

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Ins) No.1367 of 2022

In the matter of:

Sahyog Infrastructures Pvt Ltd **Appellant**
602, Block 5, East End Apartments
Phase I, Mayur Vihar Extension,
New Delhi-110096.

Vs

Mrs. Anju Agarwal
RP M/s IP Constructions Pvt Ltd. **Respondent**
166, SFS DDA Flats,
Hauz Khas, New Delhi.

Present

For Appellant: Mr Abhishek Naik, Mr. Aishvary Vikram,
Mr. Mayur Punjabi, Advocates.

For Respondent: Mr Abhishek Anand, Mr Karan Kohli, Mr.
Vaibhav Mendiratta, Advocates.

With

Company Appeal (AT)(Ins) No.1370 of 2022

In the matter of:

Gem Marketing Pvt Ltd. **Appellant No.1**
310, 3rd Floor, Krishna Apra Plaza,
Sector-18, Noida, Gautam Budh Nagar,
Uttar Pradesh – 201302.

Vidushi Agarwal, **Appellant No. 2**
Flat No. 502, Kalybso Court-2,
Jaypee Greens Wishtown,
Sector 128, Noida, Gautam Budh Nagar,
Uttar Pradesh – 201302.

Vs

Anju Agarwal
RP M/s IP Constructions Pvt Ltd. **Respondent**
166, SFS DDA Flats,
Hauz Khas, New Delhi.

Company Appeal (AT)(Ins) No.1367 of 2022

Company Appeal (AT)(Ins) No.1370 of 2022

Present

**For Appellant: Mr Abhishek Naik, Mr. Aishvary Vikram,
Mr. Mayur Punjabi, Advocates.**

**For Respondent: Mr Abhishek Anand, Mr Karan Kohli, Mr.
Vaibhav Mendiratta, Advocates.**

**JUDGMENT
(9.5.2023)**

[Dr. Alok Srivastava, Member (Technical)]

1. The two appeals viz. Company Appeal (AT) (Ins) No.1367 of 2022 (“Appeal-I”) and Company Appeal (AT) (Ins) No.1372- of 2022 (“Appeal-II”) have been filed by the respective Appellants assailing common order dated 30.8.2022 (hereinafter called “Impugned Order”) passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi) in CA No. 1470/2019 filed in CP (IB) / 593(PB)/2018.

2. Appeal-I is filed by the Appellant M/s. Sahyog Infrastructures Pvt. Ltd. (in short “Sahyog Infrastructures”) and Appeal-II is filed by the Appellants Gem Marketing Pvt. Ltd. (in short “Gem Marketing”) and Mrs. Vidushi Agarwal and Mrs. Anju Agarwal, Resolution Professional of the corporate debtor M/s I.P. Construction Pvt. Ltd. is the common Respondent in both the appeals.

3. The brief facts in Appeal-I are that an amount of Rs.2,90,00,000/- is alleged to have been paid by the Appellant Sahyog Infrastructures as security deposit to the corporate debtor in accordance with agreement dated 12.11.2015 and the repayment was made by the corporate debtor to the Appellant Sahyog Infrastructure of an amount Rs.2,16,75,000/- between 30.1.2017 to 29.10.2018, which has been held as preferential repayment of unsecured loan by the corporate debtor. The Appellant Sahyog Infrastructures has claimed that out of the amount of Rs.2,16,75,000/-paid by the corporate debtor to the Appellant, an amount of Rs.2,08,25,000/-was part of refund of security deposit and an amount of Rs.8,50,000/- was part payment made by the corporate debtor to the Appellant for providing construction related services. The Appellant has further stated that the security deposit was to be refunded after expiry of two years as was set out in the agreement, which expired on 12.7.2017, and therefore, major part of the security deposit was refunded by the corporate debtor to the Appellant and an amount of Rs.82,75,000/- still remained payable by the corporate debtor to the Appellant.

4. In Appeal-I, the Appellant has stated that the Transaction Auditor and the Resolution Professional (“RP”) have incorrectly classified the said refund of security deposit as repayment of

unsecured loan, which is to the detriment of the Appellant, and which has been held as preferential transaction, and by the Impugned Order, this transaction has been reversed and the Appellant has been directed to return the money paid by the corporate debtor to the Appellant.

5. As to the facts in Appeal-II, the Appellants have claimed that Gem Marketing booked a studio apartment with the corporate debtor on 8.1.2015 for which Rs.5,00,000/- was paid as booking amount and this amount was refunded by the corporate debtor on 29.8.2018 to Gem Marketing on account of cancellation of the booking of the studio apartment. The Appellants have also stated that a similar booking amount of Rs.5,00,000/- was paid by Mrs. Vidushi Agarwal towards another unit booked with the corporate debtor, which was cancelled and the booking amount of Rs.5,00,000/- was returned to the Appellant Mrs. Vidushi Agarwal on 7.6.2018. The Appellants have further submitted that these refunds, given to them upon cancellation of their units, were transactions made in the regular course of business of the corporate debtor and therefore, they will not qualify as preferential transactions. Since the Impugned Order has classified these two transactions as preferential transactions and ordered the Appellants have been directed to refund the said amounts to the corporate

debtor, the appellants who are aggrieved by the said order have filed Appeal - II.

Arguments in Company Appeal (AT)(Ins) No.1367 of 2022
(Sahyog Infrastructure Pvt. Ltd. vs.
Anju Agarwal, RP M/s IP Constructions Pvt Ltd.)

6 The Learned Counsel for Appellant has argued that the corporate debtor M/s. IP Constructions Pvt. Ltd. (“corporate debtor”) was admitted into Corporate Insolvency Resolution Process (in short ‘CIRP’) vide order of Adjudicating Authority dated 11.1.2019 in an application filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (in short “IBC”) by the Union Bank of India and Mrs. Anju Agarwal was appointed as Interim Resolution Professional. He has further submitted that the Respondent carried out a Transaction Record Analysis (in short “TRA”) of the corporate debtor and based on findings in the TRA, clarification was sought from the Appellant regarding transactions that were found to be falling in the ambit of section 43 of the IBC. He has further submitted that Mr. Arvind Agarwal, a suspended director of the corporate debtor, sent an e-mail dated 18.6.2019 to the RP clarifying that Sahyog Infrastructures was appointed as an Exclusive Selling Agent vide an agreement dated 12.11.2015 for selling the stock of the corporate debtor, and in accordance with the agreement, the Appellant deposited Rs.2,90,00,000/- as security deposit with the corporate debtor as performance deposit.

7. The learned Counsel for Appellant has further submitted that due to non-conducive conditions, the Appellant was unable to perform its obligation as Exclusive Selling Agent and demanded the refund of security deposit alongwith interest from the corporate debtor, which the corporate debtor refunded, but not fully and only to the extent of Rs.2,60,75,000/-. He has further argued that in the audited balance sheet of the corporate debtor for the years ended on 31.3.2017 and 31.3.2018, the said amount has been shown under the head “Other Long Term Liabilities”. On this basis, the Learned Counsel for Appellant has argued that the said amount was not part of the assets of the corporate debtor, but was actually security deposit deposited by the Appellant for a period of two years i.e. the time period of Exclusive Selling Agent contract (which was upto 11.11.2017) and therefore, the corporate debtor was obliged to refund the said security deposit amount to the Appellant.

8. The Learned Counsel for Appellant has referred to clauses 2, 11 and 12 of the Exclusive Selling Agreement in support of his argument to contend that the said amount of Rs.2,90,00,000/- was kept by the corporate debtor as Performance Deposit to be refunded within 60 days of the expiry of the contracted period, which was two years. The Learned

Counsel for Appellant has further argued that the Appellant had provided in clarification a copy of the Exclusive Selling Agent Agreement and the audited balance-sheets for the years ending 31.3.2017 and 31.3.2018 in support of his contention that the said amount was given against the security deposit and the repayment received between the period 30.1.2017 and 29.10.2018 amounting to Rs.2,16,75,000 is basically part refund of the security deposit amount, and not repayment of unsecured loan as has been claimed by the RP/Respondent on the basis of TRA.

9. The Learned Counsel for Appellant has expanded on his earlier arguments about the said amount being security deposit by referring to the balance sheet submitted by the corporate debtor, wherein in Note 5 an amount of Rs.2,91,00,000/- is shown under the head "Other Long-Term Liabilities" as 'Security Deposit received from Sahyog Infrastructura Pvt. Ltd.'. He has further argued that this balance-sheet was prepared under the oversight of RP Mrs. Anju Agarwal and therefore, the entries in the Note 5 should be taken as true and conclusive and the amount refunded to the Appellant should be considered as part refund of the security deposit.

10. The Learned Counsel for the Respondent/RP has argued that in the Transaction Record Analysis undertaken by the RP and the report submitted by the Transaction Auditor Mehrotra and Company on 6.5.2019, it is very clearly observed that the series of transactions amounting to Rs.2,16,75,000/- is a 'preferential transaction' under section 43 of the IBC. He has submitted that these transactions were made in a look back period of two years from the date of initiation of CIRP (on 11.1.2019) and therefore, they are clearly infringing section 43 of the IBC. He has further argued that the said amount of Rs.2,16,75,000/- refunded to the Appellant during the period 30.1.2017 to 30.8.2018 was basically repayment of 'unsecured loan' and not security deposit. He has referred to the Exclusive Selling Agreement dated 12.11.2015 entered into between the corporate debtor and the Appellant to point out that the said agreement was signed on a stamp paper purchased in Uttar Pradesh, even though the corporate debtor has its registered office in New Delhi. He has claimed that such an agreement creates suspicion since in the State of Uttar Pradesh, non-judicial stamp papers can be purchased, whereas in New Delhi only e-stamp papers can be purchased. He has further pointed out that this agreement is neither notarized nor registered, and therefore, veracity of this agreement is doubtful.

11. Regarding the appearance of the said amount in the audited balance-sheet for the year ending 31.3.2019, the Learned Counsel for Respondent/RP has claimed that the Independent Auditor's Report very clearly points out that the repayment made to the Appellant of Rs.2,08,25,000/- , which is reflected in Note 5 of the Financial Statement, is prefaced with the note that the IRP has recognised this transaction as preferential transaction falling within the purview of sections 43 and 45 of the IBC. Regarding RP's signature on the said financial statement, i.e. the balance sheet for year ending 31.3.2019, he has clarified that the responsibility for preparation of the balance sheet was on ex-directors Arvind Agarwal and Mrs. Vidushi Agarwal and the RP has merely put her signature since the balance-sheet was made under her oversight and hence the signature of RP does not provide credence to the repayment as being of security deposit.

12. The Learned Counsel for Respondent/RP has also argued that the Appellant has neither shown any communication in support of his claim that the said amount related to security deposit from the year 2015 when the said deposit was made, nor he has shown any communication sent by the Appellant to the corporate debtor asking for refund of the security deposit. and these deficiencies create further doubt regarding the veracity

and the timing of the agreement and the entries made in the balance-sheet for the year ending 31.3.2019. On such basis, the Learned Counsel for Respondent has contended that the refund of Rs.2,16,75,000 is clearly repayment of an unsecured loan to a related party and therefore is squarely covered under section 43 of the IBC, and hence the Adjudicating Authority has not committed any error by deciding that this amount should be refunded by the Appellant into the account of the corporate debtor.

13. We note that the Transaction Audit Report of the corporate debtor (attached at pp.62-83 of the appeal paperbook CA (AT) (Ins) No. 1367 of 2022) notes the following about the ex-directors of the corporate debtor also holding directorship of the Appellant: -

1. *“INTRODUCTION*

1.3 *Details of related parties for the relevant period (11.01.2017 to 10.01.2019)*

xx xx xx xx

b) The list of the Companies in which the Directors / KMP of the Company hold Directorships / have significant influence as disclosed to us by the management of the company.

S.No.	Name of Related Party	Relationship
1	M/s. Sahyog Infrastructures Pvt. Ltd.	Two Common Director

14. Further, section 43 of the IBC regarding preferential transactions is as follows:-

“43. Preferential transactions and relevant time

As per section 43(2) of IBC 2016, a corporate debtor shall be deemed to have given a preference if -

a) There is a transfer of property or an interest there of the corporate debtor for the benefit of a creditor or 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 creditors or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being in accordance with section 53.

xx xx xx xx

43(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.”

15. The Transaction Record Analysis notes the following in regard to the refund of Rs. 2,16,75,000/-:-

“On application of above provision to M/s IP Constructions Pvt Ltd. we found few transactions which is coming under the preview of section 43 of the Act.

- 1. Sahyog Infrastructures Pt Ltd:- The said company is the related party of corporate debtor., M/s Sahyog Infrastructures Pt Ltd is owned and control by Mr. Arvind Agarwal & Vidushi Agarwal jointly. Corporate debtor. has been entered into various transaction with Sahyog Infrastructure Pt Ltd such as unsecured loans, supply of*

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labour and building material and Sahyog also booked studio apartment with the corporate debtor. Corporate Debtor has also given preference to M/s Sahyog Infrastructures Pt Ltd in repayment of loan, refund on booking amount.

S. No.	Nature of Transaction	Repayment Dates	Amount Rs.	Remark
1.	Repayment of Unsecured Loan	30-01-2017	100000.00	Preference given to Sahyog on repayment of Unsecured Loan
		26-04-2018	25000.00	
		29-05-2018	100000.00	
		25-06-2018	2000000.00	
		29-06-2018	2500000.00	
		06-07-2018	1500000.00	
		07-07-2018	1000000.00	
		11-07-2018	2500000.00	
		07-08-2018	200000.00	
		14-08-2018	8500000.00	
		30-08-2018	1000000.00	
		03-10-2018	500000.00	
		10-10-2018	500000.00	
		29-10-2018	500000.00	
		24-04-2017	300000.00	
		14-09-2017	250000.00	
		16-12-2017	200000.00	
	Total:		21675000.00	

16. We now peruse the agreement dated 12.11.2015 appointing the Appellant as Exclusive Selling Agent of the corporate debtor (attached at pp. 35-41 of the appeal paperbook – CA 1367/2022) wherein in clause 2, it is mentioned that second party (Appellant) shall deposit with the first party (corporate debtor) an amount of Rs.2,90,00,000/- as ‘Underwriting Security Deposit’ which will be kept by the corporate debtor as ‘Performance Deposit’ and which is for procuring booking of commercial spaces in the ‘Coral Brio’ project of the corporate debtor, and this deposit shall be
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refunded within 60 days of the expiry of the contracted period, which is two years period. Further, clause 11 of this agreement provides that for the services rendered by the Appellant, the corporate debtor will pay the Appellant service charges as per terms and conditions contained in the agreement.

17. We, further, note that this Exclusive Selling Agent Agreement is made on non-judicial stamp paper of Rs.100/- purchased in Uttar Pradesh even though the registered office of the corporate debtor is situated in Delhi and that this agreement is neither notarised nor registered. We, therefore, agree with the argument of the Learned Counsel for Respondent that the registered office of the corporate debtor was situated in New Delhi, where only e-stamp papers can be used in making such agreements, but the corporate debtor/Appellant purchased the non-judicial stamp paper in Uttar Pradesh, where e-stamp papers are still not being used and therefore, we are unable to place reliance on this agreement.

18. We also note that there is no communication from the corporate debtor regarding the need for such an agreement, nor there is any communication sent by the Appellant, when he deposited the said amount as security deposit with the corporate debtor in pursuance of the agreement. We further

note the Independent Auditor's Report of the corporate debtor for the year ending 31.3.2015 (attached at pp.176-203 of the appeal paperbook), a caveat is made as follows:-

“That in terms of the report of the Insolvency Resolution Professional (IP) dated 22.07.2019, such IP has recognized various transaction for FY 2018-19 as preferential transaction with the purview of the section 43 and 45 of Insolvency and bankruptcy Code, 2016 which are listed as under:

- Repayment made to Sahyog Infrastructure Private Limited of Rs. 2,08,25,000/-

(Reflected in Note 5 of financial statement)

- Refund of booking advance to Gem Marketing Private Limited of Rs. 5,00,000/-

(Shown as Sales Return in Note No. 17 of Financial Statement)

- Repayment of loan of Mr. Arvind Agarwal of Rs. 67,25,000/-

(Reflected in Note 26 of financial statement)

*- Repayment of loan of Mrs. Vidushi Agarwal of Rs. 5,00,000/-**

(Reflected in Note 26 of financial statement)

**(Reported as booking advance in IP report however the same is classified as Unsecured Loan in Financial Statement)*

In reference to the above, no additional explanation has been provided to us by the management during the course of audit apart from what is mentioned in the report of TRP. Further, since the matter is under the review of Hon'ble National Company Law Tribunal, New Delhi, we are unable to comment regarding the genuineness and reasonableness of the said transactions.”

19. It is also noted by us that the said financial statements were prepared under the oversight of the RP, but the primary responsibility vested with Mr. Arvind Agarwal and Mrs. Vidushi

Agarwal, both ex-directors of the corporate debtor, who have also signed on the financial statement and the date for preparation of this statement is 29.6.2019 and therefore, the inclusion of the deposited money as security deposit cannot be taken as conclusive evidence of the same.

20. The Learned Counsel for Appellant has cited the judgment of Hon'ble Supreme Court in the matter of **Rai Bahadur Seth Jessa Ram Fatehchand Versus Om Narain Tankha And Another [(1967) 2 SCR 429: AIR 1967 SC 1162]**, wherein the following has been held:-

“14. Another circumstance which may have to be taken into account in a case where the agreement does not indicate clearly that the security deposit is impressed with a trust is the payment of interest. Where there is no payment of interest provided for an inference may be readily drawn that the deposit was in the nature of a trust. But where the person with whom the deposit is made is to pay interest It may be possible to infer that payment of interest is a pointer towards there being no trust. Further any other provision in the agreement and any other circumstance as to the manner in which the deposit was dealt with may also have to be taken into account in coming to the conclusion whether the security deposit in a particular case was impressed with a trust or not.”

21. The Learned Counsel for Appellant while citing the above judgment has emphasised that when there is no payment of interest provided, the security deposit should be considered to be kept in a trust, which implies that it will be the asset of the

person making the security deposit. This judgment is distinguishable on the fact that in the scheme of IBC, a preferential transaction covered under section 43 has to revert to the corporate debtor, to ensure a proper and adequate resolution of the corporate debtor and since in the present case the refund of the amount of Rs. 2,16,75,000/- is not related to refund of the security deposit, but is repayment of unsecured loan to a related party.

22. The Learned Counsel for Appellant has also referred to the judgment in the matter of ***Kshetra Mohan Das V. D. C. Basu [1 CAL. Indian Law Reports, 1943, pg.313, Appellate Civil]***, wherein it is held that the money deposited as security would not establish the relationship between the payer and payee as that of creditor and debtor, and the money so deposited would still be regarded as trust money in the hands of the company.

The relevant portion of the this judgment is as follows:-

“Proceeding on the view that that is the test, these decisions have given great weight to the stipulation for the payment of interest by the company, in cases where there is no express term in the contract that the latter would be entitled to use the money for its own purposes. The reason that is employed is that a stipulation for payment of interest necessarily implied that the company was to employ the deposit-money for its own purposes, or in such manner as it may choose. In our view, the fact that has been overlooked is that it would not be the necessary or the only implication. A trustee, when authorised, can use the trust fund and can be required by express terms to pay interest.

*That is what has been laid down in Gee v. Liddell. The Company Appeal (AT)(Ins) No.1367 of 2022
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decision of the Judicial Committee of the Privy Council in Official Assignee of Madras v. Krishnaji Bhat shows that a stipulation for payment of interest on money deposited would not necessarily militate against the case that a trust was created..... The judgment of the original Court is Sub-nomine T. Krishnaje Bhat v. Sadasiva Tawker and that of the appellate Court is Official Assignee of Madras v. T. Krishnaji Bhat. The admission made by the learned counsel before the Judicial Committee under these circumstances can only be taken to mean that in his opinion the point was not worth arguing.

xx xx xx xx

As we have already pointed out, the mere fact that there is a stipulation for payment of interest on the deposit-money, or the fact that in certain contingencies the employer or the company, as the case may, would be entitled to liquidate his or its claim from out of it against the employee or the selling agent would not establish the relationship of creditor and debtor. The money deposited as security would still be regarded as trust-money in the hands of the employer or the company.”

23. In the above stated judgment, we note that the payment of interest on money deposited with the company leads to the inference that a trustee can use a fund kept in and can be required to pay interest. We do not think that the observations in this judgment apply to the facts and context of the present case as the money refunded by the corporate debtor relates to an unsecured loan of a related party and not a security deposit kept in trust with the corporate debtor.

24. On the other hand, the Learned Counsel for Respondent has cited the judgment of the Hon'ble Supreme Court in the

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matter of **Jaypee Infratech Ltd. Interim Resolution Professional V. Axis Bank Ltd. [(2020) 8 Supreme Court Cases 401]** regarding preferential transactions, wherein the following has been held:-

“Insolvency and Bankruptcy Code, 2016: Historical background, objects, scheme and structure of the relevant parts

19. The basic issue raised in the matter being related with the effect and operation of Section 43 of the Code, concerning "preferential transactions and relevant time", appropriate it shall be to comprehend the principles underlying the concept of "preferential transactions". A little insight into the objects sought to be achieved by the Insolvency and Bankruptcy Code, 2016 and its historical background shall be apposite.

“19.3. Though the provisions relating to "preferential transactions and relevant time" (in Section 43 of the Code) occur in Chapter III of Part II, relating to liquidation process, but such provisions being for avoidance of certain transactions and having bearing on the resolution process too, by their very nature, equally operate over the corporate insolvency resolution process, and hence, the resolution professional is obligated, by virtue of clause () of sub-section (2) of Section 25 of the Code, to file application for avoidance of the stated transactions in accordance with Chapter III. That being the position, Section 43 of the Code comes into full effect in CIRP too.

Preferential transaction at a relevant time: Concept and connotations

20. Having regard to the questions involved, a brief insight into the theory relating to avoidance of certain transactions as being preferential would be pertinent at this stage.

xx xx xx xx

Analysing Section 43 of the Code

Xx xx xx xx

21.2. However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a

preference to become an offending one for the purpose of Section 43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time. The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways: (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by Sections 43 and 44 of the Code, it ought to be a preferential one answering to the requirements of sub-section (2) of Section 43; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of Section 43.

xx xx xx xx

Indicting parts - deemed preference at a relevant time

xx xx xx xx

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

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

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

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

xx xx xx xx

Net concentrate of Section 43

22.5. Thus, the net concentrate of Section 43 is that if a transaction entered into by a corporate debtor is not falling in either of the exceptions provided by sub-section (3) and satisfies the three-fold requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so.”

25. It is evident from the above extracted observations of the judgment in the **Jaypee Infratech Ltd. Interim Resolution Professional (supra)** matter that the net effect of section 43 is that for a transaction to be a preferential transaction the only exception could be as per sub-section (3) of section 43. We note that neither the transactions made by the corporate debtor regarding refund of Rs.2,16,75,000 to Sahyog Infrastructures nor the transactions made by the corporate debtor with the two Appellants Gem Marketing Pvt. Ltd. and Mrs. Vidushi Agarwal fall in the exceptions as provided in section 43(3). This judgment, therefore, provides support to the case of the Respondent/RP.

26. When we consider the financial statements of the corporate debtor for the year ending 31.3.2019 along with said balance-sheets and Note 5 in the Independent Auditor's Report and the agreement dated 20.11.2015, which are not corroborated by any communication either regarding deposit of

the said security deposit amount and the purpose for said deposit, and later the absence of any request of refund by the Appellant made to the corporate debtor, we arrive at the conclusion that the agreement and the balance-sheets on their own will not provide the necessary basis to support the contention of the Appellant that the deposit of Rs.2,90,00,000 made by the Appellant was against security deposit. As has been brought out in the Transaction Record Analysis, we are also of the same view that the said deposit relates to 'Unsecured Loan', which is taken from related parties and which is coming out from the note 25 on page 138 of the appeal paperbook, wherein the amount of Rs.2,90,00,000/- is shown as received from the related party Sahyog Infrastructures Pvt. Ltd.

27. On the above basis, we are of the clear opinion that the Adjudicating Authority has not made any error in holding that the amount of Rs.2,16,75,000/- that has been repaid by the corporate debtor to the Appellant is actually repayment of "Unsecured Loan" and is, therefore, a preferential transaction fully covered under section 43 of the IBC, and the RP has, therefore, been correctly directed to recover the money from the Respondent.

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28. With regard to Appeal-II, the Learned Counsel for the Appellants has argued that the Appellants have made two separate bookings of studio apartments with the corporate debtor. He has argued that after the initiation of CIRP of the corporate debtor, a Transaction Record Analysis (“TRA”) was undertaken by the RP, wherein two transactions viz. one between Appellant No.1 Gem Marketing Pvt. Ltd. and the corporate debtor involving refund of Rs. 5 lakhs and the other transaction between Appellant No. 2 Mrs. Vidushi Agarwal, which is also of refund of Rs. 5 lakhs, were found to be falling under in the ambit of section 43 of the IBC as being preferential transaction. He has claimed that after the receipt of the TRA, the suspended director of the corporate debtor Mr. Arvind Agarwal vide e-mail dated 18.6.2019 explained to the RP that both the transactions between the corporate debtor and the Appellants were done in the ordinary course of business and therefore, they were not preferential transactions infringing section 43 of the IBC. He has further claimed that such refunds were made to other allottees too, who had cancelled their booked flats, and therefore there was no intention of the corporate debtor to make any payment to the advantage of the Appellants.

He has further clarified that in the financial statement for the year ending 31.3.2019, the Note 4 mentions 'Other Long Term Current Liabilities', wherein the advances received from the customers against bookings have been included.

29. The Learned Counsel for Respondent/RP has in turn argued that in the Transaction Record Analysis, the two transactions relating to refund of Rs. Five lakhs each to Appellant No. 1 and Appellant No. 2 have been flagged as being the preferential transactions, which violate section 43 of the IBC. He has pointed out that the CIRP of the corporate debtor was initiated on 11.1.2019 and the refund by the corporate debtor to Appellant No.1 was done on 29.08.2018, which is within one year of CIRP initiation. He has also pointed out that a similar transaction carried out by the corporate debtor in favour of Appellant No. 2 Mrs. Vidushi Agarwal in which an amount of Rs. Five lakhs was refunded to her on 7.6.2018, which was also within one year of CIRP initiation. He has also pointed out that Mrs. Vidushi Agarwal and Mr. Arvind Agarwal are directors of Gem Marketing and were also directors of the suspended board of the corporate debtor M/s. IP Construction Pvt. Ltd. at the time of the two transactions, and therefore, both transactions are made to related parties.

30. The Learned Counsel for RP has claimed that both the transactions, therefore, infringe section 43 of the IBC, as has been brought out in the TRA and therefore, the RP preferred an application being CA No. 1470 of 2019 under sections 43 and 44 of the IBC read with section 25(2)(j) before the Adjudicating Authority seeking appropriate directions for avoidance of these transactions among certain other transactions. He has further claimed that a vague clarification regarding the said transactions was provided by Mr. Arvind Agarwal vide his e-mail dated 18.6.2019, whereby it was stated that the said transactions were done in the ordinary course of business. He has contended that since transactions were made to the related parties during the look-back period and they amount to transfer of corporate debtor's property of the corporate debtor for the benefit of creditors, who are Appellant No.1 and Appellant No. 2, and they are clearly preferential transactions under section 43(2) which should be annulled. He has further referred to Explanations I and II of section 44 (1) to strongly argue that the corporate debtor had sufficient information regarding the imminent initiation of CIRP and it made these transactions to related parties thereby putting the creditors at disadvantage.

31. We note that the Transaction Record Analysis Report (attached at pp.61-62 of CA(AT)(Ins) 1370/2022) makes the

following observations regarding the two transactions entered into by the corporate debtor with Appellant No. 1 and Appellant No. 2: -

“Transaction Record Analysis Report

Xx xx xx xx xx

1.3 Details of related parties for the relevant period (11-01-2017 to 10-01-19)

a) Directors, Relative of Directors, Key Management Personnel and Relative of Key Management Personnel of corporate Debtor – Disclosed by the Corporate Debtor with whom transactions were made.

<i>S. No.</i>	<i>Related Party Name</i>	<i>DIN</i>	<i>Relationship</i>
<i>1</i>	<i>Arvind Agarwal</i>		<i>Director cum share holder</i>
<i>2</i>	<i>Vidushi Agarwal</i>		<i>Director cum share holder</i>

Xx xx xx xx

c) List of related parties to whom with financial transactions were done by the Corporate Debtor but not disclosed by the management.

<i>S. No.</i>	<i>Name of Related Party</i>	<i>Relationship</i>
<i>1</i>	<i>M/s. Gem Marketing Pvt. Ltd.</i>	<i>Two common Director</i>

xx xx xx xx

4. EXECUTIVE SUMMARY

xx xx xx xx

4.3 Preferential transactions under section 43

As per section 43(2) of IBC Act 2016, a corporate debtor shall be deemed to have given a preference if –

- a) *There is a transfer of property or an interest there of the corporate debtor for the benefit of a creditor or surety or a guarantor for or on account of an antecedent financial debtor or operational debt or other liabilities owed by the corporate debtor; and*
- b) *The transfer under clause (a) has the effect of putting such creditors or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being in accordance with section 53.*

xx xx xx xx

2. **Gem Marketing Pvt Ltd:-** *The said company is also a related party of corporate debtor. M/s. Gem Marketing Pvt. Ltd. also owned and controlled by Mr. Arvind Agarwal and Vidushi Agarwal. M/s. Gem Marketing Pvt. Ltd. on 08th January 2015, booked a studio apartment with corporate debtor for which they paid Rs.5,00,000 as booking amount. The said booking amount were refunded by corporate debtor on 29th August, 2018.*

xx xx xx xx

4. **Mrs. Vidushi Agarwal:-** *Mrs. Vidushi Agarwal is the director of M/s. I P Construction Pvt. Ltd. She also hold 8.92% share of I P Construction Pvt. Ltd. Corporate debtor has returned booking amount to Mrs. Vidushi Agarwal with details as under :-*

S. No.	Nature of Transaction	Repayment Dates	Amount	Remark
1	Refund of booking cancellation	07-06-2018	5,00,000	Preference given to Mrs. Vidushi Agarwal on refund of booking cancellation.

32. Reference to preferential transactions is made as defined in section 43 of the IBC, which is extracted in para 14 of this judgment. Further, section 44 of IBC is as hereunder:-

*Company Appeal (AT)(Ins) No.1367 of 2022
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44. Orders in case of preferential transactions. - (1) *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;

xx xx xx xx

(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;

Xx xx xx xx

Explanation-II. – A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13.”

33. A perusal of section 43(4) and the timings of the said transactions make it clear that these transactions are within the look-back period of two years which is the ‘relevant time’ for related party transactions. Further, it is clear that these transactions are for transfer of property of the corporate debtor for the benefit of two Appellants, and fully covered under section 43(2). In addition, the amount of Rs. five lakhs each given as booking advance by both the Appellants are in the nature of antecedent operational debt/other liabilities owed by the corporate debtor.

34. Regarding the other issue that is raised by the Learned Counsel for Appellants that the refund of Rs. five lakhs each to the Appellants by the corporate debtor was done in the ordinary course of business, we note that the Appellants have not filed any document or communication to show that the said booking of flats was cancelled by the Appellants. The claim that the refund of the amount of Rs. five lakhs each to the two Appellants was done as the flats booked in their names were cancelled appears an afterthought and cannot be accepted. We are, therefore, persuaded by the argument of the Learned Counsel of the Appellants that these transactions were made in the ordinary course of business. Therefore, the Appellants claim that the said transactions are covered within the exception provided in section 43 does not appear convincing.

35. The Learned Counsel for Appellant has referred to the “Guidance Note on Related Party Transactions” prepared by the Institute of Company Secretaries of India, wherein the term ‘Ordinary Course of Business’ has been defined. The relevant portion of the Guidance Note cited is as follows:-

“Guidance Note on Related Party Transactions

1.2 ‘Ordinary course of business’

The Act uses the term ‘ordinary course of business’, however it does not define the said term.

The ordinary meaning of the expression 'in the ordinary course of business' in dictionaries is 'part of doing regular business; the regular or customary condition or course of things; as things usually happen.

Black's Law Dictionary defines 'ordinary course of business' as the 'normal routine in managing trade or business'.

In common parlance, 'ordinary course of business' would include transactions which are entered into in the normal course of the business pursuant to or for promoting or in furtherance of the company's business objectives, as per the charter documents of the company. For example, in case of a manufacturing company, purchase and sale of goods, taking premises on lease/rent, construction of factory, employing workers, etc. will be considered as ordinary course of business. To carry on a business, several activities are carried on by the company; all such activities will be considered to be in the ordinary course of business.

xx xx xx xx

To decide whether an activity which is carried on by the business is in the 'ordinary course of business', the following factors may be considered:

- a. Whether the activity is covered in the objects clause of the Memorandum of Association*
- b. Whether the activity is in furtherance of the business*
- c. Whether the activity is normal or otherwise routine for the particular business (i.e. activities like advertising, staff training, etc.)*

xx xx xx xx

j. Resources committed to the activity “

36. The Guidance Note as reproduced above may have a persuasive value, but cannot be read in place of legal or statutory provisions. Therefore, the Guidance Note could be correct in attempting a definition of 'Ordinary Course of

Business’, but we note that in the instant case we have clearly found that the said refunds to Appellants were not made in the ‘Ordinary Course of Business’ when we look at the facts and circumstances of the refund transactions.

37. In the case of **Jaypee Infratech Ltd. Interim Resolution Professional V. Axis Bank Ltd [(2020) 8 Supreme Court Cases 401]** in CA (AT)(Ins) No. 1370 of 2022, it is clarified that a transaction should be part of the common flow of business.

The relevant portion of the judgment is as hereunder:-

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

38. In the present case, as we have already noted that the transactions were not part of the common flow of business, which should have been evidenced by any letter or communication requesting cancellation of booking of the unit and through a request by the appellants for refund of the booking amount which is not the case in the instant matter. We are, therefore, of the view that this judgment provides support to the contention of the RP that ‘ordinary course of business’ should mean common flow of transactions.

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39. On the basis of the discussion above, we are of the clear opinion that the Impugned Order does not suffer from any infirmity regarding reversion of the amounts repaid to the Appellants back into the account of the corporate debtor, and the RP has, therefore, been correctly directed to recover the said amounts from the Appellants.

40. In conclusion, in the light of detailed discussion in relation to CA (AT) (Ins) No. 1367 of 2022 and CA (AT) (Ins) No. 1370 of 2022 as aforementioned, we are clear that the Impugned Order does not require any interference. The two appeals being considered in this judgment are, therefore, dismissed.

41. There is no order as to costs.

(Justice Rakesh Kumar)
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

New Delhi

9th May, 2023

/aks/