NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 405 of 2022

[Arising out of order dated 02.03.2022 passed by the National Company Law Tribunal, New Delhi in IA No. 5768 of 2020 in CP (IB) 814/ND/2019]

IN THE MATTER OF:

1. **GVR Consulting Services Pvt. Ltd.**
   A-58, Sector 65, Noida Vihar,
   Gautam Buddha Nagar, Uttar Pradesh-201301
   Email: atulprga@gmail.com **... Appellant No. 1.**
2. **GVR Electronics Pvt. Ltd.**
   A-58, Sector 65, Noida Vihar,
   Gautam Buddha Nagar, Uttar Pradesh-201301
   Email: atulprga@gmail.com **... Appellant No. 2.**

Versus

1. **Pooja Bahry**
   (Earstwhile Resolution Professional of NTL Electronics India Pvt. Ltd.)
   59/27, Prabhat Road, New Rohtak Road,
   New Delhi-110005.
   Email: pujabahry@yahoo.com ... **Respondent No. 1.**
2. **Praveen Gupta**
   Flat No. H-1001, Vrinda City, Plot No. GH-02,
   Sector PHI-IV, Greater Noida, Uttar Pradesh-201308
   Email: pgntl8@gmail.com ... **Respondent No. 2.**
3. **Arun Gupta**
   Flat No. 6012, ATS One Hamlet, Sector-104,
   Noida, Uttar Pradesh-201301
   Email: arungupta.feedback@gmail.com ...**Respondent No. 3.**
4. **Udal Singh**

Cont'd.../

567, Sector 37, Arun Vihar, Noida,
Uttar Pradesh-201303 ...**Respondent No. 4.**

Present:

For Appellants: Mr. Abhijeet Sinha, Ms. Aditi Sharma, Advocates

For Respondents: Ms. Pooja Mahajan, Advocate with Ms. Pooja Bahry (erstwhile RP).
Ms. Mehak Nayak, Advocate
Mr. Milan Singh Negi, Mr. Nikhil Jha, Advocates for R-2-4.

WITH
Company Appeal (AT) (Insolvency) No. 369 of 2022

[Arising out of order dated 02.03.2022 passed by the National Company Law Tribunal, New Delhi in IA No. 5768 of 2020 in CP (IB) 814/ND/2019]

IN THE MATTER OF:

Dyna Rasayan Ydyog Pvt. Ltd.
Having its registered office at
G-66/2 First Floor, Gautam Nagar,
New delhi-110049
Through its Director/Authorised Signatory
Mr. Santosh Kumar Maheshwari
Email: maheshwari sk@yahoo.com
Mob: 7827658301 ... **Appellant.**

Versus

1. **Pooja Bahry**
   Ex-Resolution Professional for Respondent No. 2
   59/27, Prabhat Road, New Rohtak Road,
   New Delhi-110005.
   Email: ercon@ercon-india.com
   Mob: 9811071716 ...**Respondent No. 1.**
2. **NTL Electronics India Ltd.**

Now Known as Narayan Industries Global Limited,
Having its registered office at
504-A, Nagarjuna Apartment Chilla Regulator,
Mayur Vihar, New Delhi-110096
Email: narayan47@narayanhome.com …**Respondent No. 2.**

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Gurcharan Singh Advocates.

For Respondents: Ms. Pooja Mahajan, Advocate with Ms. Pooja Bahry (erstwhile RP).
Mr. Gurcharan Singh, Ms. Mehak Nayak, Advocates

WITH
Company Appeal (AT) (Insolvency) No. 412 of 2022

[Arising out of order dated 02.03.2022 passed by the National Company Law Tribunal, New Delhi in IA No. 5768 of 2020 in CP (IB) 814/ND/2019]

IN THE MATTER OF

1. **Praveen Gupta**
Flat No. H-1001, Vrinda City, Plot No. GH-02,
Sector PHI-IV, Greater Noida, Uttar Pradesh-201308. **Appellant No. 1.**

2. **Arun Gupta**
Flat No. 6012, ATS One Hamlet, Sector-104,
Noida, Uttar Pradesh-201301. **Appellant No. 2.**

3. **Keshika Exports Pvt. Ltd.**
305, Guru Amar Dass Bhawan,
78, Nehru Place, New Delhi. **Appellant No. 3.**

Versus

Pooja Bahry
(Earstwhile Resolution Professional of NTL Electronics India Ltd.)
59/27, Prabhat Road, New Rohtak Road,
New Delhi-110005.
Email: pujabahry@yahoo.com ..**Respondent.**

Present:

For Appellant: Mr. Gaurav Mitra, Mr. Milan Singh Negi, Mr. Nikhil Jha, Advocates

For Respondent:- Ms. Pooja Mahajan, Advocate with Ms. Pooja Bahry (erstwhile RP).
Ms. Mehak Nayak, Advocate

J U D G M E N T

ASHOK BHUSHAN, J.

1. These three Appeals have been filed against the same Order dated 02nd March, 2022 passed by the National Company Law Tribunal, New Delhi, Bench-V (hereinafter referred to as **"The Adjudicating Authority"**) allowing I.A. No. 5768 of 2020 in Company Petition (IB) No. 814/ND/2019 filed by the Resolution Professional (RP in short) under Section 43 of the Insolvency and Bankruptcy Code, 2016 (Hereinafter referred to as **"The Code"**). The Adjudicating Authority by the Impugned Order held the transactions by the Corporate Debtor in favour of the Appellants as preferential transactions and directed to refund the respective amount. Aggrieved by this Order, these Appeals have been filed.

2. Company Appeal (AT) Ins. No. 405 of 2022 have been filed by the two Appellants namely GVR Consulting Services Pvt. Ltd. and GVR Electronics Pvt. Ltd. who were Respondent No. 4 and Respondent No. 7 to the I.A. No. 5768 of 2020. The Appellants are not related parties to the Corporate Debtor. The Resolution Professional filed the Application claiming transaction amounting to Rs. 1 Crore which were claimed to be repayment of unsecured loan on 04.09.2018, 11.09.2018, 24.09.2018, 25.09.2018 and 12.10.2018 totaling Rs. 1 Crore. Similarly, the total amount regarding Appellant No. 2 was Rs. 75 Lacs. Resolution Professional has pleaded in the Application that antecedent liability was discharged by the Corporate Debtor under the above transaction which was a preferential transaction.

3. Company Appeal (AT) Ins. No. 369 of 2022 has been filed by the Dyna Rasayan Udyog Pvt. Ltd. who was Respondent No. 6 to the I.A. No. 5768 of 2020. Resolution Professional in the Application has pleaded that Corporate Debtor had entered into a Loan Agreement dated 05.12.2015 with Respondent No. 6. As per ledger of Dyna Rasayan Udyog Pvt. Ltd. Corporate Debtor had payable balance of INR 2,04,48,767 as on 27.08.2017 which was discharged on 27.08.2018, 28.08.2018, 29.08.2018 and 29.08.2018 totaling Rs. 1,57,29,987/- which was claimed to be preferential transaction and has been held so by the Adjudicating Authority directing refund of the amount.

4. Company Appeal (AT) Ins. No. 412 of 2022 has been filed by the Praveen Gupta, Arun Gupta and Keshika Exports Pvt. Ltd. who were Respondent No. 1, 2 and 5 to the I.A. No. 5768 of 2020. Praveen Gupta

and Arun Gupta were managing directors of the Corporate Debtor till the commencement of the Corporate Insolvency Resolution Process (CIRP in short) and wherein the control of the Corporate Debtor and day to day actions for the entire period of the transaction. Keshika Exports Pvt Ltd – Appellant No. 3 was related party to the Corporate Debtor. The antecedent liability of the corporate debtor towards Respondent No. 1 Mr. Praveen Gupta was discharged making payment from 19.12.2017 to 02.03.2019 totaling to Rs. 1,97,50,000/- with respect to Appellant No. 2 Arun Gupta towards antecedent liability of the corporate debtor was discharged by making payment from 06.09.2017 to 05.12.2017 totaling Rs. 90,00,000/-. With regard to Appellant No. 3-Keshika Exports Pvt. Ltd., antecedent liability of the corporate debtor towards Appellant No. 3 was discharged on 31.08.2018 of amount of Rs. 2,49,338/-.

5. We may notice brief facts giving rise to these Appeals.

(i) CIRP against the Corporate Debtor commenced by Order dated 27.08.2019. On 16.09.2019 and 27.09.2019 public announcement was made. In CoC meeting dated 30.10.2019, Pooja Bahry was appointed as Resolution Professional of the Corporate Debtor.

(ii) On 09.09.2020, Resolution Professional appointed a Transaction Auditor i.e. Pipara & Co. to conduct the audit of the Corporate Debtor for the period 01.04.2016 to 27.08.2019. Transaction Auditor submitted its final report to the Resolution Professional. Resolution Professional has published Form-G. Resolution Plan was approved on 21.09.2020 by the CoC and on 28.09.2020, an Application being I.A. No. 4588 of 2020 under Section 30(6) of the

Code was filed by the RP seeking approval of the plan and on 28.01.2021, Resolution Plan was approved by the Adjudicating Authority.

(iii) Transaction Auditor has submitted a report on 09.09.2020 containing findings regarding certain transaction undertaken by the Corporate Debtor which report was placed before the CoC. On the Avoidance Application filed by the RP for avoiding various transactions in favour of the Respondents 1 to 7 to the Application I.A. No. 5768 of 2020. Notices were issued by the Adjudicating Authority on 16.02.2021. The Adjudicating Authority heard the arguments in avoidance application and reserved the order on 05th August 2021. The Order was delivered on 2nd March, 2022 by the Adjudicating Authority holding the transactions by the Corporate Debtor entered into with Respondent No. 1 to 7 as preferential transactions within Section 43 of the Code.

(iv) In the avoidance application, the RP has also prayed for declaring certain transaction undervalued and fraudulent. The Adjudicating Authority in so far as prayers made in Application under Section 45 and 66 did not accept the prayers and allowed the application only in so far as Section 43 prayers were concerned and declared the transaction in favour of the Respondent No. 1 to 7 as preferential transactions and directed to refund the amount.

(v) Aggrieved by the said order, these Appeals have been filed.

6. We have heard Mr. Abhijeet Sinha appearing for Appellant in Company Appeal (AT) Ins. No. 405 and 369 of 2022 and Mr. Gaurav Mitra

appearing for the Appellant in Company Appeal (AT) Ins. No. 412 of 2022. Learned Counsel - Ms. Puja Mahajan has appeared for Resolution Professional.

7. Mr. Abhijeet Sinha, Learned Counsel for the Appellant in support of the Appeal submits that Appellants in Company Appeal (AT) Ins. No. 405 of 2022 as well as Company Appeal (AT) Ins. No. 369 of 2022 are not related party to the Corporate Debtor and the transactions which have been held to be preferential transactions by the Adjudicating Authority were transactions which were entered into ordinary course of business of the Corporate Debtor. The Appellants had extended loan facility to the Corporate Debtor and the antecedent liability towards the Appellants' is admitted; The Corporate Debtor on various dates occurring into look back period repaid the amount of loan. The loan was taken by the Corporate Debtor from the appellants for the purposes of running the corporate debtor as a going concern and the amount which was received from the Appellant was utilized by the corporate debtor for running its business and meeting its liabilities. The repayments by the Corporate Debtor was in ordinary course of business and were towards financial affairs of the corporate debtor which are clearly exempted from the preferential transactions within the meaning of Section 43 of the Code. It is further submitted that composite application filed by the RP under Section 43, 44, 45, 46, 66, 67 and 60(5) of the Code raising allegations against several party under different provisions of the Code was not maintainable in view of the law laid down by the Hon'ble Supreme Court in **"Anuj Jain,**

IRP for Jaypee Infratech Limited Vs. Axis Bank Ltd. & Ors.", (2020) 8 SCC 401.

8. Mr. Gaurav Mitra, Learned Counsel for the Appellant submitted that the Resolution Professional had no authority to pursue the avoidance application in view of the position of law as declared by Delhi High Court in its Judgement **"M/s. Venus Recruiters Pvt. Ltd. Vs. Union of India & Ors."**, 2020 SCC OnLine DL 1479. In the present case, Resolution Plan does not authorize the Resolution Professional to pursue the Application. It is further submitted that alleged withdrawal of the payments are less than the money deposited by the Appellant in the account of the Corporate Debtor. The Appellant during the period in question has deposited monies to the tune of Rs. 28 Crores. Payments made to the related parties was actually infused by the Appellant in account of the Corporate Debtor. Payments made to the related parties were clearly in ordinary course of business while Corporate Debtor was also honoring payments to its secured creditors as well as Operational Creditors.

9. Ms. Pooja Mahajan, Learned Counsel for the Erstwhile Resolution Professional submits that after report was received from Transaction Auditor, Resolution Professional examined the Report and other materials on record and after being satisfied with several transactions of the Corporate Debtor falling within preferential, undervalued and fraudulent transactions, the Application was filed before the Adjudicating Authority for avoiding said transactions. It is submitted that in the Resolution Plan, there was specific stipulation that any application filed by the RP under Section 43, 45, 50 and 66, any amount realized by the Corporate Debtor

in future shall be distributed among the financial creditors in order of priority as per Section 53 of the Code. Details regarding the avoidance transactions were duly placed before the CoC at the time of consideration of the Resolution Plan. CoC specifically directed the RP to include the above provision in the Resolution Plan. Resolution Professional has filed the avoidance application on 24th September, 2020 that is prior to the Application for approval of the plan was filed. The transaction auditor report was placed before the CoC in the meeting dated 13th August, 2020. In the avoidance application, ingredients of Section 43, 45, 50 and 66 were separately dealt with and pleaded. There was no overlapping in the pleadings of different nature of allegations. As per provision of Section 43, the transaction in question were preferential transaction. Ingredients of Section 43 were present. The payments made in favour of the related parties and non-related parties had effect of putting the Appellants in a more beneficial position than they would have been in the event of distribution of assets of the corporate debtor in accordance with Section 53 of the Code. Payments made to the Appellants did not fall under any of the exceptions under Section 43(3) of the Code. Giving of loan to the Corporate Debtor was not part of ordinary course of business. Learned Counsel for the RP relied upon the Judgement of the Hon'ble Supreme Court in **"Anuj Jain"** (supra). In support of her submission, she submitted that present transactions do not fall in ordinary course of business. The Adjudicating Authority has rightly declared the transaction as preferential transactions.

10. We have considered the submissions of Learned Counsel for the parties and have perused the record.

11. The Adjudicating Authority having accepted the claim of Resolution Professional with respect to preferential transactions and having not accepted case of the RP with regard to other transactions, consideration in these Appeals are only with regard to preferential transactions within the meaning of Section 43 of the Code.

12. Section 43 of the Code deals with preferential transactions and relevant time. Section 43 of the Code is as follows:

> ***"43: Preferential transactions and relevant time.-*** *(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in 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) 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."

13. Section 44 deals with Order in case of preferential transactions.

14. The Adjudicating Authority in the Impugned Order has noted in detail the facts and transactions which have been questioned by the Resolution Professional in the avoidance application. In paragraph 8(vii) of the Order, repayment to related parties and repayment to non-related parties have been separately noticed by the Adjudicating Authority. It is relevant to notice the paragraph 8(vii) which is to be following effect:

"vii. TAR highlighted that during the relevant period provided in Section 43(4) of the Code, the following repayment/transfer were made by the Corporate Debtor to its related parties from 27.08.2017 to 27.08.2019 and to non-related parties from 27.08.2018 to 27.08.2019 to discharge its antecedent liability:

Date	*Name of the party*	*Amount (INR)*	*Purpose*
Repayment to Related Parties			
A. Arun Gupta			
06.09.2017	*Unsecured Loan – Arun Gupta A/c*	*20,00,000*	*Repayment of unsecured loan of directors*
07.10.2017	*Unsecured Loan – Arun Gupta A/c*	*10,00,000*	*Repayment of unsecured loan of directors*
22.11.2017	*Unsecured Loan – Arun Gupta A/c*	*20,00,000*	*Repayment of unsecured loan of directors*
05.12.2017	*Unsecured Loan – Arun Gupta A/c*	*40,00,000*	*Repayment of unsecured loan of directors*
15.06.2018	*Unsecured Loan – Arun Gupta A/c*	*3,50,000*	*Repayment of unsecured loan of directors*
	Total (A)	*90,00,000*	
B. Praveen Gupta			
19.12.2017	*Unsecured Loan – Praveen Gupta A/c*	*1,00,000*	*Repayment of unsecured loan of directors*
16.01.2018	*Unsecured Loan – Praveen Gupta A/c*	*2,00,000*	*Repayment of unsecured loan of directors*
22.02.2018	*Unsecured Loan – Praveen Gupta A/c*	*7,00,000*	*Repayment of unsecured loan of directors*
22.02.2018	*Unsecured Loan – Praveen Gupta A/c*	*70,00,000*	*Repayment of unsecured loan*

			of directors
27.03.2018	*Unsecured Loan – Praveen Gupta A/c*	*85,00,000*	*Repayment of unsecured loan of directors*
19.07.2018	*Unsecured Loan – Praveen Gupta A/c*	*20,00,000*	*Repayment of unsecured loan of directors*
26.10.2018	*Unsecured Loan – Praveen Gupta A/c*	*7,00,000*	*Repayment of unsecured loan of directors*
02.03.2019	*Unsecured Loan – Praveen Gupta A/c*	*2,00,000*	*Repayment of unsecured loan of directors*
	Total (B)	*1,97,50,000*	
C. Keshika Exports Private Limited			
31.08.2018	*Keshika Exports Private Limited*	*2,49,338*	*Payment of interest on unsecured loan*
	Total (C)	*2,49,338*	
	Total (A+B+C)	*2,80,99,338*	

Repayment to Non-Related Parties			
D. Dyna Rasayan Udyog Private Limited			
27.08.2018	*Dyna Rasayan Udyog Private Limited*	*40,00,000*	*Repayment of unsecured loan*
28.08.2018	*Dyna Rasayan Udyog Private Limited*	*45,00,000*	*Repayment of unsecured loan*
29.08.2018	*Dyna Rasayan Udyog Private Limited*	*7,29,987*	*Repayment of interest on unsecured loan*
29.08.2018	*Dyna Rasayan Udyog Private*	*65,00,000*	*Repayment of*

	Limited		*unsecured loan*
	Total (D)	*1,57,29,987*	
E. GVR Electronics Private Limited			
27.08.2018	*GVR Electronics Private Limited*	*25,00,000*	*Repayment of unsecured loan*
29.08.2018	*GVR Electronics Private Limited*	*25,00,000*	*Repayment of unsecured loan*
31.08.2018	*GVR Electronics Private Limited*	*25,00,000*	*Repayment of unsecured loan*
04.09.2018	*GVR Electronics Private Limited*	*15,00,000*	*Repayment of unsecured loan*
	Total (E)	*90,00,000*	
F. GVR Consulting Services Ltd.			
04.09.2018	*GVR Consulting Services Ltd.*	*10,00,000*	*Repayment of unsecured loan*
11.09.2018	*GVR Consulting Services Ltd.*	*25,00,000*	*Repayment of unsecured loan*
24.09.2018	*GVR Consulting Services Ltd.*	*25,00,000*	*Repayment of unsecured loan*
25.09.2018	*GVR Consulting Services Ltd.*	*15,00,000*	*Repayment of unsecured loan*
12.10.2018	*GVR Consulting Services Ltd.*	*25,00,000*	*Repayment of unsecured loan*
	Total (F)	*1,00,00,000*	
	Total (D+E+F)	***3,56,29,987***	
	Grand Total (A+B+C+D+E+F)	***6,37,29,325***	

15. There is no dispute between the parties that repayment to related parties and repayment to the non-related parties were within the lookout period.

16. The avoidance transaction in Insolvency Proceedings has been dealt with in the legislative schemes under several enactments relating to subject. We may have a look over the legislative scheme with regard to avoidance transaction prior to enforcement of IBC to appreciate the changes in the legislative scheme which has been brought by the IBC. The Provincial Insolvency Act, 1920, Section 54 deals with avoidance of preference. Section 54 of the Act is as follows:

> *"54. (1) Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.*
> *(2)This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent."*

17. The Companies Act, 1956 also contained provisions regarding Preferential Payments. Section 531 is as follows:

> *"531(1) Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within*

three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be deemed in his insolvency a fraudulent preference, shall in the event of the company being wound up, be deemed a fraudulent preference of its creditors and be invalid accordingly:

***Provided that**, in relation to things made, taken or done before the commencement of this Act, this sub-section shall have effect with the substitution, for the reference to six months, of a reference to three months.*

(2)For the purposes of sub-section (1), the presentation of a petition for winding up in the case of a winding up by the Tribunal, and the passing of a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond to the act of insolvency in the case of an individual."

18. Section 531A deals with Avoidance of Voluntary Transfer. Section 531A is as follows:

"Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration, if made within a period of one year before the presentation of a petition for winding up by the Tribunal or the passing of a resolution for voluntary winding up of the company, shall be void against the liquidator."

19. Learned Counsel for the Appellant has also referred to Uncitral Legislative Guide on Insolvency Law where under Part II, F, Avoidance

Proceedings have been dealt with. Paragraphs 151, 152 and 153 are as follows:

> *"151. It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate. Avoidance provisions may also have a deterrent effect, discouraging creditors from pursuing individual remedies in the period leading up to insolvency if they know that these may be reversed or their effects nullified on commencement. Transactions are typically made avoidable in insolvency to prevent fraud (e.g. transactions designed to hide assets for the later benefit of the debtor or to benefit the officers, owners or directors of the debtor); to uphold the general enforcement of creditors' rights; to ensure equitable treatment of all creditors by preventing favouritism where the debtor wishes to advantage certain creditors at the expense of the rest; to prevent a sudden loss of value from the business entity just before the supervision of the insolvency proceedings is imposed; and, in some States, to create a framework for encouraging out-of-court settlement—creditors will know that last-minute transactions or seizures of assets can be set aside and therefore will be more likely to work*

with debtors to arrive at workable settlements without court intervention.

152. Avoidance provisions can be important to an insolvency law not only because the policy upon which they are based is sound, but also because they may result in recovery of assets or their value for the benefit of creditors generally and because provisions of this nature help to create a code of fair commercial conduct that is part of appropriate standards for the governance of commercial entities. It should be noted that, in the cross-border context, jurisdictions with insolvency laws that do not provide for avoidance of certain types of transaction, may encounter difficulties with recognition of proceedings and cooperation with courts and insolvency officials of jurisdictions where those transactions are subject to avoidance.

153. Notwithstanding the generally accepted rationale of avoidance provisions, it is important to bear in mind that many of the transactions that may be subject to avoidance in insolvency are perfectly normal and acceptable when they occur outside that context, but become suspect only when they occur in proximity to the commencement of insolvency proceedings. Avoidance powers are not intended to replace or otherwise affect other devices for the protection of the interests of creditors that would be available under general civil or commercial law."

20. The ordinary course of business has also been dealt with in Paragraph 164-165 which are as follows:

"(d) ***Ordinary course of business***

164. Many insolvency laws use the concept of the "ordinary course of business" in defining their avoidance criteria, so that an extraordinary payment, as noted above, may be subject to avoidance. The concept has wider relevance to an insolvency regime as it may also be used, for example, to draw a distinction between the exercise of powers regarding the use and disposition of assets during the insolvency proceedings in the "ordinary course of business" and in other circumstances, both in terms of who may exercise such powers and the protections that are required (see above, paras. 75 and 76).

165. States define the "ordinary course of business" with varying emphasis on different elements. However, in most jurisdictions a common purpose of the definition is to determine what constitutes routine conduct of business and allow a business to make routine payments and enter into routine contracts, without subjecting those transactions to possible avoidance in insolvency. Those routine payments might include the payment of rent, utilities such as electricity and telephone and possibly also payment for trade supplies."

21. On defences, Paragraph 169 lays down following:

"Defences

169. Where an insolvency law provides defences to avoidance for individual counterparties, those defences may have the potential to dilute the efficacy of avoidance provisions. Defences that involve elements that may be subject to dispute, such as whether the transaction occurred in the ordinary course of business,

or the counterparty acted in good faith, or involving the state of the counterparty's actual or implied knowledge, can create uncertainty for all parties and will require determination by the court. The likelihood of such uncertainty occurring has been increased in some jurisdictions by the courts adopting a wide interpretation of such defences in favour of counterparties. Insolvency representatives may be reluctant to use avoidance provisions as an effective tool in an insolvency, because of associated costs or because the procedures are inefficient and unpredictable. These potential difficulties underscore the desirability of an insolvency law adopting clear and predictable avoidance criteria and defences that will enable all parties to assess potential risks and avoid disputes, for example objective criteria focusing on the effect or result of transactions rather than on the intent of the parties. Where elements such as "ordinary course of business" are included they should be clearly defined and circumscribed by an insolvency law."

22. Paragraph 177 is as follows:

"177. Preferential transactions may be subject to avoidance where: (a) the transaction took place within the specified suspect period; (b) the transaction involved a transfer to a creditor on account of a pre-existing debt; and (c) as a result of the transaction, the creditor received a larger percentage of its claim from the debtor's assets than other creditors of the same rank or class (in other words, a preference). Many insolvency laws also require that the debtor was insolvent or close to insolvent when the transaction took place and some

further require that the debtor have an intention to create a preference. The rationale for including these types of transaction within the scope of avoidance provisions is that, when they occur very close to the commencement of proceedings, a state of insolvency is likely to exist and they breach the key objective of equitable treatment of similarly situated creditors by giving one member of a class more than they would otherwise legally be entitled to receive."

23. Hon'ble Supreme Court had occasion to elaborately consider the scope and ambit of preferential transaction in IBC in **"Anuj Jain Vs. Axis Bank Limited & Ors"** (supra). Before we come to the treatment of law by the Supreme Court in **"Anuj Jain"**, a look into the legislative scheme from Provincial Insolvency Act, 1920 till the IBC Code indicate that legislative requirements under the different enactments were not identical and ingredients for avoidance of a transaction under the different enactments has been separately dealt. The Companies Act, 1956 dealt with fraudulent transaction. In the IBC, preferential transaction and fraudulent transaction has been separately dealt, ingredients to prove are different for preferential transaction. There is no need to prove any fraudulent intent for a preferential transaction. When we look into the scheme of Section 43 of the Code, sub-section (2), a clear statutory provision is that a corporate debtor shall be deemed to have given a preference if conditions as mentioned in paragraph 'a' and 'b' are fulfilled. When a provision provides for deeming fiction, 'deeming fiction' come into play on fulfilment of the requirement even if in fact it may not be so. In

sub-section (3) of Section 43, certain exception has been provided. Thus those transactions which fall as exception under Sub-Section (3) can be taken out of sub-section 2 of Section 43, rest shall be covered by deeming fiction.

24. Anuj Jain (supra) was a case where the Hon'ble Supreme Court was considering a case where IRP filed an Application for avoidance of certain transactions as preferential transactions where the Corporate Debtor had created security interest by way of mortgage in favour of lenders of third party that is "JAL" on the unencumbered land of the Corporate Debtor which transaction were sought to be avoided by RP by filing an application. The Adjudicating Authority has declared the said transaction as preferential transaction. In paragraph 13.3, Hon'ble Supreme Court has quoted the conclusion of the Adjudicating Authority which paragraph 13.3 is as follows:

> *"13.3. The Tribunal concluded in its order as follows:*
>
> *"On the above basis, it is clear that the company application filed by the Resolution Applicant deserves to be allowed. Hence, is allowed.*
>
> *ORDER*
>
> *The company application filed by the Resolution Professional under Sec. 66, 43 & 45 of the Insolvency and Bankruptcy 2016 is allowed. The impugned transactions, details of which are given in the schedule of the judgment are declared as fraudulent, preferential and undervalued*

transactions as defined under section 66, 43 and 45 of the Code respectively.

Transactions given in the following schedule of property have been found as preferential, undervalued and fraudulent, therefore, we pass the order for release and discharge of the security interest created by the Corporate Debtor in favour of lenders of the Jaiprakash Associates Ltd. under the provision of Section 44(c) of the Insolvency and Bankruptcy Code 2016. We also pass an order under Section 48(a) of the Code that the properties mortgaged by way of preferential and undervalued transactions shall from now on be deemed to be vested in the Corporate Debtor."

25. NCLAT has upturned the Order of the Adjudicating Authority. Aggrieved against which order, the Corporate Debtor through IRP and certain other parties had filed the Appeal before the Hon'ble Supreme Court. In the above background, the Hon'ble Supreme Court had occasion to examine the concept of preferential transaction and exposition of law as contained in IBC. Hon'ble Supreme Court has also in its Judgement noticed paragraph 177 to 179 of Uncitral Legislative Guide as has been noticed in foregoing paragraph of the Judgment. The distinctive feature of the Companies Act, 2013 and the IBC have been noted in paragraph 20.4 and following has been laid down by the Hon'ble Supreme in paragraph 20.4:

"20.4. Noteworthy distinctive features, in the scheme of the Companies Act, 2013 and Insolvency and

Bankruptcy Code, 2016, as regards preferences in relation to the corporate personalities, are that while Section 328 of the Act of 2013 deals with fraudulent preference and Section 329 thereof deals with transfers not in good faith but, on the other hand, in the Code, separate provisions are made as regards the transactions intended at defrauding the creditors (Section 49 IBC) as also for fraudulent trading or wrongful trading (Section 66 IBC). The provisions contained in Section 43 of the Code, however, indicate the intention of legislature that when a transaction falls within the coordinates defined therein, the same shall be deemed to be a preference given at a relevant time and shall not be countenanced. Therefore, intent may not be of a defence or support of any preferential transaction that falls within the ambit of Section 43 of the Code."

26. In paragraph 21, 21.1, 21.2., 21.3 and 21.4, the Hon'ble Supreme Court while analyzing section 43 of the Code made following observations:

"21. In the backdrop of the foregoing, we may now scrutinise Sections 43 and 44 of the Code. Section 44 provides for the consequences of an offending35 preferential transaction i.e., when the preference is given at a relevant time. Under Section 44, the Adjudicating Authority may pass such orders as to reverse the effect of an offending preferential transaction. Amongst others, the Adjudicating Authority may require any property transferred in connection with giving of preference to be vested in the corporate debtor; it may also release or discharge (wholly or in part) any security interest created by the corporate debtor. The

consequences of offending preferential transaction are, obviously, drastic and practically operate towards annulling the effect of such transaction. Looking to the contents, context and consequences, we are at one with the contentions urged on behalf of the respondents with reference to the decisions in Devinder Singh and other cited cases, that these provisions need to be strictly construed. However, even if we proceed on strict construction of Section 43 of the Code, the underlying principles and the object cannot be lost sight of. In other words, the construction has to be such that leads towards achieving the object of these provisions.

21.1. Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when 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 specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in Section 44. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit36 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 as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor

or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.

21.2. However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of Section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time". The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways: (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by Sections 43 and 44 of the Code, it ought to be a preferential one answering to the requirements of sub-section (2) of Section 43; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of Section 43.

21.3. However, even if a transaction of transfer otherwise answers to and comes within the scope of sub-sections (4) and (2) of Section 43 of the Code, it may yet remain outside the ambit of sub-section (2) because of the exclusion provided in sub-section (3) of Section 43.

21.4. Sub-section (3) of Section 43 specifically excludes some of the transfers from the ambit of sub-section (2). Such exclusion is provided to: (a) a transfer made in the ordinary course of business or financial affairs of the corporate debtor or transferee; (b) a transfer creating security interest in a property acquired by the corporate debtor to the extent that such security interest secures new value and was given at the time specified in sub-clause (i) of clause (b) of Section 43(3) and subject to fulfilment of other requirements of sub-clause (ii) thereof. The meaning of the expression "new value" has also been explained in this provision."

27. In paragraph 22 and 22.1 while dealing with Sub-Section (2) and Sub-Section (4) of Section 43, following has been observed by the Hon'ble Supreme Court:

"22. In order to understand and imbibe the provisions concerning preference at a relevant time, it is necessary to notice that as per the charging parts of Section 43 of the Code i.e., sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (a) and (b) of sub-section (2) coupled with the applicable requirements of either clause (a) or clause (b) of sub-section (4), as the case may be, are satisfied.

22.1. To put it more explicit, the sum total of sub-sections (2) and (4) is that a corporate debtor shall be deemed to have given a preference at a relevant time if:

(i) the transaction is of transfer of property or the interest thereof of the corporate debtor, for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or operational debt or other liability;

(ii) such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets in accordance with Section 53; and

(iii) preference is given, either during the period of two years preceding the insolvency commencement date when the beneficiary is a related party (other than an employee), or during the period of one year preceding the insolvency commencement date when the beneficiary is an unrelated party."

28. Hon'ble Supreme Court has categorically held in the above case that if the requirement made in sub-section (2) of Section 43 are satisfied legal fiction comes into play. In paragraph 22.3, Hon'ble Supreme Court has held that when the deeming provisions come into existence the transaction entered into between the corporate debtor would be regarded as preferential transaction with attendant consequences irrespective whether the transaction was in fact intended or even anticipated to be so. In paragraph 22.3, following has been laid down:

"19.3. On a conspectus of the principles so enunciated, it is clear that although the word 'deemed' is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-

matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so."

29. Hon'ble Supreme Court after analyzing the provision of Section 43 noted net consequences of Section 43 in Paragraph 22.5. In paragraph 23, 23.1, 23.2, 23.3, 23.4 and 23.5 laid down following:

"23. The analysis foregoing leads to the position that in order to find as to whether a transaction, of transfer of property or an interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case:

23.1. As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

23.2. As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?

23.3. As to whether such transfer has the effect of putting such creditor or 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?

23.4. If such transfer had been for the benefit of a related party (other than an employee), as to 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?

23.5. As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?"

30. Hon'ble Supreme Court has analyzed the facts of that case and returned a finding in paragraph 25.4 that Corporate Debtor by giving preference by way of mortgage transaction for the benefit of related party falls within preferential transaction. In paragraph 25.4, following was held:

"25.4. In the scenario taken into comprehension hereinabove, there is nothing to doubt that the corporate debtor JIL has given a preference by way of the mortgage transactions in question for the benefit of its related person JAL (who has been the creditor as also surety for JIL) for and on account of antecedent financial debts, operational debts and other liabilities owed to such related person. In the given fact situation, it is plain and clear that the transactions in question meet with all the requirements of clause (a) of sub-section (2) of Section 43."

31. The Hon'ble Supreme Court had also occasion to consider the concept of ordinary course of business in paragraph 28, 28.1, 28.2 and 28.3. Observations made by the Hon'ble Supreme Court in 28.3 and 28.5 are relevant which are to the following effect:

> *"28.3. Needless to reiterate that if the transfer is examined with reference to the ordinary course of business or financial affairs of the transferee alone, it may conveniently get excluded from the rigour of sub-section (2) of Section 43, even if not standing within the scope of ordinary course of business or financial affairs of the corporate debtor. Such had never been the scheme of the Code nor the intent of Section 43 thereof. It has rightly been contended on behalf of the appellants that for the purpose of exception under clause (a) of sub-section (3) of Section 43, the intent of legislature is required to be kept in view. If the ordinary course of business or financial affairs of the transferee (lenders of JAL in the present case) would itself be decisive for exclusion, almost every transfer made to the transferees like the lender-banks/financial institutions would be taken out of the net, which would practically result in frustrating the provision itself.*
>
> *.....*
>
> *28.5. Looking to the scheme and intent of the provisions in question and applying the principles aforesaid, we have no hesitation in accepting the submissions made on behalf of the appellants that the said contents of clause (a) of sub-section (3) of Section 43 call for purposive interpretation so as to ensure that the provision operates in sync with the intention of legislature and achieves the avowed objectives.*

> *Therefore, the expression "or", appearing as disjunctive between the expressions "corporate debtor" and "transferee", ought to be read as "and"; so as to be conjunctive of the two expressions i.e., "corporate debtor" and "transferee". Thus read, clause (a) of sub-section (3) of Section 43 shall mean that, for the purposes of sub-section (2), a preference shall not include the transfer made in the ordinary course of the business or financial affairs of the corporate debtor and the transferee. Only by way of such reading of "or" as "and", it could be ensured that the principal focus of the enquiry on dealings and affairs of the corporate debtor is not distracted and remains on its trajectory, so as to reach to the final answer of the core question as to whether corporate debtor has done anything which falls foul of its corporate responsibilities."*

32. In observations made in paragraph 28.3 as noted above, Hon'ble Supreme Court has held that if the ordinary course of business or financial affairs of the transferee that is lenders of JAL would itself be decisive for exclusion, almost every transfer made to the transferees like the lender-banks/financial institutions would be taken out of the net, which would practically result in frustrating the provision itself. Thus while finding out whether a transaction is ordinary course of business, the object and purpose of Section 43 and the legislative scheme have to be kept in mind. In paragraph 28.5 in sub-section (3) of Section 43 the expression "or", appearing as disjunctive between the expressions "corporate debtor" and "transferee" ought to be read as "and". Relying on

a judgement of the High Court of Australia in Downs Distributing Company following has been observed in paragraph 28.6.1:

> *"28.6.1. Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive.43 As regards the meaning and essence of the expression 'ordinary course of business', reference made by the appellants to the decision of the High Court of Australia in Downs Distributing Co., could be usefully recounted as under:-*
>
> > *"As was pointed out in Burns v. McFarlane the issues in sub-s. 2(b) of s. 95 of the Bankruptcy Act 1924-1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor." It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that*

according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

33. In the above judgement, last part of the judgement of High Court of Australia was highlighted by the Hon'ble Supreme Court which may be quoted here to find out the purpose of emphasis:

"*It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."*

34. In paragraph 28.6.2, Hon'ble Supreme Court further laid down as follows:

"28.6.2. Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of 'the undistinguished common flow of business done'; and is not arising out of 'any special or particular situation', as rightly expressed in Downs Distributing Co. Though we may assume that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the

present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, we have no hesitation in concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL."

35. After noticing the law laid down by the Hon'ble Supreme Court in the above case, we need to apply the ratio of the judgement in the facts of the present case to find out as to whether defence taken by the Appellant in their submissions that the repayment of loan which was given to the Corporate Debtor was in ordinary course of business and was financial affairs of the corporate debtor or not.

36. The Corporate Debtor-NTL Electronics India Ltd. was engaged in the business of manufacturing and electronics component and projects. In paragraph 7.1 of the Company Appeal (AT) Ins. No. 412 of 2022, following has been stated about the business of the Corporate Debtor:

> *"7.1 That the corporate debtor was incorporated on 26.04.2022 with the appellant no.1 and 2 as promoters and was being managed by them. The corporate debtor was engaged in the business of manufacturing of electronics components and products and as such it required financial assistance from time to time, being so certain financial assistance was sought from and accordingly extended by Axis Bank, ICICI Bank and Karnataka Bank."*

37. Taking financial assistance from related and non-related parties which transactions are subject of enquiry in the present Appeal can not be held to be ordinary course of business of the Corporate Debtor. The expression "ordinary course of business" or "financial affairs of the Corporate Debtor" has to be read "ejusdem generis". The expression "financial affairs of the Corporate Debtor" cannot be given an extended meaning as contended by Learned Counsel for the Appellants that all financial transactions done by the Corporate Debtor is covered within

expression "financial affairs' hence the loan taken by the corporate debtor from different related and non-related parties is part of the financial affairs cannot be accepted. The Judgement of the Hon'ble Supreme Court in **"Anuj Jain"** (Supra), the emphasis has been given that transaction must fall into place as part of the undistinguished common flow of the business done. Undistinguished common flow of the business of the Corporate Debtor does not contemplate any such or particular situation where the Corporate Debtor's claim that its financial position became unstable due to market condition and had started arranging money from their relatives and other parties. Money arranged from relative and other parties by the Corporate Debtor thus cannot be held to be part of ordinary course of business or part of financial affairs.

38. The Adjudicating Authority has in detail considered the submissions of both the parties and has gone through and examined the transactions in question and has returned the finding that the transaction come under the preferential transaction and in paragraph 65 and 66 following directions were issued:

> *"65. So far section 43 IBC 2016 is concerned, as we held transactions made with the respondent no. 1,2,4,5,6 and 7 come under the preferential transactions under Section 43 of the IBC,2016. Therefore, Respondent No. 1 is directed to refund the amount of Rs. 1,97,50,000/- is directed to refund the amount of Rs. 90,00,000/- and Respondent No. 5 is directed to refund the amount of Rs. 2,49,338/-. Similarly, the Respondents No. 4, 6 and 7 are directed to refund the amount of Rs. 1,00,00,000, Rs. 1,57,29,987 and Rs*

90,00,000/- respectively. The amounts so received shall be distributed among the creditors, who are entitled to get it, in accordance with provision of law and it shall not be paid to the successful resolution applicant.

66. Accordingly, the respondents no. 1,2,4,5,6 and 7 are directed to refund the amount within three months from the date of order and the applicant is directed to take steps to distribute the said amounts among the Financial Creditor/Creditors, who are entitled to get it, in accordance with provision of law within a month from the date of receipt of the said amount and submit the compliance report soon thereafter. And if the respondents no. 1,2,4,5,6 and 7 failed to deposit the said amount within the period then same shall be recovered in accordance with the provision of law."

39. In so far as the Judgement of the Delhi High Court in **"M/s Venus Recruiters Pvt. Ltd. Vs. Union of India & Ors."** as relied upon by Learned Counsel for the Respondent, the judgement of Venus Recruiters has already been overruled by the Division Bench of the Delhi High Court in "**Tata Steel BSL Ltd. Vs. Venus Recruiters Pvt. Ltd."** decided on 13.01.2023 hence no more applicable.

40. We may also notice one more submission advanced by Learned Counsel for the Appellant-Mr. Abhijeet Sinha. It is submitted that the transaction in question were undertaken due to the pressure on behalf of Lenders. Corporate Debtor has issued certain security cheque and notices were issued and demands were issued from Lenders for payment of their dues. When the payments were made under the pressure of notice and demand including threat of initiating proceeding under Section 138 of the

Negotiable and Instrument Act, the transaction cannot be said to be a preferential transaction. Preferential Transaction is a transaction which is voluntary transaction when the Corporate Debtor was to enter into transaction due to pressure and threat the same is clearly not preferential transaction. In support of the submission, Learned Counsel for the Appellant has placed reliance on few judgements of the High Courts which need to be noticed.

41. The first judgment relied upon by Learned Counsel for the Appellant is judgement of the Gujarat High Court in "**Re Maneckchowk and Ahmedabad Co. Ltd".** (1969) SCC OnLine Guj 22. In the above case, the Gujarat High Court was considering a petition under Section 391(2) of the Companies Act, 1956 for sanctioning a scheme and compromise between the creditors and members of the Maneckchowk and Ahmedabad Co Ltd. While considering the said petition, High Court had occasion to consider certain allegations regarding the fraudulent preferences given by the Company. Reference was made to one of the deed of mortgage executed by the Company in favour of the Central Board of Trustee for the Provident Fund which was alleged to be fraudulent preference. In paragraph 18 of the Judgment, following observations have been made:

> *"18.....If, therefore, it could be shown that the debtor acted under an apprehension that he would be prosecuted or under a threat of prosecution, the transfer of property by him could not be said to be a free volitional act of the debtor disclosing an intention to prefer the creditor but it would a pear that he has acted under the compulsion of the circumstances, may be of*

his own creation' Reference in this connection may be made to Sharp (Official Receiver) v. Jackson. In that case it was found that the trustee had committed breaches of trust and was insolvent. and, on the eve of his bankruptcy, he conveyed an estate to make good the breaches of trust, this transfer was sought to be avoided as fraudulent preference in a bankruptcy proceeding against a trustee. It was held that the transfer cannot be avoided as fraudulent preference because it was found that the trustee made the conveyance not with the intention or view or object whatever it may be called preferring any person in whose favour the transfer was made but for the sole purpose of shielding himself. In order to find out whether a transfer of property would amount to fraudulent preference, the question should be addressed whether it was done to prefer one of the creditors to the exclusion of others. If it was done not with a view to prefer one of the creditors but to save one's own skin, say a threat of prosecution looming large or to avoid prosecution, certainly the transfer could. not in such circumstances be fraudulent preference. This decision has been followed in In re M. L G. Trust Ltd. Reference may also be made to In re F. L. E. Holdings Ltd. In that case a passage from Buckley on the Companies Acts, 13th Edition (1957), is quoted which shows that as preference implies selection and selection implies freedom of choice, a payment must in order to constitute a preference be voluntarily made, and that a payment made under pressure, e.g., in the shape of proceedings actual or threatened by the creditor concerned, or fear of such proceedings, is not for this purpose a voluntary payment. Viewed from this angle, the transfer by way of mortgage by directors in

favour of the Central Board of Trustees would not prima facie appear to be fraudulent preference as it appears that it was done under the threat of imminent prosecution."

42. Gujarat High Court in Paragraph 19 however had observed that fraudulent preferences given by the Company would not go unchallenged and uninvestigated, if the scheme is sanctioned. Observation in paragraph 19 are as follows:

"18. Recalling now the submission of Mr. Vakil that the company has been guilty of giving a number of fraudulent preferences they could not be investigated except in a winding up proceedings and, therefore, the scheme is not a proper alternative to winding up, does not carry conviction. The charges created by the decrees in favour of the five aforementioned creditors, which certainly call for investigation, have been set aside without having taken recourse to the proceeding in winding up and two mortgages one in favour of the Union Bank of India and the other in favour of the Central Board of Trustees of Provident Fund have prima facie no tinge of fraudulent preference. Therefore, it is not possible to accept the - submission of Mr. Vakil that the fraudulent preferences given by the company would go unchallenged and uninvestigated if the scheme is sanctioned."

43. From the above judgment, it is clear that the High Court has not given any concluded opinion with regard to fraudulent preference as was claimed in the said case and has observed that if the scheme is

sanctioned the allegation may call for an investigation. The above judgement of the Gujarat High Court was followed by Bombay High Court in "**M/s Monark Enterprises Vs. Kishan Tulpule",** (1991) SCC OnLine Bom 461. In which in paragraph 31 and 32, following has been observed:

> *"31. The next question which arises is as to whether the company had entered into the transaction dated February 18, 1987, with Monark Enterprises with a view to preferring one creditor to another creditor and that too fraudulently. The question which arises for consideration of the court is whether the company entered into the said transaction as a result of lawful pressure exercised by Monark Enterprises to recover its legitimate dues forthwith. It is well-settled that, if the transaction was entered into as a result of lawful pressure of a bona fide creditor to recover his dues, the transaction of transfer could not be treated as a fraudulent preference. Another connected aspect of the same question is as to whether the company entered into the said transaction to save its own skin for its own benefit in the circumstances then prevailing or whether the dominant motive of the company in effecting the said transaction was to favour one creditor to another.*
>
> *32. By its letter dated August 3, 1985, Bank of Maharashtra had already threatened in writing to the effect that it would adopt legal proceedings both against Monark Enterprises as well as against "the company" if the sum of Rs. 14.63 lakhs with overdue interest remained unpaid. The threat of legal proceedings was an imminent threat. It is an admitted*

fact that the company did not pay the decretal instalments which had fallen due from November 1, 1986. By reason of the default clause provided in the consent terms, Monark Enterprises were entitled to execute the decree or present a winding-up petition against the company or resort to such other legal remedies as were available to them under the law. The prospect of further legal proceedings by Monark Enterprises against the company to recover the decretal dues was too obvious. Reasonable inferences can be easily drawn if required. The court must endeavor to take a view consistent with common sense and the ordinary course of human conduct. It is obvious to me that the impugned transaction dated February 18, 1987, was entered into by and between the company with Monark Enterprises after hard bargaining not with a view to preferring one creditor to another creditor but in view of the lawful pressure exercised by Monark Enterprises on the company. Learned counsel for Monark Enterprises filed a compilation of judgment and passages from various text books on the subject. I do not propose to deal with all the cases included in the compilation though I have considered all the cases cited by learned counsel for all the parties. I propose to refer to only one case to justify the approach of the court to the problem under consideration. (In re Maneck chowk and Ahmedabad Mfg. Co. Ltd.) [1970] 40 Comp Case, 819 at 847, D. A. Desai J. (as His Lordship then was) of the High Court of Gujarat summed up the legal principle applicable in such a situation in his own inimitable style, after referring to the judgment of the House of Lords in (Sharp Official Liquidator V. Jackson) [1899] A.C. 419.

The High Court of Gujarat observed that, if the transaction was done not with a view to prefer one of the creditors but to save one's own skin, the transfer could not, in such circumstances, be treated as a fraudulent preference. After referring to a passage from Buckley on the Companies Acts, 13th edition (1957), the learned judge observed that the expression "preference" implied selection and selection implied freedom of choice. The learned judge observed that a payment, in order to constitute a preference, must be voluntarily made, and that a payment made under pressure, e.g., in the context of proceedings, actual or threatened, by the creditor concerned, or fear of such proceedings, could not be considered as a fraudulent preference under the company law. In the instant case, the facts are quite eloquent. Learned counsel for the official liquidator and the petitioners have submitted that Monark Enterprises had not issued any notice to the company to the effect that it would execute the decree in view of the default committed. No such notice need be actually issued. Since Monark Enterprises were receiving threatening letters from the Bank of Maharashtra, Monark Enterprises must have threatened the company to pay its dues as the primary liability in respect of unpaid hundis executed by the company for the price of goods sold and delivered by Monark Enterprises were facing threats from the Bank of Maharashtra mainly because of the company having defaulted in respect of its obligation to discharge its liability to pay the amount in question."

44. Bombay High Court has referred to Judgment of the Gujarat High Court and further noticed the **Halsbury's Laws of England**. Paragraph 33 are as follows:

> *"36. Paragraphs 908, 909, 913, 915, 918 and 920 of the Halsbury's Laws of England, Volume 2, 4th edition, set out the statement of law on the subject of fraudulent preference neatly and clearly. The principles of law operating in the field of bankruptcy/insolvency law are imported into the Companies Act. In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the view, that is to say, the principal or ??? view, of giving the creditor a preference over the other creditors. Paragraph 914 of the said volume formulates the statement of law on the subject of test to be applied in the following words:*
> *"914. Test to be applied. - In order to ascertain whether the giving of a preference was the principal or dominant view in the debtor's mind, the test to be applied is: was the act done voluntarily ? ...""*

45. We may observe that the provision which is under consideration in the present case is Section 43 of the IBC which statutory scheme is clearly not the same as was enunciated in Halsbury's Laws of England noted in paragraph 33 of the Bombay High Court. The intent of the Corporate Debtor is not relevant since the Section 43 envisages statutory fiction as has been noted above. Whether the Act is voluntary or not has no relevance while coming to the conclusion whether transaction is preferential or not. Learned Counsel for the Resolution Professional has

rightly referred to Section 43, sub-section (3) proviso. We may notice that sub-section (3) of Section 43 provides for exception to preferential transaction and the proviso of Section 3 reads as under:

> "*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."*

46. When the law mandates that any transfer made in pursuance of order of Court can not preclude such transfer to be deemed to be giving a preference there is no occasion for not accepting any transaction made in pursuance to a notice or demand issued by the Lender or by threat extended by lender for initiating any legal proceeding as preferential transaction. The legislative scheme which is clarified by the above proviso clearly leads to the conclusion that any transaction under any notice, demand or threat shall not lose its character of preferential transaction merely on the above reason.

47. Learned Counsel for the Appellant has also relied on Judgement of the Madras High Court reported in "**P.G. Vivekanandan & Ors. Vs. R.P.S. Benefit Fund Ltd.",** 2002 SCC OnLine Mad 917. Madras High Court in paragraph 39 made following observations:

> *"39. Any transaction of this nature and such magnitude, if it is not made in the ordinary course of business and it was not made in good faith and for valuable consideration, then it cannot be sustained. It is equally well settled that if the transaction was entered into as a result of lawful pressure of a bona fide creditor to*

recover his dues the transaction or transfer could not be treated as a fraudulent preference. Merely because it was entered into within a period of six months prior to the commencement of winding up, but if the transaction was entered into as a result of a design by directors to give preference to certain creditors and to siphon off the funds, definitely the court is not helpless. The test would be whether the company entered into such transaction to save its own skin for its own benefit in the circumstances then prevailing or whether the dominant motive of the company is to favour one creditor over another. This is not a case where the transferee could contend that he is not aware of the infirmity in the resolution or designs or motive behind the transaction. With full knowledge of what is going on in the company the transferee entered into the transaction with designs with the active assistance of the persons in the management of the company."

48. In the above judgement, the Madras High Court has given weight to the dominant motive of the Company in transaction. We have already observed that question of intent and motive is not relevant while examining as to whether transaction is a preferential transaction. Judgement of the Hon'ble Supreme Court in **"Anuj Jain"** (supra) has clearly laid down about the irrelevance of the motive in such transaction.

49. Learned Counsel for the Appellant has also relied on certain Foreign Judgments in support of his submissions. We in the present case are examining the statutory scheme under Section 43 of the Code which statutory scheme has been delineated and explained by the Hon'ble

Supreme Court in **"Anuj Jain"** (supra) case. We are of the view that the decision of the Foreign Courts relied on by the Learned Counsel for the Appellant dealing with particular statutory scheme under consideration cannot extend any help while interpreting Section 43 when the clear interpretation has already been made by the Hon'ble Supreme Court in **"Anuj Jain"** (supra) case.

50. Reliance on the Judgment of United States Court of Appeals in "**In re Fulghum Const. Corp."** as well as Judgment of House of Lords in "**Barclays Bank Ltd. vs. Quistclose Investments Ltd."** can have no relevance and are not helpful in the present case.

51. Learned Counsel for the Appellant has also referred to Judgment of the Hon'ble Supreme Court in **"Canbank Financial Services Ltd. Vs. Custodian & Ors.",** 2004 8 SCC 355. The above judgement of the Hon'ble Supreme Court was not dealing with the provision pertaining to fraudulent preference or preferential transactions and the Court was dealing with the Benami Transaction Provision Act, 1988 and the Provisions of the Transfer of Property Act, 1882 as well as Trust Act, 1882. Paragraph 15 and 16 of the Judgment which has been relied by Learned Counsel for the Appellant is not helpful in the present case. In the above case noticing the Judgment of the House of Lords it was observed that even monies advanced as a loan can be treated as impress with trust, when the monies are advanced for specific purpose. In the present case no issue has arisen to treat the money advanced to the Corporate Debtor to be money in trust. The above Judgment of the Hon'ble Supreme Court has no application.

52. We thus are of the view that the submissions of the Appellant on the ground that the transaction was entered into by the Corporate Debtor due to pressure put on it has no relevance and shall not change the nature of transaction from preferential transaction.

53. Now coming to the submission of Learned Counsel for the Appellant that composite application under Section 43, 44, 45, 46, 66, 67 and 60(5) of the Code could not have been filed by the RP as per law laid down by the Hon'ble Supreme Court, we may first notice the law as has been laid down by the Hon'ble Supreme in paragraph 32.1 in **"Anuj Jain"** (supra). In paragraph 32.1, observations of the Hon'ble Supreme Court are as follows:

> *"32.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of*

undervaluation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority."

54. What has been emphasized by the Hon'ble Supreme Court is that ingredients of Section 43, 45 and 66 are different and Resolution Professional is expected to keep such requirement in view while making motion to the Adjudicating Authority. When we look into the Application

which has been filed in the present case the Resolution Professional has in the avoidance application in his application has dealt with preferential transaction undertaken by the Corporate Debtor and undervalued transaction undertaken by the Corporate Debtor as well as fraudulent transaction in different heads i.e. 'i', 'ii' and 'iii' thus allegations and averments were separately made and filing of composite application does not lead to any infirmity in the Application. We are not persuaded to accept the submission of the Appellant that since the composite Application was filed it ought to have been rejected.

55. In view of the foregoing discussions, we are of the view that the Adjudicating Authority has rightly allowed the Application filed by the Resolution Professional and declared the preferential transactions undertaken in favour of the Appellants and directed the Appellants to refund the amount within three months. We having entertained the Appeal and also passed an Interim Order on 19th April, 2022, we grant further three months to Appellants to refund the amount as directed by the Adjudicating Authority in paragraph 65 and 66. Subject to above, all the Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI
24th April, 2023

Basant B.