under section 43 as is required under Regulation 35A of the Insolvency and Bankruptcy Board of India (Resolution Process for Corporate Persons), Regulations 2016.

6. As insolvency resolution of corporate debtor could not be achieved. Resultantly, liquidation process of the Corporate Debtor was initiated on **24.09.2019** and the Applicant was appointed as the Liquidator.

7. It was at this stage that the liquidator considered the forensic report dated 15.04.2019 and determined that following transactions undertaken by the Corporate Debtor, as mentioned in the application

are covered as preferential transactions under Section 43 of the Code,:-

Sr. No.	Preferential Transaction	With	Amount in Rs.
1.	Loan Given To CD And Share Capital Issued By CD To Company In March 2018-	Melstar Information Technologies Pvt. Ltd. **(R-2)**	1,79,35,296/-
2.	Advance payment	Amadeus Retail LLP related party) (**R-3)**	8,08,250/-
3.	Rohstoffe International Private Limited / Sona Cotsyn Pvt. Ltd.	**R-1/R-4**	2,59,00,000/-
4.	Rohstoffe International Pvt. Ltd. /Sona Cotsyn Pvt. Ltd.	**R-1/R-4**	2,10,00,000/-
5.	Wendt Corporate Services Pvt. Ltd.	**R-5**	1,50,00,000/-
6.	Wendt Corporate (Expenses A/c)		2,46,000/-
7.	Wendt Holding Pvt. Ltd.	**R-6**	8,50,000/-
8.	Wendt Management Consultants Proprietor	No Respondent	37,43,000/-
9.	Sale of cotton waste of SPG Multi Trade Pvt. Ltd.	No Respondent	12,22,764/-
	Total		**8,67,05,310/-**

8. During the hearing, the parties jointly submitted that R-1 and R-4 is one and the same entity because M/s Rohstoffe International Private Limited was earlier known as Sona Cotsyn Private Limited. Therefore, for ease of reference we have referred **R-1 to also mean and include R-4**.

9. Ld. Counsel appearing for the Liquidator, candidly submitted that initially the liquidator treated the Respondents as related parties and accordingly moved the present application against them. However, according to a legal advice received, the Applicant admits that the Respondents cannot be treated as related parties. The effect of the same would be that some of the alleged preferential transactions with Respondents are now excluded being beyond the look back period which is now reduced by one year. Therefore, the amounts claimed in the present application would stand reduced.

10. The main reason why these transactions are considered preferential transactions by the Applicant is that transactions were undertaken during the period when the corporate debtor had defaulted in repayment of the loans to banks but made payments to the Respondents.

11. The Affidavit in reply was filed by R-1 and R-5 explaining that the alleged transactions were undertaken in the **ordinary course of business.** Therefore, even if, the alleged transactions fall under sub-section (2) of section 43, they fall in the exception carved out by the sub-section (3) of the section 43 of the Code.

12. The nature of alleged preferential transactions and submissions of the Applicant and Respondents qua the said transactions are given below against each transaction for ease of reference:-

A. Transaction with Rohstoffe International Private Limited/Sona Cotsyn Private Limited (R-1)

i. Initially, the liquidator had alleged preferential transactions amounting to Rs.4,69,00,000/- out of which Rs. 2,59,00,000/- on account of purchases made from R-1 and Rs. 2,10,00,000/- on account of sales made to R-1. During the oral hearing as well as by way of written submissions, the Applicant reduced the claimed amount to Rs. 185,53,514/- only, on account of purchase of cotton bales by the Corporate Debtor from R-1 and the only allegation is that purchases were made within a short span of one month from February 2018 to March 2018.

ii. Per contra, Mr. Guarav Joshi, Senior Advocate on behalf of R-1 submitted that Corporate Debtor is engaged in the business of manufacturing cotton yarn and requires cotton bales as raw material to manufacture its finished products. The CD and R-1 have had past business relations and CD has been purchasing the cotton bales from it. It annexed invoices for the said supply and the GST returns to substantiate the payment of GST. He further submitted that the said purchases have been undertaken at prevailing market rates which has been confirmed by the forensic auditor in the forensic report. In the light of the same, the alleged transactions are in a usual course of business of the Corporate Debtor.

B. <u>Transaction with Amadeus Retail LLP (R-3)</u>

i. The CD had paid an advance of Rs. 3,11,000/- in 2018 to R-3 towards purchase of blazers for a total amount of Rs. 8,08,250/- and paid the balance amount of Rs. 4,97,200/- in May/June 2018. Since the payment was made during the look back period, the Applicant treated it as preferential transaction under section 43 of the Code, treating R-3 as the related party.

ii. None appeared for R-3 and no reply has been filed on behalf of R-3. However, this Bench has perused the ledger annexed to the application and also the relevant pages of the forensic audit report pertaining to the purchase of blazers to arrive at its decision as discussed in subsequent paragraphs.

C. Wendt Corporate Services Limited (R-5)

i. Initially, the liquidator had clubbed the various payments made to entities at Sr. Nos. 5, 6, 7 & 8 in the Table in paragraph 7 above and had claimed an amount of Rs. 1,98,39,000/- as preferential transactions. However, after receiving the legal advice, the Applicant has reduced the claim to Rs.1,07,84,200/- paid to the Respondent No.5 against Consultancy Services from 28.11.2017 to 29.11.2018 on the ground that the Invoices indicate Consultancy Charges for Technical Improvement in Production whereas the CD was unable to repay loan to banks.

ii. Per contra it was submitted by the Ld. Counsel appearing for R-5 that R-5 is engaged in providing consulting services relating to marketing of finished goods, selection and arrangement of raw materials, daily production plans, coordinating with senior management team etc. The Corporate Debtor was struggling in difficult phase and to ensure product improvement better efficiency, cost saving measures, etc. appointed R-5 as a consultant of the Corporate Debtor vide an appointment letter dated 01.04.2017. The services rendered by R-5 are in the ordinary course of business of R-5 and was also in the ordinary course of business of the CD appointed it as a desperate measure to improve and achieve efficiency in its business operations. R-5 has annexed invoices and GST returns to substantiate the same.

13. The Applicant submits that the above narrated transactions are not in the ordinary course of business because the payments have been made to the Respondents when the Corporate Debtor was facing financial difficulties and therefore, it amounts to preference over other creditors of the Corporate Debtor.

14. The applicant has relied upon the judgments passed by the Hon'ble Supreme Court in the case of ***Anuj Jain, IRP for Jaypee Infratech Limited Versus Axis Bank Limited and Others*** and order passed by Hon'ble NCLAT in the case of ***"Sahyog Infrastructures Pvt. Ltd and Ors. vs. Anju Agarwal, RP of IP Constructions Pvt. Ltd., Company Appeal No.1367 of 2022.***

15. Mr. Gaurav Joshi, Senior Advocate on behalf of R-1 submitted that the requirements of Section 43 of the Code have not been satisfied in the present instance. Section 43(2) defines a preferential transaction as a 'transfer of property or an interest thereof of the Corporate Debtor'. Thus, the transaction must involve the transfer of property owned by and/or belonging to the Corporate Debtor. Additionally, the

transaction must have the effect of placing the creditor and/or surety and/or guarantor to whom property has been transferred in a beneficial position in case of a distribution of assets under Section 53 of the Code. Nothing of this kind has been brought out by the Applicant. According to him, question of a transfer of property to the said Respondent did not arise at all. It was in fact a transfer of property of the Respondent to the Corporate Debtor for the business operations of the Corporate Debtor. The transaction of purchase of cotton bales from the R-1 was in the nature of a supply of raw material, which was utilized by the Corporate Debtor in the manufacture of yarn. This transaction took place on an arms-length basis, and has been corroborated by the Forensic Report itself. The Forensic Auditor appointed by the Resolution Professional had found that the sales in question were reasonable. The Forensic Report did not cast any doubt of suspicion over these transactions.

16. It is submitted that the Applicant has failed to make out any case establishing how a preference has been given in regards to the transaction in question in terms of the provision of Section 43(2) of the Code. It is clear from the section that in order to classify any transaction as preferential transaction u/s 43, the following ingredients ought to be satisfied:

   a. The recipient has to be either a creditor or surety or guarantor
   b. There has to be transfer of property or an interest thereof of the corporate debtor.
   c. The transfer of asset or money should have placed the creditor in beneficial position as compared to his position u/s 53 of the Code.

17. He further submitted that even if it were to be assumed that the requirements to attract the applicability of Section 43 of the Code were satisfied in the present instance, the alleged transactions in question are transactions conducted in the ordinary course of business and expressly excluded from its ambit under sub section (3) of section 43.

18. The Respondent No. 1 relied upon the judgement passed by the Hon'ble Supreme Court in ***Anuj Jain, IRP for Jaypee Infratech Limited Versus Axis Bank Limited and Others*** wherein the Hon'ble Supreme Court has held that "*the result of discussion in the foregoing paragraphs is that the transfers in question could be considered outside the purview of sub- section (2) of section 43 of the Code only if it could be shown that the same were made in the ordinary course of business or financial affairs".*

19. Mr. Nauser Kohli appearing on behalf of Respondent No. 5 argued on the same lines and adopted the legal submissions made by Mr. Gaurav Joshi but explained the nature of transactions. He submitted that it is absurd to brand the transactions made in the ordinary course of business as preferential transactions under the mischief of section 43 merely because the entity and its directors are known to the Corporate Debtor. He further submitted that the payments were made to R-5 for current dues towards professional services and not for any past dues and if the current dues are not paid, the professionals are bound to discontinue the services which shall be detrimental to the Corporate Debtor.

20. Ld. Counsel further submitted that the Respondent has learnt that erstwhile management had provided very detailed response/

clarifications on issues raised in the forensic audit report. The RP being satisfied with the reply by ex-management came to conclusion that no case is made out for filing an application under Section 43 of the IBC. While basing the allegations only on the forensic report, the Applicant did not seek any response from the Respondent in regard to issues concerning the Respondent before drawing adverse inferences against it. The Applicant is guilty of suppression of all relevant facts and therefore, the application ought to be dismissed.

FINDINGS & OBSERVATIONS

21. Heard the counsel appearing for the Applicant Liquidator and for Respondent No. 1 and 5 and perused the material on record.

22. The arguments put forth by the Applicant are that the Respondent No.1, 3 and 5 supplied goods and services to the Corporate Debtor and were therefore owed 'Antecedent Operational Debt' by the Corporate Debtor and that it is on account of this Operational Debt of the Respondent No.1, 3 and 5 that the aforesaid amounts were transferred to them by the Corporate Debtor. Being the Operational Creditors, the said Respondents would rank low in the waterfall mechanism as envisaged under Section 53 of the Code and would receive payment only after the Financial Creditors (Secured / Unsecured) and Workmen / Employees are paid off. However, entire payment has been made to the Respondents prior to the commencement of the Corporate Insolvency Resolution Process of the Corporate Debtor before satisfying the Debt of the Financial Creditors thereby, putting them in a better position than they would have been in the event of Distribution as envisaged under Section 53 of the Code.

23. The nature of the transactions and the submissions of the parties have already been mentioned in para 12 above. We must examine the scope of section 43 which 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 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 transfer-

(a) transfer made in the ordinary course of 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."

24. Section 43 of IBC is a deeming provision and any transaction covered by sub-section (2) falls within the ambit of preferential transaction. However, sub-section (3) lays down exceptions one of which is when transfer is made in the **ordinary course of the business** of the Corporate Debtor and the transferee.

25. Respondents No. 1 and 5 were present and have vehemently asserted that the alleged transactions by the Applicant are made in the ordinary course of business of the CD and the Respondents. None appeared for Respondent No. 3. The moot question in all the transactions to be examined is whether the transactions were undertaken in the ordinary course of business or not. If they are undertaken in the ordinary course of business then they are covered by the exception under 43(3)(a) of the Code.

26. The term ordinary course of business has not been defined under the Code. According to the Black's Law Dictionary meaning of ordinary course of business is ***the normal routine in managing a trade or business."*** We get some more clarity from the Guidance Note of related party transaction issued by Institute of Company Secretaries, which is also referred to by the Hon'ble NCLAT in the Judgement of **Sahyog Infrastructure Private Limited and Ors. Vs. Anuj Agarwal** wherein the Hon'ble NCLAT held that the guidance note has persuasive value though it cannot be read in place of statutory provisions. The guidance notice could be correct in attempting the definition of ordinary course of business.

Guidance Note of related party transaction issued by Institute of Company Secretaries

*"In common parlance, **<u>'ordinary course of business' would include transactions which are entered into in the normal course of business pursuant to or for promoting or in furtherance of the company's business objectives</u>**, as per the charter documents of the company. For example, in case of a manufacturing company, purchase and sale of goods, taking premises on lease/rent, construction of factory, employing workers, etc. will be considered as ordinary course of business. To carry on a business, several activities are carried on by the company; all such activities will be considered to be in the ordinary course of business.*

However, if a manufacturing company, for the purpose of diversification, decides to acquire another company which is engaged in a completely unrelated business, this activity will not be considered to be in the ordinary course of business.

To decide whether an activity which is carried on by the business is in the ordinary course of business, the following factors may be considered:

a. *Whether the activity is covered in the objects clause of the Memorandum of Association*
b. *Whether the activity is in furtherance of the business*
c. *Whether the activity is normal or otherwise routine for the particular business (i.e. activities like advertising, staff training etc).*
d. *Whether the activity is repetitive/frequent*
e. *Whether the income, if any, earned from such activity/transaction is treated as business income in the company's books of account*
f. *Whether the transactions are common in the particular industry*
g. *Whether there is any historical practice to conduct such activities*
h. *The financial scale of the activity with regard to the operations of the business*

i. Revenue generated by the activity
j. Resources committed to the activity

The above list is not exhaustive. Individually, none of the above parameters can amounts to the transactions being in the ordinary course of business.

In other words, any activity which is routine and in accordance with the usual customs and practices of a particular business can be described to be 'in the ordinary course of business'. For a company, the interpretation needs to be contextual, taking into account the nature of the activity and its relevance in the overall context of the company's business".

27. In view of the above background, let us examine the alleged transactions one by one.

Transaction with Rohstoffe International Private Limited/Sona Cotsyn Private Limited (R-1)

28. The nature of alleged transactions with R-1 has been explained by the Applicant as purchase of cotton bales by the Corporate Debtor. Since the Applicant has subsequently been advised that Respondent No.1 is not a Related Party. Therefore, the look back period is one year prior to the commencement of the insolvency date (i.e. 20.09.2018), hence, the amount claimed from R-1 is reduced to Rs. 185,53,514/-. The only allegation is that purchases were made within a short span of one month from February 2018 to March 2018.

29. We have given our thoughtful consideration. We have also perused the ledger account of R-1 in the books of CD which annexed to the application as well as the Annexure K attached to the Forensic Report

which gives the observations about the alleged transactions. According to the ledger account, R-1 has supplied cotton bales to the CD for a total amount of Rs. 2.59 odd crores. R-1's account was debited by approx. Rs. 2 lakhs on account of low parameters and the CD made aggregate payment of Rs. 1.85 odd crores to R-1 leaving a balance of Rs. 72 lakhs.

30. During the hearing of the case, question was put to the Ld. Counsel for Applicant whether the CD was running as a going concern at the relevant point of time and whether payments were made to other creditors also apart from the Respondents in this application. After seeking some time Ld. Counsel submitted that the CD was running as a going concern at the relevant time and payments were being made to other creditors also.

31. We tried to examine if any special circumstances existed to give any preference to R-1. We note that the CD is engaged in the business of manufacturing of cotton yarn and the transactions of purchase of cotton bales, being raw material for the finished products of CD, are routine and in furtherance of the business of the CD. It is not the case of the Applicant that R-1 does not deal in the business of cotton bales. In fact, the CD has been purchasing the cotton bales from R-1 in the past also, beyond the look back period. We also note the Observation in the Forensic Report relating to the purchases made from R-1 as ***"the rates of purchase @ 40,500 and @ 40,300 are reasonable.".*** Further it is mentioned in the Forensic Report that Purchases of Raw Material (Cotton) have been done from various parties. During the period from 01.04.2028 to 10.12.208 net purchases of Rs. 45.21 Crores have been made at different prices from vendors. Few suppliers have been mentioned from whom purchases have been

made during the period from 01.04.2018 to 10.12.2018. To name a few of them Saraswati Ginning and Pressing Factory, Avantika Ginning Factory, Govardhandas Motilal Bhadeeh Ginning Industries, Jay Cott Fibres. It is not the case of the Applicant that no payments were made to other vendors and only payments were made to R-1. We further observe that there is still outstanding payment of approx. Rs.72 lakhs which has not been paid by the CD and R-1 explained that this was one of the reasons for not supplying the further raw material to the CD after March 2018. From the above mentioned facts, it is clear that CD had been running as a going concern and purchasing raw materials from various vendors including R-1 and was also making payments to the Vendors. The Applicant has not been able to explain how the routine purchase of raw materials is not in the ordinary course of business. Thus, after examining from all angles and considering the facts and circumstances of the transaction, we are of the considered view that the purchase of cotton bales by the CD during the period from February 2018 to March 2018 and the payments made for such purchases to R-1 is in the ordinary course of business and is covered under exception under subsection (3) of the section 43 of IBC.

Purchase of Blazers from Amadeus Retail LLP (Respondent No.3)

32. The alleged transaction is purchase of blazers worth Rs.8,08,250/- in April 2018 from the Respondent No.3 by paying advance of Rs. 3,11,000/- in February 2018 and the remaining Rs.4,97,200/- in May/June 2018.

33. None appeared for the R-3. However, this Tribunal has perused the ledger annexed to the application and also the relevant pages of the forensic audit report pertaining to the purchase of blazers. It is

mentioned in the Forensic Report that advance amounting to Rs. 3,11,000/- is given to Amadeus Retail LLP which is a concern indirectly related to the Corporate Debtor. It is further observed that stock wise details are not maintained in the books of account by the CD i.e. details of quantity of each type of blazer purchase, rate, discount given, details of purchase (input) and details of sale (output) of the blazer and the rate at which the sales have been made. The advance payment was adjusted in form of purchase of blazers. Sale of blazer was done in cash to the tune of Rs. 69,910/-. Total quantity of blazers sold is 31 blazers as compared to 341 blazers purchased. The remaining blazers in stock have been shown as closing stock as on 11.11.2018 at Rs. 675,488/-.

34. We have given our thoughtful consideration to the said transaction to form an opinion whether sale and purchase of blazers is in ordinary course of business or not. The CD is engaged in the manufacture and sale of fabric and dealing in allied business activities is a routine business decision. Further, though forensic report states that there is no stock in the tally record yet upon reconciliation, the quantity of blazer purchased, sold and in stock are correctly recorded and reflected in the books of account. There is nothing extraordinary to exclude the above transaction from ordinary course of business. The advance payment of Rs. 3,11,000/- in any case cannot be on account of an antecedent operational debt. In the light of above discussions, we are of the considered view that the Applicant has not made out a case for preferential transaction under Section 43 of the Code.

Wendt Corporate Services Limited (Respondent No.5)

35. The Applicant had initially sought a relief of contribution of Rs. 1,98,39,000/- from Respondent No.5. At the time of oral submissions

and in written submission, the applicant submitted that claim of R-5 being a related party is dropped and therefore, the lookback period for R-5 is one year prior to the commencement of the CIRP. Accordingly, the amount now claimed from the Respondent No.5 has been reduced to Rs. 1,07,84,200/- which was paid against Consultancy Services from 28th November 2017 to 29th October 2018 and invoices indicate consultancy charges for technical improvement in production whereas the CD was facing financial stress.

36. In its reply and written submission by R-5 it is explained that R-5 is engaged in providing consulting services relating to marketing of finished goods, selection and arrangement of raw materials, daily production plans, coordinating with senior management team etc. The Corporate Debtor was struggling in difficult phase and to ensure product improvement better efficiency, cost saving measures, it appointed R-5 as its consultant vide an appointment letter dated 01.04.2017 which is in the usual course of business.

37. We have heard the parties and also examined the observations given in the Forensic Report on the basis of which the present application was filed by the Applicant. The Forensic Report has treated the alleged transaction is with potentially related party. It is mentioned that the level of quantum of operations at which CD is operating, the payment of any form of fees needs to be justified as to in what respect such huge consultancy payments have been done. It is further mentioned that the CFO of the CD had informed the forensic auditor that these fee payments were made for consultancy towards amendments and extension of megaproject of the Corporate Debtor.

38. Considering the entirety of facts and circumstances we note that the CD was struggling with financial losses and to improve efficiency of business operations, it appointed R-5 on monthly consultancy basis. The factum of R-5 being an entity engaged in consultancy services, raising of invoices by R-5 and GST returns of R-5 has not been denied by the Applicant. It is also admitted in the Forensic Report that the CFO of CD informed Forensic auditor that fee payments to R-5 were made for amendments and extension of the project of CD. We note that providing professional services is ordinary business of R-5 and availing such services is in the ordinary course of business of the CD. The services provided by the R-5 to the Corporate Debtor is for improvement in its business operations. Therefore, the said transaction was carried in a usual course of business of the CD. Further services rendered by R-5 have been supported by invoices raised upon the Corporate Debtor in which it has charged GST and paid GST as can be seen from the GST returns. There is nothing to establish that the said transactions were special or extraordinary in nature or beyond the primary objective of the CD especially in view of the fact that payments were made to the R-5 for current dues over the period of time and not in one single shot. In the light of above discussions, we are of the considered view that the Applicant has not made out a case for preferential transaction under Section 43 of the Code.

39. Now we deal with the cases relied upon by the Applicant. The applicant has relied upon the judgment of Hon'ble Supreme Court in the case of ***Anuj Jain, IRP for Jaypee Infratech Limited Versus Axis Bank Limited and Others.*** In this case, the Hon'ble Supreme Court of India was examining the transaction by the Corporate Debtor in mortgaging its assets for the loans advanced to its Holding

Company. The Hon'ble Court observed that furnishing a security is a normal business practice but it would become a part of ordinary course of business only if it falls in place as part of "the undistinguished common flow of business done" and is not arising out of "any special or particular situation". In this case Jaypee Infratech Ltd. (JIL) had mortgaged its property to secure working capital loan of approx. Rs. 30,000 crores provided to the Holding Company (JAL). JAL was also creditors to JIL. By way of such transactions, JAL was a beneficial and at advantageous position by creating security interest over the properties of the Corporate Debtor (JIL) and in the eventuality of distribution of assets under Section 53 of the Code, other creditors of JIL would be at the disadvantageous position. Therefore, the Hon'ble Supreme Court held that where the Corporate Debtor has mortgaged its assets for the benefits of its Holding Company putting its own creditors into disadvantageous position, it would be a preferential transaction under Section 43 of the Code. The facts of ***Jaypee Infratech Limited (supra)*** are clearly distinguishable from the facts of the present case in hand. The alleged transactions in the present case i.e. purchase of cotton bales (raw material), purchase of blazers for sale and remaining lying as closing stock, availing consultancy services for improvement of under distress business operations of the Corporate Debtor are falling under "undistinguished common flow of business" of the CD. During the hearing, the Bench repeatedly raised query to the Ld. Counsel for the Applicant to demonstrate how the alleged transactions are not in the ordinary course of business. However, learned Counsel is unable to explain the special nature of the transactions except to point out that by making the payment to the Respondents they were given preference over other creditors. Therefore, the judgment of ***Anuj Jain, IRP for Jaypee Infratech Limited Versus Axis Bank Limited and***

Others does not support the case of the Applicant. We have no doubt in arriving at the conclusion that the transactions undertaken in the present case are in the ordinary course of business and covered by the exception provided under 43(3) of the Code.

40. The Applicant has also relied upon the Judgment of the Hon'ble NCLAT in the matter of "***Sahyog Infrastructures Pvt. Ltd and Ors. vs. Anju Agarwal, RP of IP Constructions Pvt. Ltd., Company Appeal No.1367 of 2022***". In this case, Sahyog Infrastructures Pvt. Ltd. had claimed to have booked an Apartment with the Corporate Debtor against Payment of Security Deposit. An amount of Rs. 2.16 crores was repaid by the Corporate Debtor during the look back period to Sahyog Infrastructure Pvt. Ltd. claiming that booking was cancelled and the security deposit held in trust by CD was refunded. However, the repayment of security deposit was considered to be a Preferential Transaction and not in the 'Ordinary Course of Business' as no letter or communication of cancellation etc. was placed on record. Further the written agreement between Sahyog Infrastructures Pvt. Ltd and the Corporate Debtor was on Stamp Paper which was purchased from Uttar Pradesh though the Corporate Debtor had registered office at Delhi where e-stamp paper is mandatory. Therefore, the intention of the parties was under suspicion and such agreement was not relied upon. The Court held that payment of amount of Rs. 2.16 crores paid to Sahyog Infrastructure Pvt. Ltd. was not refund of security deposit but it was repayment of unsecured loan to a related party during look back period. Therefore, the facts are distinguishable and this case also does not support the Applicant.

41. The Applicant next relied upon paras 20 & 21 of the judgment of Royal Courts of Justice Strand, London, WC2A 2LL in the case of ***Michael Wilson & Partners, Ltd. Vs. John Forster Emmott,*** to contend that whether or not a payment is made in ordinary course of business will depend on the purpose of the payment and the course of business that must be ordinary. The relevant extract is reproduced below:

> *"20. **Whether a payment is made in the "proper course of business" is likely to depend on the purpose of the payment.** If the payment is to be made in order to discharge a pre-existing liability of the business incurred in good faith, them it is difficult to see how that would not be the "proper course of business". In the present case, having decided (or assumed) in MWP's favour that the KHI loan was genuine and that the rent was not inflated, it seems to me that the judge must have proceeded on the basis that both payments were made in the "proper course of business". He certainly made no finding that they were not.*
>
> *21. So the question then was: were the payment made "in the ordinary …course of business". That is not necessarily the same as asking whether the payments themselves were "ordinary": it is the course of business that the exception deals with. It is thus the course of business that must be "ordinary".*

42. We have gone through complete judgment to understand the context. In this case there was freezing order against MWP prohibiting it from making any payment except in the ordinary course of business. It was alleged that in violation of the said freezing injunction order, MWP transferred a huge amount to KHI towards consultancy/legal fee/expenses and towards payment of arrears of office rental, service and maintenance whereas KHI was an entity controlled by the sole

director of MWP. The Judge at the first instance decided that there was a breach of the freezing injunction order. However, on an appeal before the Appellate (Civil Division) Queen's Bench, the three judges unanimously held that a question to determine whether a transaction is in the ordinary course of business or not is highly fact sensitive question. Though the payment made by MWP to its related entity appears to be special transaction, however, considering all the circumstances surrounding the transaction, concluded that the alleged transactions were indeed in the ordinary course of MWP's business. Though, the judges cautioned that it does not mean that in all circumstances the repayment of indebtedness to associate companies will be regarded as falling within the ordinary course of business. This case also does not support the submissions of the Applicant.

43. We also find force in the submission of R-5 that after receiving the detailed clarifications on issues raised in the forensic audit report, the RP concluded that no case is made out for filing an application under Section 43. After obtaining the forensic audit report dated 15.04.2019 and after considering the detailed response if the RP formed an opinion that CD has been subjected to avoidance transactions under section 43, then as per Regulation 35A(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it was obligatory on her part to make a determination on or before the one hundred and fifteenth day of the insolvency commencement date. However, it appears that neither has the Resolution Professional formed any opinion or determination nor has she filed any application under Section 43 of the Code.

44. We cannot lose the sight of the matter that though in the pleading, the Applicant had initially treated the alleged transactions between Corporate Debtor and the Respondent as related party transactions. However, as already pointed out the allegation of related party has been dropped during the hearing of the matter. It appears the allegation of related party was based on the forensic report which mentioned that these transactions have taken between "potential related parties". It was the duty of the Applicant to determine whether the respondents are related parties or not. We note that despite forensic audit dated 15.04.2019, the RP did not form any such opinion/ determination.

45. The Applicant has a duty to establish to the satisfaction of this Tribunal, that the alleged transactions are of special nature and entered into to give any benefit/preference to the Respondents and therefore do not fall under the category of ordinary course of business. During the hearing when query was put to the Ld. Counsel for the Applicant to demonstrate any special circumstances it was admitted that the Corporate Debtor was running as a going concern and payments were made to the other creditors in the ordinary course of business. If that is the case where CD was running as a going concern and payments were being made to creditors and vendors, then we cannot appreciate how the alleged transactions of purchase of cotton bales, purchase and sale of blazers duly supported by closing stock, payment of consultancy for improving business efficiency of corporate debtor are not in the ordinary course of business of CD.

46. The Applicant has not made out a case of preferential transaction except making sweeping allegations which were earlier premised on the assumption that the alleged transactions were undertaken with a

related party and later such allegation was dropped. In view of the above facts and circumstances of the case, we are of the view that the alleged transactions were undertaken in the ordinary course of business, they are covered by the exception under sub-clause (3) of Section 43 and cannot be held as preferential transaction.

47. We find no merit in the present application which is liable to be rejected. Accordingly, the above application is **dismissed** and **disposed of.**

Sd/-	**Sd/-**
CHARANJEET SINGH GULATI	**LAKSHMI GURUNG**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**

/rks/