

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

MA 1254/2018

Under Section 43 & 44 r/w Section 60(5) of
the Insolvency & Bankruptcy Code, 2016

In the matter of

Ms. Charu Desai

...Applicant

Versus

HDFC Bank Limited & Ors.

...Respondents

In the matter of

C.P.(IB) No. 1399/MB/2017

Bank of Baroda

...Financial Creditor

Versus

Mandhana Industries Ltd.

...Corporate Debtor

Order delivered on: 16.04.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Saurabh Bachhawat a/w
Ms. Mahima Singh and Ms.
Shrishti Agnihotri i/b
Chandhiok & Mahajan

For the Respondent : Mr. Sameer Pandit a/w Ms.
Krina Gandhi and Mr.
Chintan Prasad i/b Wadia
Ghandy & Co.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This application MA 1254/2018 was filed by Mr. Charu Desai ("Applicant") against the HDFC Bank Limited (Respondents & others) in the matter of Mandhana Industries Limited (Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs:
 - a. Direct Respondent No. 1 to refund the sum of Rs. 21.77 Crores to the account of the Corporate Debtor;
 - b. Award costs of this Application in favour of the Applicant;
 - c. Any other order(s) which this Hon'ble Adjudicating Authority may deem fit in the facts and circumstances of the present case.
2. The present application is filed by Resolution Professional ("RP") of Mandhana Industries Limited ("Corporate Debtor") who is a registered 'Insolvency Resolution Professional with Insolvency and Bankruptcy Board of India bearing registration no. IBBI/IPA-001/IP-P00434/2017-18/10757.
 - 2.1. That the Corporate Debtor is a listed public company in the National Stock Exchange, incorporated on 25 July 1984, under the

Companies Act, 1956, having its registered office at Plot No. C-3, M.I.D.C, Tarapur Industrial Area, Boisar Maharashtra. The authorized share capital of the Corporate Debtor is Rs. 50,00,00,000/- (Rupees Fifty Crores only) and its paid-up share capital is Rs. 33,12,39,130/- (Rupees Thirty Three Crores Twelve Lakhs Thirty Nine Thousand One hundred Thirty only).

- 2.2. That the Corporate Debtor is a company engaged in the manufacturing and sales of textiles and garments. Vide order dated 29 September 2017 (certified copy of which was issued on 11 October 2017) passed by this Adjudicating Authority, the Corporate Debtor entered into the corporate insolvency resolution process ("CIRP") on an application by one of its financial creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code").
- 2.3. The present Application is being filed by the RP, in his capacity as the RP of the Corporate Debtor, under Section 43 of the Code, for avoidance of certain preferential transactions made by the Corporate Debtor during relevant time, and for issuance of appropriate orders under Section 44 of the Code by this Hon'ble Adjudicating Authority.
- 2.4. That since incorporation, the Corporate Debtor has been controlled and managed by the Mandhana family who are the promoters of the Corporate Debtor. As on the insolvency commencement date, following were the directors of the Corporate Debtor:
 - i. Mr. Purushottam C. Mandhana
 - ii. Mr. Manish B. Mandhana
 - iii. Mr. Monarch Ajit Gandhi
- 2.5. That Mr. Purushottam C. Mandhana, Respondent No. 2, is the Managing Director of the Corporate Debtor. Mr. Manish B. Mandhana, Respondent No. 3, is a Director of the Corporate Debtor. As per FY 2017 Annual Report of the Corporate Debtor,

role of Mr. Manish Mandhana was re-aligned from Joint Managing Director to Non-Executive Director with effect from 01 March 2017.

2.6. That Respondent No. 2 and Respondent No. 3, together with their family members, form the promoter group of the Corporate Debtor ("Promoter Group"). In my opinion, Respondent No. 2 and Respondent No. 3, alongwith other members of the Promoter Group, have been in management and control of the Corporate Debtor till insolvency commencement date.

2.7. CD at a relevant time given preference to HDFC Bank in transactions under Section 43 of the Code. The Corporate Debtor had availed loans from a consortium of banks comprising Bank of Baroda, State Bank of India, Corporation Bank, The Saraswat Co-Op. Bank Limited, State Bank of Patiala, Bank of India, Allahabad Bank, Axis Bank Limited, Punjab National Bank, HDFC Bank Limited, Indian Bank, Karur Vysya Bank and led by the Bank of Baroda ("Consortium Lenders"). The loan of the Consortium Lenders was secured by way of security interests created over various assets of the Corporate Debtor. The total admitted debt of the Consortium Lenders is Rs1113.53Crores.

2.8. In addition, as per books of the Corporate Debtor, it took a loan of Rs. 25 Crores from Respondent No. 1 ("HDFC Loan"). The HDFC Loan was an unsecured loan and was first drawn down on 31 March 2015 to the tune of Rs 10 crores, followed by subsequent receipts and repayments in FY 2015-16 and FY 2016-17. As per the books of the Corporate Debtor, a sum of Rs. 25 Crores was outstanding as on 31 March 2016 to Respondent No. 1.

2.9. It is pertinent to note that the Corporate Debtor's account was first classified as NPA in the books of Axis Bank (one of the Consortium Lenders) on 31st March 2016, eventually followed by NPA in the books of other Consortium Lenders as per Corporate Debtor's records. By 31 March 2017, the Corporate Debtor had defaulted and

was classified as NPA in the books of almost all Consortium Lenders.

2.10. That while on one hand, as shown above, the Corporate Debtor had started defaulting in payments to Consortium Lenders in early 2016, the ledger of Respondent No. 1 maintained with the Corporate Debtor reflects various payments made by the Corporate Debtor towards the HDFC Loan even in FY 2016-17. It is pertinent that a number of these payments, totaling to Rs. 21.77 Crores (principal and interest), were made to Respondent No. 1 during the one-year period preceding the insolvency commencement date, as shown in the table below ("Impugned Transactions"):

2.11. From the review of the aforesaid facts, RP of the Corporate Debtor is of the opinion that the Corporate Debtor, acting through Respondents No. 2 and 3 has, at the relevant time, given a preference to Respondent No. 1 by way of the Impugned Transactions, for the following reasons-

- a. The Impugned Transactions involved a transfer of property of the Corporate Debtor i.e. funds belonging to the Corporate Debtor, totalling to Rs. 21.77 Crores, for the benefit of a creditor of the Corporate Debtor (Respondent No. 1).
- b. The Impugned Transactions were made by the Corporate Debtor on account of an antecedent financial debt/ liability (i.e. HDFC Loan) owed by the Corporate Debtor to Respondent No. 1.
- c. That the Impugned Transactions were made at the relevant time as per Section 43(4) of the Code i.e. during the period of one year preceding the insolvency commencement date.

2.12. That while the Corporate Debtor failed to make payments to the Consortium Lenders, at the same time, by way of such preference, the dues of Respondent No. 1 (an unsecured lender) were cleared by the Corporate Debtor (acting through Respondents No. 2 and 3) in priority to the outstanding secured loans of the Consortium

Lenders of the Corporate Debtor, which had the effect of putting Respondent No. 1 in a beneficial position than it would have been in the event of a distribution of assets of the Corporate Debtor being made in accordance with Section 53 of the Code.

2.13. It may be added that Section 43(3) of the Code provides for certain exceptions to a preference transaction in cases where transfer is made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee or in case of transfer creating a security interest in property acquired by the corporate debtor to the extent that such security 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. It is submitted that the Impugned Transactions do not fall within any of the exceptions set out in Section 43(3) of the Code as the same was neither in the ordinary course of the business or financial affairs of the Corporate Debtor or Respondent No. 1 nor given to secure any new value.

2.14. Under Section 44 of the Code, following orders may be made by this Hon'ble Adjudicating Authority:

"The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;
- (b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money to transferred
- (c) release or discharge (in whole or in part) of any security interest created by the corporate debtor,

- (d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct:
- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;
- (f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference, and
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.”

Submissions of Respondent no. 1 :

- 3. The respondent no.1 has submitted that the impugned transactions do not fall within the category of avoidable transactions and are not liable for reversal as per law laid by the Hon’ble Supreme Court in the cases of *Anuj Jain*.
- 4. In the present case, the Applicant has failed to meet the burden cast on him by the Hon'ble Supreme Court to prove a transaction as an avoidable one. The Applicant has not placed on record any material, audit report

or other evidence to suggest that the Impugned Transactions were not in ordinary course of business of the Corporate Debtor. On the contrary, the following facts would demonstrate that the transaction was nothing more than in the ordinary course of business.

- a. Respondent No. 1 is a scheduled bank and the largest private sector lender in the country.
 - b. The Applicant has not disputed the following facts: (i) Corporate Debtor was availing loans in the form of working capital facilities from Respondent No. 1 since 2015; (ii) loans were for Corporate Debtor's own business; (iii) repayment made by the Corporate Debtor was in fact towards the amounts outstanding owed by the Corporate Debtor towards the loan; (iv) there was no prepayment or excess payment.
5. The lookback period began only on September 29, 2016. The ledger set out at Exhibit "B.colly" (@pg.22) to the Application shows the transactions between Respondent No. 1 and the Corporate Debtor in relation to the loan. The debit and credit entries show that amounts were drawn down and repaid regularly since 2015 as part of the loan. The transactions before and after the lookback period are roughly of the same value. There is nothing out of the ordinary about the transactions (either in terms of nature or value) that took place after September 29, 2016. This would show that the Impugned Transactions formed part of the undistinguished common flow of Corporate Debtor's business and therefore qualify as transactions in the ordinary course of business.
6. The Application proceeds on the erroneous basis that repayment of a loan to a bank within the look back period ipso facto makes it an avoidable transaction. There is no provision of law or any single judicial precedent which treats repayment of an ordinary loan to a financial institution ipso facto as a preferential transaction. Even in Anuj Jain's case, the transaction was found to be avoidable only because the

Corporate Debtor furnished security not for its own business but for the business of its holding company.

7. If every single repayment of loan was made avoidable, then it would put a premium on non-repayments by a Corporate Debtor and would set a dangerous precedent where every company facing financial stress would avoid repaying loans to its lenders. Banks, as entities regulated by the Reserve Bank of India, are bound to diligently recover their dues and no bank can be faulted for being diligent in recovery of its dues.
8. Accordingly, the Impugned Transactions are not offending preferential transactions and are not liable to be avoided/reversed.

Findings and Decision

9. Heard learned counsel for both sides and perused the records.

9.1. Section 43 of the Code deals with preferential transactions

. Section 43 of the Code is as follows:

“43 : Preferential transactions and relevant time.-

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in subsection (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

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

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

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

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

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

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

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

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

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

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

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

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

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

9.2. Section 43 is a deeming fiction and Hon'ble Supreme Court in case of **Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited (Civil Appeal 8512-8527 of 2019)** at para 19.3 held that “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".

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

9.4. In the present case, the Corporate Debtor took unsecured loan from the Respondent and the terms of such loan stipulated periodical payments. and had paid some money towards repayment of such debt within the look back period of one years. It is not in dispute that the Respondents were put in beneficial position in what they would have been in case such amounts were to be distributed in

accordance with Section 53 of the Code. Accordingly, the transaction in question satisfies the basic ingredients contained in section 43(2) & (4). Hence, the transaction in question, to the extent it falls within the look back period, is a preferential transaction. However, section 43(3) of the Code provides certain exceptions, whereby even a transaction falling within the mischief of Section 43(2) read with Section 43(4) of the Code are excluded from the scope of section 43 calling for orders u/s 44 of the Code.

9.5. The Respondents have pleaded that the said transaction was carried out in Ordinary Course of business. The Respondent is a Schedule Commercial Bank, whose business is to lend to the business and recover the amounts so lent alongwith interest in terms of the repayment schedule. . The Corporate Debtor is engaged in business and borrows the money for the purpose of its business to meet its short term and long term financial requirements. The question whether the transaction should be in ordinary course of business of either of party or it has to be in ordinary course of business of both the parties was decided by Hon'ble Supreme Court in case of Anuj Jain (supra) in the following words –

“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.”

9.6. The Respondent has pleaded that the impugned transaction was made in discharge of Corporate Debtor's obligations to repay the loan in accordance with the terms of sanction and the debit and credit entries show that amounts were drawn down and repaid regularly since 2015 as part of the loan. The transactions before and after the lookback period are roughly of the same value. There is nothing out of the ordinary about the transactions (either in terms of nature or value) that took place after September 29, 2016. Accordingly, we have no hesitation to hold that repayment of loan to Respondent No. 1 during look back period was in Ordinary Course of business qua Respondent No. 1. Now the question is whether the impugned transaction can be said to be in ordinary course of business of the Corporate Debtor so as to satisfy the test laid down in section 43(3) for exclusion from rigors of section 43 of the Code and as interpreted in Anuj Jain's case (Supra).

9.7. In the present case, the Corporate Debtor is a business entity and requires funds for its business operations, which are partly met through borrowings and such borrowings are repaid in accordance with the sanction terms out of future cash accruals. The treasury management involving allocation of funds to the business need, lender's repayment, investment opportunities is one of important function. It is not in dispute that the Corporate Debtor have been making part payments regularly to the Respondent even prior to look back period and there have been no change in repayment behavior

within look back period also. The Corporate Debtor borrowed from the Respondents to meet its financial requirements for its business. It is not the case of the applicant that the borrowings from the Respondent were for a purpose other than the business of the Corporate Debtor. Ordinarily, every borrower makes sure that the amounts borrowed are paid as and when it becomes due or with least delay. The loans taken from Respondents are stated to be paid regularly as and when part of it fall due. Hence, we are of considered view that such repayment of loan was in Ordinary Course of business of the Corporate Debtor as well. Since, the impugned transaction was in Ordinary Course of business of Corporate Debtor and the Respondent, we are of considered view that it squarely falls within the exception provided in Section 43(3) of the Code. Hence, the impugned transaction can not be held to be a preferential transaction in terms of section 43 of the Code.

9.8. In view of foregoing, IA 1254/2018 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V. G. Bisht (Retd.)
Member (Judicial)