

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

M.A. 675 OF 2019

Under Section 43 of Insolvency &
Bankruptcy Code, 2016

Sterling Biotech Limited

...Applicant

Vs.

**Mr. Nitin Jayantilal Sandesara
& others**

...Respondent

In the matter of

C.P.(IB) No. 490/MB/2018

Andhra Bank

Financial Creditor

Vs.

Sterling Biotech Limited

Corporate Debtor

Order delivered on: 05.03.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Devashish Godbole, Advocate

For the Respondent : None

ORDER`

Per: V.G. Bisht, Member (Judicial)

1. This Misc. Application No. 675/2019 is filed by M/s Sterling Biotech Limited through its Resolution Professional in Corporate Insolvency Resolution Process (“CIRP”) seeking declaration of the transactions to related parties undertaken by the erstwhile Directors i.e. Respondent Nos. 1 to 5 as preferential transactions u/s 43 of the Insolvency & Bankruptcy Code, 2016 (“Code”) and to set aside those transactions and directions to the respondents to pay in respect of benefits received by them from the Corporate Debtor due to related parties transactions alleged in the Application. The Applicant seeks following reliefs :

1.1.This Tribunal be pleased to declare the Related Party Transactions entered into by the Corporate Debtor with its Related Parties as "preferential transactions";

1.2.This Tribunal be pleased to set aside the preferential transactions undertaken by the Respondent Nos. 1 to 5 on behalf of the Corporate Debtor with the Related Parties;

1.3.This Tribunal be pleased to direct the directors of the Corporate Debtor (i.e. the Respondent Nos. 1 to 5) pay such sums to the Applicant in respect of benefits received by him from the Corporate Debtor due to the Related Party Transactions;

2. Andhra Bank, a financial creditor of the Corporate Debtor, had filed an application against the Corporate Debtor to initiate the corporate insolvency resolution process under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code"), which was admitted vide order dated June 11, 2018, initiating insolvency application ("Admission Order"), and appointing the Applicant as the interim resolution professional of the Corporate Debtor. Thereafter, the Applicant was appointed as a resolution professional in the First meeting of CoC which was held on July 26, 2018.

3. The Applicant states that the following entities are related parties of the Corporate Debtor and fall under the definition of 'related party' as defined under Section 2(24) of the Code:
 - a. Sterling Oil Resources Limited;
 - b. Sterling Port Limited.Collectively referred to as "Related Parties"

3.1. The Applicant states that Section 43 of the Code reads as under
:

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 transfer —

(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.

4. The Applicant states the Corporate Debtor under the management of Respondents had entered into preferential transactions with the Related Parties, the summary which is set out below ("RP Transactions");

Sr. No.	Name of the Party	Nature of Transaction	Number of Transaction	Payment (INR) in Crores
1.	Sterling Oil Resources Limited	Financing Transaction	20	12.17
2.	Sterling Port Limited	Financing Transaction	04	3.68

		and Advance Payment		
Total			26	16.03

4.1. The Applicant states that the RP Transactions mentioned hereinabove fulfills all the conditions laid down in Section 43 of the Code, for it to be qualified as a 'preferential transaction' as as out hereinbelow:

4.2. On review of the payment register for the period of June 11, 2016 to June 10, 2018 (i.e. two years prior to the Insolvency Commencement Date), the Applicant states that the Corporate Debtor has undertaken the RP Transactions within the said period.

4.3. The Applicant states that on review of the constitutional documents of the Related Parties, the main objects of the business of the Related Parties is as follows:

Sr. No.	Name of the Entity	Nature of Business as stipulated in the MOA
1.	Sterling Oil Resources Limited	Oil Exploration and Production Activities
2.	Sterling Port Limited	Operates and Develops Marine Ports.

4.4. However, the transactions undertaken by the Related Parties of the Corporate Debtor are not in the nature of their ordinary course of business of the Corporate Debtor. The business of the Corporate Debtor is manufacturing of gelatin and active pharmaceutical ingredients.

4.5. Further, advancing of temporary loan to the Related Parties of the Corporate Debtor is not in nature of ordinary course of business or financial affairs of either parties but in the nature of financial debt. Therefore, repayment of temporary loans owed to these entities is not covered under exceptions under section 43(2) of the Code.

4.6. The Applicant states that it is abundantly clear from the details mentioned hereinabove that the debt due and payable to the Related Parties is of the nature of financial debt or operational debt and is antecedent in nature. The Applicant states that there are ledger extracts of the Related Parties which specifies that there is amount which is paid by the Related Parties to Corporate Debtor and the same has been annexed and marked hereto as Exhibit "E" Colly. Further, there are bank statements of the Related Parties which evidence that certain amounts were paid to the Corporate Debtor. The excerpts of the bank statements of the Related Parties have been annexed and marked hereto as Exhibit "F" Colly.

4.7. Section 53 of the Code sets out a waterfall mechanism for the the distribution of proceeds from the sale of the assets of the Corporate Debtor. Further, Section 53 sets out that the distribution of proceeds shall take place as per the priority list of creditors of the Corporate Debtor. Therefore, during the distribution of the assets of the Corporate Debtor, the Related Parties will be treated as creditors of the Corporate Debtor and will receive proceeds as per the priority list of creditors set out in Section 53 of the Code.

4.8. The Applicant states the Respondents undertaking the RP Transactions of the Corporate Debtor have given preference to the Related Parties. Further, the Applicant states that the debts owed by the Corporate Debtor to the Related Parties fall under clause (f) of Section 53(1) of the Code. The transactions such as these is precisely what has been envisaged in the Section 43 of the Code.

4.9. The Applicant further states that the Applicant was not provided with all the information sought by the Applicant from the management. It appears certain information pertaining to the pre- CIRP tenure has been intentionally withheld, misrepresented or destroyed with view to avoid detection. The Applicant submits that the Corporate Debtor is already being investigated by the Central Bureau of Investigation, Directorate of Enforcement and other investigatory bodies. The Applicant craves leave to rely on the orders/findings or the said bodies.

5. The Respondents have not filed the reply despite numerous opportunities having been provided to them. They have also not entered in appearance before this Tribunal.
6. Heard Counsel and perused the material on record.
 - 6.1. Section 43 of the Code creates a legal fiction whereby a payment made to a creditor towards repayment of antecedent debt is deemed as preferential transactions provided such transaction was taken within the specified period and was not in ordinary course of business.
 - 6.2. In the present case, the stated transaction clearly falls within the specified look back period of two years and the payee creditors are related parties of the Corporate Debtor. We appreciate the fact that the applicant has limited information to make out the case and it is the duty of the Respondents to come forward to explain that these transactions falls within the exception provided in section 43 of the Code, failing which an adverse inference can be drawn. The Applicant has specifically averred that the management has failed to provide complete information and details in relation to affairs of the Corporate Debtor. Accordingly, we have no hesitation to hold that the Respondents have failed to explain their position in relation to allegations against them, and the Applicant has proved that these transactions are preferential transactions. Accordingly, we set aside these transactions and hold that the parties who were paid by the Corporate Debtor shall refund these sums within 30 days of the communication of this Order.

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7. In view of aforesaid discussion, this MA 675/2019 is allowed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)