

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -II**

IA No. 2382/2021

In

C.P. (IB) No. 220/MB/2017

Under Section 42 of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016

Times Innovative Media Limited

Having address at- A-Wing, Matulya Centre, Senapati Bapat Marg, Lower Parel (West), Mumbai- 400013.

.... Applicant

Versus

Pawan Kumar Aggarwal (Liquidator)

Having address at – C42, Gopal Bhavan, 199, S.G. Marg, Marine Lines (East), Near Parsi Diary, Mumbai- 400002

.... Respondent No. 1

Rakesh Gandhi

Having address at – 1, Ashwamegh Bungalow Part 7, Near Hasubhai Park, Jodhpura Gam, Satellite, Ahmedabad-380015

.... Respondent No.2

In the matter of

Times Innovative Media Limited

...Operational Creditor

Versus

**Brand Connect Communications (India)
Pvt. Ltd.**

...Corporate Debtor

Order Delivered on :- 24/04/2024

Coram:

**Mr. Anil Raj Chellan
Member (Technical)**

**Mr. Kuldip Kumar Kareer
Member (Judicial)**

Appearances:

For the Applicant : Adv. Yash Jain a/w Yahya Batatawala

For the Respondent : Adv. M.S. Bhardwaj

ORDER

Per: - Kuldip Kumar Kareer, Member (Judicial)

1. The Applicant (i.e. Operational Creditor) has filed the present application impugning the order dated 03.09.2021 passed by the Liquidator Mr. Pawan Kumar Agarwal (i.e. Respondent No. 01), wherein the Respondent No. 01 rejected the Applicant's objection dated 20.06.2019 and came to an

observation that “financial creditor Mr. Rakesh Gandhi, even though he is a related party, is entitled to have priority over the Operational Creditors in terms of Section 53 of the IBC, 2016”.

2. The Applicant states that vide present application, the Applicant is seeking directions from the Hon'ble Tribunal to set aside the observations and conclusions of the Respondent No. 1.
3. The Applicant states that one Mr. Rakesh Gandhi, who is the Respondent No. 2 herein, is the Financial Creditor holding more than 51 % stake in the Corporate Debtor. Keeping in mind the position held by Respondent No.02 in the Corporate Debtor, the Respondent No. 2 is a related party who has lent monies to the Corporate Debtor and, thus, he is also a financial creditor coming under the purview of the Section 5(24)(a) of the Insolvency and Bankruptcy Code, 2016 (“the Code”).
4. The Adjudicating Authority was pleased to admit the above-captioned Company Petition vide Order dated 27th March, 2018. Applicant/ Operational Creditor states that during the CoC meeting held on 07.06.2019 in relation to the liquidation of the Corporate Debtor, the Financial Creditor indicated that according to the section 53 of the Insolvency and Bankruptcy

Code, 2016, the financial creditor would get preference over the operational creditor in distribution of liquidation estate of the Corporate Debtor.

5. The Applicant/ Operational Creditor further states that an objection was taken by the Operational Creditor against such indication and according to the Operational Creditor such preference cannot be given as the Financial Creditor in this case is a related party of the Corporate Debtor under section 5 (24)(a) of the Insolvency and Bankruptcy Code, 2016.
6. The Applicant states that the impugned order was passed on 03/09/2021 and was communicated to the Operational Creditor on 06/09/2021 and hence, the present Application is within limitation as per the statute. The Applicant states that if any delay in filing this application be condoned.
7. The Applicant states that no harm and prejudice shall be caused to the Respondent No. 2 if the present Interlocutory application is allowed and however grave harm and prejudice shall be caused to the applicant if the same is not allowed.
8. The Applicant prays this Tribunal to set aside order dated 03.09.2021 passed by the Liquidator and to direct the Liquidator to disburse the amount derived from liquidation process by giving priority to the Operational Creditor over

the Financial Creditor when the Financial Creditor is a related party to the Corporate Debtor. Hence the present application.

Reply filed on behalf of the Respondent No. 2:-

9. It is submitted that the Applicant is trying to mislead this Tribunal as the Respondent No. 2 is not related to the Corporate Debtor under Section 5 (24) (a) of the Insolvency and Bankruptcy Code, 2016. It is an admitted fact that the Respondent No.02 had resigned as Director of the Corporate Debtor with effect from 01.10.2013. Hence, the first preference when the Corporate Debtor undergoes liquidation should go to the Financial Creditor under Section 53 of the Insolvency and Bankruptcy Code, 2016. Therefore, grave, harm, loss and prejudice would be caused to the Respondent No. 2, if the present application of the Applicant is allowed by this Tribunal.
10. The Order of Allahabad NCLT in the matter of Swadisht Oils Pvt Ltd has been overruled by Hon'ble NCLAT in the matter of JYA Finance and Investment Company Ltd v/s. J.R. Agro Industries. Further, Section 53 of the Code does not bifurcate/discriminate among the financial creditors.
11. The preference has already been prescribed under the Code and the same shall be followed. The ulterior intention of the Applicant is to recover money

from liquidation of the Corporate Debtor bypassing the waterfall mechanism as prescribed under the Code.

12. Thus, the Respondent No. 2 has prayed for the dismissal of the present Interlocutory Application preferred by the Applicant.

Analysis and Findings: -

13. We have heard the Counsel for the parties and gone through the record.
14. The Applicant is seeking to impugn and set aside the order dated 03.09.2021 passed by the Liquidator/Respondent No. 2 whereby he has rejected the objections dated 20.06.2019 raised by the Applicant with an observation that Financial Creditor i.e. Ramesh Gandhi, even though is a related party, is entitled to have priority over the Operational Creditors in terms of Section 53 of the IB Code, 2016. The Applicant further seeks a direction to the Liquidator to give priority to the Operational Creditors in the distribution process under Section 53 of the IB Code, 2016 over the Financial Creditor which is a related party of the Corporate Debtor.
15. During the course of arguments, the Counsel for the Applicant has relied upon in the Judgment of Hon'ble NCLT, Allahabad Bench in the matter of *J.R. Agro Industries Private Limited vs. Swadisht Oil Private Limited (Company*

Application No. 59 of 2018) decided on 24.07.2018 whereby it was held that the unsecured debt of related party, which is intra-group debt, will be treated as an equity contribution rather than as an intra-group loan, with the consequence that the intra-group obligation will rank lower in priority than the same obligation between the unrelated parties. It was further held that an intra-group debt given by a related Company of the Corporate Debtor be classified at par with other equity shareholder and partners as provided in waterfall mechanism given in Section 53 (1) (h) of the IB Code, 2016. The Court further held that all the Operational Creditors should be treated equally without being also classified by their ageing that is without any discrimination of the period of their outstanding dues. It was further observed that a related party of the Corporate Debtor cannot misuse the provision of Section 53 of the IB Code, 2016 to defraud its creditors.

16. Ld. Counsel for the Applicant has further pointed out that the aforesaid NCLT, Allahabad Bench judgement was upheld by the Hon'ble NCLAT in its order dated 04.12.2018 passed in Company Appeal (AT) (Insolvency) No. 408 of 2018.
17. Ld. Counsel for the Applicant has further relied upon *Binani Industries Limited vs. Bank of Baroda & Anr., Company Appeal (AT) (Insolvency) No. 82*

of 2018 decided by the Hon'ble NCLAT on 14.11.2018 and has also relied upon *Phoenix ARC Private Limited vs. Spade Financial Services Limited and Others, Civil Appeal No. 2842 of 2020* decided by the Hon'ble Supreme Court on 01.02.2021.

18. On the other hand, Counsel for the Respondents has argued that Section 53 clearly places unsecured Financial Creditors over and above the Operational Creditors. Counsel for the Respondents has further argued that in Section 53 of the IB Code, 2016, there is no indication whatsoever that if the unsecured Financial Creditor is a related party, it has to be treated differently than the other unsecured Financial Creditors. Ld. Counsel for the Respondents has further argued that the ultra-virus of Section 53 of the IB Code, 2016 were challenged before the Hon'ble Supreme Court and in its judgement passed in *Swiss Ribbons Pvt. Ltd. vs. Union of India and others*, the constitutional validity of Section 53 of the IB Code, 2016 has been upheld. Therefore, according to the Counsel for the Respondent No. 2, a related party Financial Creditor cannot be discriminated on any ground when Section 53 of the IB Code, 2016 does not tend to distinguish the related party unsecured Financial Creditors from the other unsecured Financial Creditors in any manner.
19. Ld. Counsel for the Respondent No. 2 has further argued that Respondent No. 2 had given a loan to the Corporate Debtor in 2011-2012 part of which

was repaid and a sum of Rs. 1,21,74,901/- was due and payable on 31.03.2012. Thereafter, in the year 2013-2014, another amount of Rs. 16,00,000/- was received back. Respondent No. 2 resigned from the directorship of the Company on 01.10.2013 and his resignation was accepted on 30.12.2013. Respondent No. 2 had lodged a claim on 02.03.2019 for an amount of Rs. 1,79,75,886/- which was admitted to the extent of Rs. 49,23,316/- by Respondent No. 1. Therefore, according to the Counsel for the Respondent No. 2, the Operational Creditors cannot be placed ahead of Respondent No. 1 who is undisputedly an unsecured Financial Creditor even though he holds equity of more than 50% in the Corporate Debtor.

20. Having thoughtfully considered the contentions raised by the Counsel for the parties and after going through the case laws relied upon by them, we are of the considered view that in the matter of Swiss Ribbons Private Limited vs. Union of India (Supra), the Hon'ble Supreme Court has unequivocally held that the rationale for differentiating between financial debts, which are secured, and operational debts which are unsecured, creates an intelligible differentia between financial debts and operational debts which are unsecured, is directly related to the objects sought to be achieved by the IB Code. The Hon'ble Supreme Court has further held that it can be seen that unsecured debts of various kinds and so long as there is some legitimate

interest sought to be protected, having relations to the objects sought to be achieved by the statute in question, Article 14 does not get infringed and, therefore, the challenge to Section 53 of the IB Code, 2016 must also fail. It is, thus, evident from the law laid down in the matter of *Swiss Ribbons Private Limited vs. Union of India* that the constitutional validity of this section has been upheld. Since Section 53 of the IB Code, 2016 does not envisage any difference between unsecured debtors and related party unsecured Financial Creditors, it cannot be successfully argued on behalf of the Applicant/Operational Creditors that the Liquidator was wrong in placing Respondent No. 2 ahead of the Operational Creditors in the waterfall mechanism under Section 53 of the IB Code, 2016.

21. So far as the law laid down by the Hon'ble NCLT Allahabad Bench, in the matter of *J.R. Agro Industries Private Limited vs. Swadisht Oil Private Limited* (Supra) is concerned, the same cannot be applied to the facts and circumstances of the instant case. Firstly, the order was passed by the Hon'ble NCLT, Allahabad Bench in the context of a resolution plan, which is usually approved by the CoC in its commercial wisdom which is not justiciable and secondly, since the vires of Section 53 of the IB Code, 2016 have been upheld by the Hon'ble Supreme Court and in the absence of any specific provision in the said section, it cannot be interpreted in a way to hold that Operational

Creditors can be placed ahead and above of the unsecured Financial Creditor even if it may be a related party of the Corporate Debtor.

22. As a result of above discussions, we are of the considered view that there is no merit in the application and **IA No. 2382/2021 is hereby dismissed being devoid of merit.** There shall be no order as to cost.

Sd/-

**ANIL RAJ CHELLAN
(MEMBER TECHNICAL)**

Sushil

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**