



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

IA. No. 614/2021

**In
CP(IB) 1202/MB/2017**

**Application filed under Section 43 and 44 r/w
Section 60(5) of the Insolvency & Bankruptcy
Code, 2016 along with other applicable
provisions of IBC.**

In the matter of

KSS Petron Private Limited

.... Corporate Debtor

AND

IN THE MATTER OF

VINEET K. CHAUDHARY

Liquidator

At D-38/LGS(L/S),

South Extension Part-2, New Delhi – 110 049

.... Liquidator/Applicant

Versus

JSC-OGCC Jazstroy Service

Grand Alatau Business Centre 28V, TIMIRY

ASEV STR., Almaty 050040, Kazakhstan.

Also, at Project Office in India:

Unit No 330, third Floor, Tower Br Spaze I-

Tech Park, Sector 49 Sohna Road Gurgaon HR

122001.

... Respondent

Order Pronounced on: - 18.12.2024



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Coram:

Anil Raj Chellan
Member (Technical)

Kuldip Kumar Kareer
Member (Judicial)

Appearances -

For the Liquidator/Applicant : Adv. Sandeep Bajaj, Adv. Soayib Qureshi, Adv. Rishabh Dua, Adv. Aparna Singh.

For the Respondent : Sr. Adv. Chetan Kapadia, Adv. Saloni Kapadia, Adv. Karan Gandhi, Adv. Yash More.

Liquidator in Person : Mr. Vineet K Chaudhary.

ORDER

Per: Anil Raj Chellan, Member (Technical)

1. The instant Interlocutory Application is preferred by the Applicant/Liquidator of KSS Petron Private Limited (the 'Corporate Debtor') under Sections 43 and 44 of the Insolvency and Bankruptcy Code, 2016 (the 'Code') read with Section 60(5) of the Code along with other applicable provisions and regulations to pass an order directing the Respondent to pay the amount of Rs. 84 Crore paid by the Corporate Debtor during the period of April 2016-May 2017 along with interest as those transactions are in preference over other creditors.

Facts of the case as pleaded by the Applicant: -

2. On a petition filed under Section 10 of the Code, the Corporate Insolvency Resolution Process ('CIRP') was initiated against the



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Corporate Debtor vide order dated 01.08.2017. The Committee of Creditors ('CoC') constituted as per the provisions of the Code passed a resolution for conducting the forensic audit of the Corporate Debtor for a period of 2 years preceding the insolvency commencement date, i.e., 01.04.2015 to 30.11.2017 and the forensic auditor submitted his report dated 27.03.2018. Based on the forensic audit report and other documents, the Resolution Professional formed an opinion that the Corporate Debtor has, at the relevant time, given a preference and filed an application bearing MA No. 529 of 2018 on 04.06.2018 before this Tribunal.

3. Since the CIRP Process could not succeed, this Tribunal vide order dated 27.12.2019 initiated liquidation proceedings against the Corporate Debtor and appointed, the Applicant as liquidator.
4. The Liquidator, pursuant to his obligations and duties under the Code, perused MA No. 529 of 2018 and found the same to be lacking in material particulars. Therefore, an application (memo of withdrawal) was preferred by the Applicant on 13.10.2020 based on which this Tribunal vide its order dated 10.12.2020 granted liberty to the Applicant to file a fresh application in this regard. Accordingly, the present application has been filed by the Applicant.
5. The Applicant submits that the Corporate Debtor was subcontracted offsite and utility portion of the refinery project of Indian Oil



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Corporation Limited (IOCL) situated at Paradip, Orissa ('Paradip Project') through fellow subsidiary of the Corporate Debtor namely, JSC-OGCC Kazestroy Services, the Respondent. The project was completed by the Corporate Debtor and it was also put into operation and dedicated to the nation on 07.02.2016. The Corporate Debtor was raising invoices to the Respondent regarding the work done in the said pipeline project and the Respondent, upon receiving a fund of IOCL, was releasing the same to the Corporate Debtor against the invoices raised.

6. In addition, the Respondent provided certain funds in advance to the Corporate Debtor to carry on the project work in case there was a delay in getting funds from IOCL or to mitigate the cost over expenditure. As per the records of the Corporate Debtor, an advance of Rs. 279.95 Crores was received by the Corporate Debtor from the Respondent up to 31.03.2016.
7. The Corporate Debtor raised certain financial assistance from the consortium of lenders led by the State Bank of India and the said loan accounts were classified as non-performing assets on account of the defaults and the said creditors/lenders recalled their outstanding dues from the Corporate Debtor by 31.03.2016.
8. The Applicant states that the Corporate Debtor paid an amount of Rs. 84 Crores to the Respondent during the period April 2016 to May 2017



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i.e., during the relevant period, despite the loan accounts being NPA and lenders having recalled their outstanding loans in complete disregard of the credit agreement and established principle of the law.

9. The Applicant states that the transfer of Rs. 84 Crores to the Respondent despite there being outstanding dues of Rs. 582.19 Crores against the lenders as on 31.03.2016 and an outstanding of Rs. 219.24 Crores towards other trade payables as on 31.03.2016 appears to be without any legal or bonafide reason. The Applicant has produced a copy of the relevant vouchers maintained by the Corporate Debtor for the relevant period and a copy of the financial statement of the corporate debtor for the financial year ended as on 31.03.2016 to depict the aforesaid transactions.
10. The Applicant further states that the Respondent herein is a related party of the Corporate Debtor and falls within the definition of Section 5(24)(i) of the Code, being a fellow subsidiary of the Corporate Debtor. The Applicant contends that the amount of Rs. 84 Crores has been transferred by the Corporate Debtor to the Respondent to give preference to its related party over lenders and other creditors of the Corporate Debtor.
11. The Respondent, being an Operational Creditor of the Corporate Debtor, stands much lower in priority than the lenders, that too the secured and other creditors of the Corporate Debtor. By way of the said



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transfer, the Respondent has been accorded a beneficial position due to the unique position of being a fellow subsidiary of the Corporate Debtor.

12. The Applicant further submits that the amounts paid by the Corporate Debtor to the Respondent in preference over other creditors are required to be vested in the Corporate Debtor so that the same becomes a part of the liquidation estate of the Corporate Debtor and be paid off to all the stakeholders as per the mechanism provided under Section 53 of the Code.
13. It is also submitted that as per Regulation 39 of the IBBI (Liquidation Process) Regulations 2016 ('Liquidation Regulations'), the Liquidator is duty-bound to recover and realise all assets and dues to the Corporate Debtor in a time-bound manner for maximization of the value of the assets.
14. The Applicant submits that the transfer of the said amount in favour of the Respondent has put the Respondent in a much more beneficial position than it would have been in the absence of such transfer. The aforesaid transfer appears to be preferential transactions as per Section 43 which took place within the look-back period of 2 years preceding the Insolvency commencement date i.e., 01.08.2017.
15. The Applicant states that preferential transactions/transfers have taken place during the relevant time as prescribed under Section 43 (4) of the



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Code, and therefore has prayed for issuing directions to the Respondent to pay such sums to the liquidation estate. The Applicant has also referred to the judgment of the Hon'ble Supreme Court in *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited [Civil Appeal Nos. 8512-8527 of 2019]*.

Submissions of the Respondent

16. The Respondent has filed its affidavit in reply and denied each and every statement, averments, and allegations contrary to the case of the Respondent.
17. The Respondent states that it is a technology-driven engineering, procurement and construction company with a global presence. It is an ethical law-abiding entity known for its punctilious and extensive corporate governance policies.
18. The Respondent states that this application has been filed by the Applicant more than 2 years after the filing of the original application MA No. 529 of 2018. Though the Tribunal allowed the withdrawal of the application bearing MA No. 529 of 2018 on 10.12.2020, the present application is defective for the reason that the limitation period for filing the said application was not protected by this Tribunal.
19. The Respondent submits that IOCL and the Respondent entered into a contract dated 06.11.2010 for the development of Paradip refinery LSTK Package C (Project) pursuant to the acceptance of KSS' bid in the tender issued by IOCL. Subsequently, the Respondent sub-contracted the work



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to the Corporate Debtor on a back-to-back basis under the Sub-contract agreement dated 02.03.2011 executed between the Respondent and the Corporate Debtor ('Sub-contract').

20. As per the terms of the Paradip Contract, IOCL agreed to advance various sums to the Respondent (on behalf of the Corporate Debtor) to undertake the Project. The said advances were remitted on the condition, inter alia, that the same, together with the interest thereon at the rates specified for the time being, shall, without prejudice to any other mode of recovery available to IOCL (by deduction from the gross accepted amount of any running account bill and the final bill of KSS, commencing from any running account bill of KSS), shall be secured by a guarantee/undertaking from a Bank. Accordingly, pursuant to the advances paid by IOCL from time to time, the Respondent approached various Banks for issuing such guarantees.
21. Accordingly, the following Bank guarantees were issued by the relevant Banks pursuant to the advances paid by IOCL, from time to time, for the execution of the Project;
 - a) Bank guarantee for Rs. 50 Crores dated 20.11.2013 which was a continuing Bank guarantee and remained valid and irrevocable for all claims of IOCL upon Axis Bank Limited made up to the midnight of 20.11.2024. The original Bank guarantee was subsequently extended by Punjab National Bank. The advance payment received by the Respondent from IOCL was advanced to the Corporate Debtor on 02.12.2013. The said advance was to be recovered by IOCL from monthly running account bills within



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a specified tenure of 1 year. However, the said amount of Rs. 50 Crores could not be set off from RA bills due to financial crunch at the Corporate Debtor's end, non-completion of work as per the agreed schedule and other project financing needs.

As the advance could not be recovered from the Corporate Debtor within the stipulated time frame and the extended period due to reasons solely attributable to the Corporate Debtor, IOCL issued notice dated 21.03.2016 for invocation of the Bank Guarantee to recover the advance payment made to the Corporate Debtor.

The issuer Bank PNB made the payment of Rs. 50 Crores to IOCL in terms of the guarantee as per the Banking guidelines and recovered the same from KSS. As the delay in completion of the project as per the agreed schedule is solely attributable to the Corporate Debtor, the Respondent vide its letter dated 30.03.2016 called upon the Corporate Debtor to immediately pay the outstanding Rs. 50 Crores to the Respondent.

- b) Axis Bank issued a Bank guarantee for Rs. 25 Crores on 12.06.2014 in respect of the advance payment of Rs. 25 Crores received from IOCL which was, in turn, advanced to the Corporate Debtor on 19.06.2014.

As the advance could not be recovered from the Corporate Debtor within the stipulated time and extended period due to reasons solely attributable to the Corporate Debtor, IOCL issued notice dated 13.06.2015 to Axis Bank for invocation of the Bank



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Guarantee to recover the advance payment. Axis Bank made the payment of Rs. 25 Crores to IOCL in terms of the said Bank guarantee as per the Banking guidelines and recovered the same from Respondent.

Accordingly, Respondent vide its letter dated 20.06.2015 called upon the Corporate Debtor to immediately pay the outstanding Rs. 25 Crores to the Respondent.

- c) Another Bank guarantee for Rs. 25 Crores was issued by ING Vaishya Bank on 20.01.2015. The amount of advance received from IOCL was passed on to the Corporate Debtor in January and February 2015.

As the advance could not be recovered from the Corporate Debtor within the stipulated time frame and extended period, due to reasons solely attributable to the Corporate Debtor, IOCL issued a notice dated 13.05.2015 to ING Vaishya Bank Limited for invocation of Bank guarantee for an amount of Rs. 25 Crore to recover the advance payment made to the Corporate Debtor. ING Vaishya Bank made the payment of Rs. 25 Crores to IOCL in terms of the said Bank Guarantee and recovered the same from the Respondent.

Accordingly, the Respondent vide its letter dated 13.05.2015 called upon the Corporate Debtor to immediately pay the outstanding Rs. 25 Crores to the Respondent.



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22. The Respondent submits that it facilitated several advances to the Corporate Debtor from April 2013 to 31st March, 2016 to aid the Corporate Debtor from its own funds and from advances from the customer (i.e., IOCL) as rolling advance and advance against Bank guarantees to meet the working capital needs of the Project and executed its obligations. The total advances from the Respondent to the Corporate Debtor as on 31.03.2016 stood at Rs. 279.45 Crores which were to be recovered from the Corporate Debtor as per the terms of the Sub-contract read with the Paradip Contract.
23. In addition to the above, since 1st April, 2016 various sums were paid to the sub-contractors and suppliers engaged by the Corporate Debtor (approximately Rs. 48.29 Crores).
24. Between July 2014 and March 2016, the Respondent sent several reminders to the Corporate Debtor for payment of outstanding amounts (in relation to bank guarantees) under the Sub-contract, pursuant to which, the Corporate Debtor paid a total of Rs. 84 Crores only to Respondent.
25. It is submitted that the aforementioned proceeds were used by Respondent to clear the Issuing Bank's outstanding of Rs. 201 crores accrued on account of invocation of Bank Guarantee No. 007BG00205014 dated December 27, 2013 (amended on December 31, 2013) ("Bank Guarantee 4"), provided for the Project. It is apposite to



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mention that the Bank Guarantee 4 was invoked by IOCL due to poor performance by the Corporate Debtor in the execution of the Project.

26. It is submitted that the Corporate Debtor was running the Project till as late as January 13, 2016, post which, due to reasons solely attributable to the Corporate Debtor, alternate agencies were engaged by IOCL for the balance work/punch points, at the risk and cost of Corporate Debtor, which was settled by Respondent, and recoverable from the Corporate Debtor. It is pertinent to note that Respondent has incurred these costs on account of abandoning the Project by the Corporate Debtor without completion. It is submitted that due to reasons solely attributable to the Corporate Debtor, the Corporate Debtor abandoned the Projection, without even completing the same, leading to serious law and order issues and protests by the sub-contractors and agencies engaged by the Corporate Debtor. It is reiterated that the Project was abandoned prior to completion, without any intimation of IOCL or KSS, due to reasons solely attributable to the Corporate Debtor.
27. In terms of the Proof of Claim dated September 12, 2017 submitted by Respondent to the Interim Resolution Professional/Resolution Professional, the Respondent has a claim of Rs. 447,27,65,010/- against the Corporate Debtor ('claim'). The payment of Rs. 84 Crores made by the Corporate Debtor has already been accounted for in the claim submitted by Respondent. It is pertinent to note that the Claim submitted



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to the Interim Resolution Professional/ Resolution Professional in Form F, specifically mentioned “Ledger account, Agreement copy, Various correspondence requesting for the return of project advance, Banks statements etc.” against “DETAILS OF DOCUMENTS BY REFERENCE TO WHICH CLAIM CAN BE SUBSTANTIATED”. Further, KSS mentioned “As per back-to-back contract from IOCL and JSC to KSS Petron on all the risk and cost and other applicable clause of the agreement” against “DETAILS OF ANY MUTUAL CREDIT, MUTUAL DEBTS, OR OTHER MUTUAL DEALINGS BETWEEN THE CORPORATE DEBTOR AND THE CREDITOR WHICH MAY BE SET-OFF AGAINST THE CLAIM”. Copies of the aforesaid were also submitted along with the Claim. As such, the Interim Resolution Professional/ Resolution Professional became aware of the payments made by the Corporate Debtor to Respondent on the very date of submission of the Claim i.e., on September 12, 2017.

28. A copy of the Proof of Claim dated September 12, 2017 submitted by KSS to the Interim Resolution Professional/Resolution Professional is annexed.
29. It is evident that the case of the Applicant in the Application is untenable both in fact and law, and the Application ought to be dismissed on the following grounds, each of which is taken in alternate and without prejudice to the other.



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30. The Respondent submits that as per Regulation 35-A of the CIRP Regulations, any application under Section 43 must be made within 135 days of the commencement of the Insolvency Process.
31. The Respondent also submits that the relief sought by the Applicant by way of the present application is also brought under the provisions of the Limitation Act, 1963.
32. The Respondent further submits that it received the monies from the Corporate Debtor in its ordinary course of business and in line with the subsisting contract. The impugned transactions are indisputably covered in the ordinary course/common flow of business for an engineering, procurement and construction such as the Respondent which undertakes various construction works in India, in certain instances with the help of sub-contractors and assignees.
33. It is also further contended that a contract of guarantee is an independent contract and does not fall within the purview of Section 43 of the Code.

Analysis

34. We have heard the Counsel for the parties, and have also perused the documents on record.
35. The Applicant's case is that the Corporate Debtor made certain transactions amounting to Rs 84 crore in favour of the Respondent



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which is a related party as per Section 5(24)(i) of the Code. These transactions occurred within a period of 2 years preceding the Insolvency Commencement Date. Despite the classification of loan accounts by the consortium of lenders and the recall of their outstanding dues from the Corporate Debtor, these transactions were made in complete disregard of the credit agreement and established legal principles.

36. As of 31.03.2016, an outstanding amount of Rs. 582.19 crore was due to the secured lenders. The Applicant contends that the Corporate Debtor made a preferential payment of Rs.84 crore to the Respondent without any legal or bonafide justification. Shortly after these payments, a meeting of the Board of Directors was held on 27.06.2017 during which they authorised the filing of an application under Section 10 of the Code to initiate CIRP against the Corporate Debtor. Consequently, an application under Section 10 was filed before this Tribunal on 11.07.2017.
37. The Applicant argues that the timing of the CIRP application, being filed merely two months after the payments to the Respondent, clearly indicates that preferential treatment was given to the Respondent over the financial creditors, including banks and other creditors. Furthermore, the Applicant asserts that the Respondent, as one of many alleged operational creditors of the Corporate Debtor, is positioned much lower in priority compared to the financial creditors. As a result



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of these transactions, the Respondent has obtained a beneficial position.

Therefore, the Applicant seeks to classify the transfer of Rs. 84 Crores as a preferential transaction under Sections 43 and 44 of the Code.

38. The Respondent, on the other hand, states that it subcontracted the work to the Corporate Debtor under a back-to-back arrangement, as outlined in the Sub-contract dated 02.03.2011. For the execution of the project, IOCL agreed to advance various sums to KSS (on behalf of the Corporate Debtor), with the condition that these sums, along with interest, would be secured by a guarantee or undertaking from a Bank. Consequently, several Bank guarantees were issued pursuant to the advances paid by IOCL, with the Respondent securing these advance payments from IOCL and advancing them to the Corporate Debtor, as needed for the execution of the project.
39. Due to the financial crunch on the part of the Corporate Debtor, along with the non-completion of work according to the agreed schedule and other project financing necessities, the advance payments made by IOCL could not be set off against the monthly running account bills. As a result, IOCL invoked the bank guarantees from time to time. The payments made by the Corporate Debtor to the Respondent were used to clear the outstanding related to the Bank Guarantees.



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40. It is further submitted that the Respondent filed a claim of Rs. 447,27,65,010/- against the Corporate Debtor after taking into account the payment of Rs. 84 Crores.
41. Having taken note of the brief outline of the facts of the case and the submissions from both parties, we may dilate upon the contentions raised by the parties.
42. There is no dispute between the parties regarding the payment of Rs. 84 crore by the Corporate Debtor to the Respondent, who is a related party. These transactions admittedly took place during the period from April 2016 to May 2017, which is within two years preceding the Corporate Insolvency Resolution Process that was initiated on August 1, 2017. However, the Respondent strongly argues that the Application is not maintainable, claiming it is barred by limitation and that the transactions were conducted in the ordinary course of business.
43. It is noticed that CIRP was initiated against the Corporate Debtor on 01.08.2017. During the 3rd meeting of the Committee of Creditors ('CoC') held thereafter, a resolution was passed to conduct a forensic audit of the Corporate Debtor. Accordingly, the forensic auditor conducted the audit and submitted his report dated 27.03.2018. Based on this report, the erstwhile RP filed an application bearing MA No. 529 of 2018 on 04.06.2018 under Section 43 read with Section 50 and 66



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before this Tribunal, titled “Mohan Lal Jain v. M/s KSS Petron Private Limited and Ors.”.

44. As the CIRP did not yield successful results, this Tribunal initiated liquidation proceeding against the Corporate Debtor vide an order dated 27.12.2019, and appointed the Applicant as the Liquidator. On 13.10.2020, the Liquidator submitted a praecipe to this Tribunal requesting permission to file a fresh application following the withdrawal of MA No. 529 of 2018, previously filed by the RP. This Tribunal vide order dated 10.12.2020 allowed the withdrawal of MA No. 529 of 2018 and granted liberty to file fresh application(s), if any, as permissible under law. Subsequently, the Applicant filed the present application on 25.02.2021.
45. The Respondent contends that the provisions of the Limitation Act, 1963 apply to proceedings under the Code and thus, the reliefs sought by the Applicant in the present application are barred under the provisions of the Limitation Act, 1963. It is further submitted that Article 137 of the Limitation Act, 1963 provides that for any application for which no period of limitation is expressly provided, the period of limitation will be three years from the date when the right to apply accrues. It is contended that the period of limitation prescribed under Article 137 of the Limitation Act, 1963 applies to all applications, including the present one. To support this argument regarding the



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application of the Limitation Act, the Applicant has cited decisions from the Hon'ble Apex Court in *B.K. Educational Services Pvt. Ltd. v. Paras Gupta & Associates AIR 2018 SC 5601*, *Sagar Sharma & Anr. v. Phoenix Arc Pvt. Ltd. & Anr. (2019) 10 SCC 353*, *Jignesh Shah and Anr. v. Union of India and Anr. 2019 SCC Online 1254*, *Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries (P) Ltd. (2020) 15 SCC 1*

46. It is further submitted on behalf of the Respondent that although this Tribunal allowed the Applicant to withdraw MA No. 529 of 2018 vide its order dated 10.10.2020, the said liberty cannot be misinterpreted. The liberty granted does not permit to seek an extension of the limitation period. The order merely preserved the Applicant's right to file a fresh application and did not extend the limitation period prescribed under law.
47. It is further argued by the counsel for the Respondent that the benefit of exclusion of time period during which MA No. 529 of 2018 was being prosecuted by the Applicant, available under Section 14(2) of the Limitation Act is not available to the Applicant in this case. To support this argument, the Respondent has cited the orders passed in *Consolidated Engg. Enterprises and Ors. v. Principal secy. Irrigation Deptt. And Ors. (2008) 7 SCC 169*, *Deena v. Bharat Singh and Ors. 2002 6 SCC 336*, *Zafar Khan and Ors. v. Board of Revenue, U.P. and Ors., 1984 Supp SCC 505* & *Sesh*



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*Nath Singh & Anr. v. Baidyabati Sheoraphuli Co-Operative Bank Ltd. And
Anr. [Civil Appeal No. 9198 of 2019, decision dated March 22, 2021].*

48. The Respondent vehemently contended that the present application has been filed by the Applicant after a delay of 1304 days from the date date of commencement of CIRP, and 426 days from the date of the liquidation order. Therefore, the Respondent contends that the Application should be dismissed being barred by time.
49. On the contrary, the Applicant has submitted that the Respondent has wrongly relied on Regulation 35-A of IBBI (Insolvency Resolution for Corporate Persons) Regulations, 2016 to assert that an application under Sections 43 and 44 of the Code must be filed by the Resolution Professional within a period of 135 days. The Applicant has stated that Regulation 35-A came into effect on 04.07.2018, following a notification dated 03.07.2018 whereas the erstwhile RP had already filed an application being MA No. 529 of 2018 under Section 43 and 44 of the Code on 04.06.2018 before this Tribunal. Therefore, the timeline provided in Regulation 35-A does not apply to this case, and the Applicant contends that the current application is not barred by limitation.
50. Before we consider the rival contentions of the parties, we may notice Section 43 of the Code:



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“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 an 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.”

51. A plain reading of the above provisions indicates that both the resolution professional and the liquidator are allowed to prefer an application under Section 43 of the Code. Although CIRP Regulations 35-A (3) specifies a time limit for making an application under Sections 43, 45, 50 or 66 to the Adjudicating Authority, the IBBI (Liquidation Process) Regulations 2016 do not prescribe any such time limit. Furthermore, Regulation 15(2)(e) of the Liquidation Regulations gives a clear indication that the liquidator is also authorised to submit these applications.
52. In the present case, the Application has been filed by the Applicant, who has been appointed as the liquidator of the Corporate Debtor. Therefore, we are of the view that the time limit prescribed in CIRP Regulations, which applies to the resolution professional, cannot be considered applicable here as the Corporate Debtor is currently in the liquidation stage and this application has been filed by the liquidator of the Corporate Debtor.



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53. We may usefully refer to the decision of the Hon'ble NCLAT in the case of Aditya Kumar Tiberwal v. Om Prakash Pandey and Ors. [Company Appeal (AT) Insolvency No. 583 of 2021] where it was observed as follows;

“Regulation 35A of the CIRP Regulations imposes a duty on the Resolution Professional to take measure within the timeline as prescribed. In performance of such duty the public in general has no control including the Corporate Debtor. In event it is held that any action taken by Resolution Professional beyond the time prescribed in Regulation 35A of the CIRP Regulations is prohibited, it shall cause serious general inconvenience or injustice to the Corporate Debtor. One of the objective of the Code is to maximise the assets of the Corporate Debtor. In event the actions taken by the Resolution Professional after the timeline prescribed in Regulation 35A of the CIRP Regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of Resolution Process, reach of the Court and shall cause great inconvenience and injustice to Corporate Debtor. Hence, we are of the view that timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the Resolution Professional beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be non-est or void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations. There may be genuine and valid reasons for Resolution Professional not to file application for avoiding the transactions within time prescribed which are question relating to each case and has to be 17 Company Appeal (AT) Ins. No. 583 of 2021 examined on case-to-case



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basis and if there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit.”

54. The Hon'ble Apex Court in the case of Surendra Trading Company v. Juggilal Kamlapet Jute Mills Company Ltd and Ors referred with approval the following observation in P.T. Rajan Vs. T.P.M. Sahir and Ors. (2003) 8 SCC 498:

“48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Monghur & Anr. AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal & Ors. (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited & Anr. V. Swapan Kumar Jana & Ors. (1997) 1 CHN 189).

49. Furthermore, a provision in a statute which is procedural in nature although employs the word “shall” may not be held to be mandatory if thereby no prejudice is caused.”

55. Based on the above discussion and decisions referred we hold that CIRP Regulation 35 A (3) is not applicable in the present case.
56. The counsel for the Respondent further argued that the provisions of the Limitation Act should apply to this Application if not CIRP Regulations 35-A (3), and has referred to Section 238 A of the Code, which states:



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238A. Limitation. – The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.

57. However, in our considered view, it is a settled position of law that the provisions of the Limitation Act apply to applications for the initiation of CIRP against a corporate debtor. The various decisions cited by the Respondent from Hon'ble NCLAT and Hon'ble Supreme Court also pertain to applications filed under Sections 7 and 9 of the Code. However, the issue for consideration here is whether the process of CIRP or liquidation is governed by the provisions of the Limitation Act. The timelines specified for different procedural actions are intended to ensure that the process is completed in a time-bound manner, thereby achieving the objectives of the Code. Therefore, we do not agree with the Respondent's argument that Article 137 of the Limitation Act, 1963 applies to every action contemplated under the Code.
58. Even if we assume that Article 137, which sets a limitation period of three years from the date when the right to apply accrues for "other application" is applicable for every application filed under the Code, it can be observed that the present application was filed within the three year timeframe. The CIRP commenced on 01.08.2017, and the



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liquidator filed the present application on 25.02.2021. The Hon'ble Supreme Court, in Suo Moto Writ Petition No. 03 of 2020, issued an order dated 23.09.2021 which excluded the period from 15.03.2020 till 02.10.2021 when calculating the limitation period for any suit, appeal, application or proceeding. If the above period is excluded, it is clear that the application was filed within 3 years from the insolvency commencement date.

59. In this situation, we do not find it necessary to examine the exemption or exclusion of limitation period, if any, due to the filing of an initial application under Sections 43 and 44 (MA No. 529 of 2018), as well as the implications of obtaining leave from the Tribunal to file a fresh application.
60. Based on the above discussions, we conclude that timelines specified in Regulation 35-A of the CIRP Regulations do not apply to the present application. Therefore, the application filed by the liquidator cannot be held invalid or non est on the grounds of limitation.
61. Now, we come to the question of whether or not the transactions made by the Corporate Debtor to the Respondent can be considered as preferential transactions.
62. The Respondent submits that the Corporate Debtor was developing the Project and was entitled to compensation in terms of Clause 3 of the Sub-



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contract, and as such, was paid an aggregate of approximately Rs. 1000 (Thousand Crores) in complete discharge of its obligation under the Sub-contract, despite defaulting on the Project Completion Schedule. It is submitted that the Corporate Debtor raised invoices of Rs. 257,01,65,819/- since 30.04.2016, which invoices were approved by the Respondent and adjusted against the amounts paid by the Respondent. The Respondent states that it has made the following payments as part of the transactions under the Paradip Contract and the Sub-contract;

- (i) Rs. 279.45 crores under Bank guarantees;
- (ii) Rs. 48.29 crores to the sub-contractors and agencies engaged by the Corporate Debtor;
- (iii) Rs. 153 crores to external agencies engaged by IOCL, at the risk and cost of the Corporate Debtor.

In addition, an amount of Rs. 207 crores is payable by the Corporate Debtor towards liquidated damages on account of non-performance of contractual terms.

63. According to the Respondent, all of the impugned actions were undertaken in the due and ordinary course of business, and within the mandate of the Paradip Contract and Sub-contract. Therefore, the act of repayment of the guarantee amounts for advances paid to the Corporate Debtor by IOCL must not be looked at in isolation but as part of a wider transaction. The transaction was undertaken merely to achieve the business purpose of Respondent and not to defraud one or the other



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creditors. Repayment of the amounts due to the Respondent was in due and ordinary course of business and to keep the project running. It is further submitted that even before the look-back period (prior to July 31, 2015), the Corporate Debtor, in the ordinary and due course of business, had been making payments to the Respondent as set out below;

Date of Payment	Amount
12.04.2016	1 crore
19.04.2016	8 crore
15.09.2016	5 crore
19.10.2016	5 crore
28.10.2016	7 crore
16.11.2016	4 crore
27.01.2017	25 crore
29.03.2017	5 crore
06.04.2017	14 crore
06.05.2017	10 crore

64. The Respondent submits that the above details demonstrate that the Corporate Debtor was making payments to the Respondent in the ordinary course of business and to meet the requirement to make payments in respect of the Bank Guarantees issued by the issuer Banks from time to time and within the mandate of the contracts existing at the time, to keep the project running, which was beneficial to both the Respondent and the Corporate Debtor. It is submitted that the larger purpose of the transaction should be kept in view while ascertaining a preferential transaction.



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65. It is further submitted that it is settled law that a Contract of Guarantee is an independent contract, which creates independent and distinct rights and obligations in favour of the parties which does not fall within the ambit of Section 43 of the Code. The Respondent has further submitted that various Bank guarantees were issued by the Banks on behalf of the Respondent towards the performance of the Paradip Contract, the liability of performance whereof was with the Corporate Debtor. It is submitted that an amount of Rs. 201 crores was due and recoverable from the Corporate Debtor as of May 2016. The payment of Rs. 84 crores by the Corporate Debtor to the Respondent was against the liability towards the invocation of the Bank guarantees. As such, the payment of the amount claimed as a preferential transaction was in reality in part discharge of the liability owed to the Banks when the bank guarantees were invoked by IOCL on account of the non-performance of its obligation by the Corporate Debtor, for reasons solely attributable to the Corporate Debtor.
66. It is also submitted that merely because the transaction was routed through the Respondent, it cannot be classified as a related party transaction. Therefore, inasmuch as the real nature of the transaction was a payment in part discharge of the liability owed to Banks, the classification of the same as a related party transaction is misconceived. Since the Paradip Contract and the Sub-contract were entered into much prior to the look-back period and the transactions were undertaken only



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in furtherance of the Paradip Contract and the Sub-contract, the transactions should be looked beyond the look-back period.

67. The Respondent has further submitted that the amount of Rs. 84 crores paid to the Respondent is a mere 11% of the amount owed to the Respondent at that time. Thus, it is clear that such transactions were not entered into to defraud the creditors.
68. On the other hand, the Applicant states that the date of issuance of the Bank guarantees pertains to the years 2013, 2014 and 2015, however, the transactions in question have been made by the Corporate Debtor to the Respondent in the year 2016-2017. Further, no correspondence or document has been placed on record by Respondent to show that the transactions in question are on account of the encashment of Bank Guarantees.
69. One of the Respondent's primary contentions is that the Corporate Debtor paid Rs. 84 crores to the Respondent to fulfil the obligation arising from the invocation of the Bank guarantees issued in connection with the execution of the project. We may, therefore, notice the details of the guarantees and the dates on which the guarantees were invoked which are reproduced in the following table:



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S.N.	Guarantee Amount	Bank	Validity	Date of invocation
1.	50 crore	Axis Bank	20.11.2013 to 20.11.2014	
		Substituted by Punjab National Bank	Validity upto 20.07.2015	
		Extension of guarantee	Upto 20.07.2016	21.03.2016
2.	25 crore	Axis Bank	12.06.2014 to 13.06.2015	13.06.2015
3.	25 crore	ING Vysya Bank	upto 13.06.2015	13.05.2015

70. It is observed that the Bank guarantee of Rs. 50 crore issued by Axis Bank, which was subsequently substituted and extended by Punjab National Bank was invoked by IOCL on 21.03.2016. In response, the Respondent vide its letter dated 30.03.2016 sought a transfer of Rs. 50 crore from the Corporate Debtor. However, a payment of just Rs. One crore on 12.04.2016 and another amount of Rs.8 crore on 19.04.2016 were only made shortly after the said communication.
71. Additionally, the Bank guarantee of Rs. 25 crore issued by Axis Bank was invoked by IOCL on 13.06.2015 and the Respondent vide its letter dated 20.06.2015 called upon the Corporate Debtor to make the said payment. Similarly, the guarantee of Rs. 25 crore issued by ING Vysya Bank was also invoked by IOCL on 13.05.2015, with the Corporate Debtor being requested to make the payment vide letter of Respondent



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dated 20.06.2015. The Respondent states that between July 2015 and March 2016, it sent several reminders to the Corporate Debtor regarding the payment of amounts related to the aforesaid bank guarantees. However, the Respondent has not provided any transactions close to the invocations of these guarantees that fall outside the look-back period. Furthermore, we do not see any connection between the stated encashment of the aforesaid bank guarantees and the impugned transactions made by the Corporate Debtor to the Respondent.

72. Another contention of the Respondent is that the transactions were undertaken in the ordinary course of business and within the mandate of the contracts existing at the time, to keep the project running, which was beneficial to both the Respondent and the Corporate Debtor.
73. As per Section 43(2), a corporate debtor shall be deemed to have given “preference” if the corporate debtor’s transfer of property benefits any creditor on account of any pre-existing debt owed by the corporate debtor and such a transfer puts the creditor into a beneficial position than it would have had the assets been distributed in a liquidation scenario. Section 43(3) lays down two exceptions from the trappings of the deeming fiction of preferential transactions one of them being “*transfers made in the ordinary course of business or financial affairs of the corporate debtor or the transferee*”. Since the phrase “ordinary course of business” is not



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defined under the Code or the Companies Act, 2013, its establishment is subjective and must be assessed on a case-to-case basis.

74. When determining the nature of a transaction, several relevant factors need to be considered, including but not limited to the historical payment behaviour, the quantum of payments made, the benefits these transactions provided to the corporate debtor in maintaining its status as a going concern, and the relationship between the Corporate Debtor and the beneficiary. It is observed that the Respondent has not produced any records of payments made by the Corporate Debtor to the Respondent prior to the look-back period, which would have demonstrated the Corporate Debtor's payment behaviour. Furthermore, the Respondent mentioned in its reply that the Corporate Debtor was running the Project till as late as 13.01.2016, post which due to reasons solely attributable to the Corporate Debtor, alternate agencies were engaged by IOCL for the balance work. Therefore, it is important to notice that all the transactions in question occurred after the Corporate Debtor was no longer implementing the project, providing any benefit to them, or keeping its status as a going concern.
75. It is undisputed that as of 31.03.2016, an amount of Rs. 582.19 crores was outstanding to the lenders and due to defaults committed by the Corporate Debtor, the lenders classified the accounts as non-performing assets and recalled the loans, demanding payment by 31.03.2016.



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Despite being secured financial creditors, it is evident that the Corporate Debtor chose to make payment to the Respondent without any reason or justification.

76. As per the financial statement of the Corporate Debtor for the financial year ending 31.03.2016, the trade payables totalled Rs, 219.24 crores. The Respondent, as an operational creditor, ranks much lower in priority compared to the lenders that too secured and other creditors of the Corporate Debtor.
77. It is also important to note that the Respondent is a related party of the Corporate Debtor as per, Section 5(24)(i) of the Code and the CIRP against the Corporate Debtor was initiated at its instance under Section 10 of the Code on 04.04.2017. Being the 100% shareholder of the Corporate Debtor, the Respondent was fully aware of the Company's financial health and the proposed actions well in advance. Notably, even after filing the petition under Section 10 of the Code, the Corporate Debtor made payments totalling Rs. 24 crore to the Respondent (Rs. 14 crore on 16.04.2017 and Rs. 10 crore on 06.05.2017) despite knowing that the Company was headed for insolvency. Furthermore, the Board Resolution annexed with the petition for admission of the Corporate Debtor was dated after the date of filing of the petition under Section 10 of the Code.



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78. In the light of the discussions above, we have absolutely no doubt whatsoever that the Corporate Debtor provided preferential treatment to the Respondent, a related party, during the relevant period. These transactions clearly fall under the provisions of Sections 43 and 44 of the Code and cannot be treated as transactions in the ordinary course of business. Accordingly, IA No. 614 of 2021 is allowed and the Respondent is hereby directed to return the amount of Rs.84 core to the Corporate Debtor within one month from the date of this order. However, the Respondent shall be at liberty to submit a claim for this amount before the liquidator in accordance with the provisions of the Code.

There shall, however, be no order as to costs.

Sd/-

ANIL RAJ CHELLAN
Member (Technical)

//SALAM//

Sd/-

KULDIP KUMAR KAREER
Member (Judicial)