

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (Ins)No.184/2022
(IA Nos.420/2022, 421/2022& 232/2024)

IN THE MATTER OF:

H.P.Arun Kumar

House No. 3, Old No. 68, Brindavana,

Behind Shantinikethan School,

Anugraha Layout,

Bengaluru - 560 076

...Appellant No. 1

C.M. Nagaraj

23, House No. 1, Brindavana

Anugraha Layout,

Bengaluru - 560 076

...Appellant No. 2

Usha

Wife of C.M. Nagaraj

23, House No. 1, Brindavana

Anugraha Layout,

Bengaluru - 560 076

...Appellant No. 3

V

Addanki Haresh, Resolution Professional

M/s. Right Engineers and Equipments Pvt. Ltd.

Corporate Debtor

Address: No.25, D Cross,

Bilekahalli Industrial Area,

Banneraghatta Road,

Bengaluru - 560 076

...Respondent

Present :

For Appellant : Mr. Manu Kulkarni,
Mr. Manoj Raikar, Advocate
Mr. Skanda Kumar, Advocate
For Respondent : Mr. Addanki Haresh, Liquidator

JUDGMENT
(Hybrid Mode)

[Per: Justice Sharad Kumar Sharma, Member (Judicial)]

The question, which would be the subject matter of consideration in the instant Company Appeal preferred under section 61 of the Insolvency and Bankruptcy Code, 2016 would be, “As to whether, the identified two preferential transactions as per the report of Committee of Creditors of 09.11.2020, would fall to be a preferential transaction so as to be within the ambit of Section 43 of the I & B Code, 2016”.

2. The grievance, which has caused the Appellants to prefer this appeal, was as to the consequence of passing of an order on IA No. 482/2020, which was preferred by Respondent No.1, invoking Section 43 of I & B Code, 2016, contending thereof that two transactions, which is apparent from the draft Forensic Audit report of 09.11.2020 amounting to Rs.81.33 lakhs and Rs.78.81 lakhs, were ultimately found to be preferential and fraudulent transaction respectively. Upon establishment of the said fact the Impugned Order dated 02.02.2022 was passed by the learned NCLT, Bengaluru, in Company Petition (IB) No. 320/BB/2019, wherein while allowing the IA

No.482/2020 the learned Adjudicating Authority had directed the Appellant No. 1 to restore an amount of Rs.24,29,874/- (Rupees Twenty Four Lakh Twenty Nine Thousand and Eight Hundred and Seventy Four) Appellant No. 2 to restore Rs. 25,53,233/- (Rupees Twenty Five Lakh Fifty Three Thousand and Two hundred and Thirty Three) and Appellant No. 3 to restore Rs.11,50,000/- (Rupees Eleven Lakh and Fifty Thousand) which were found to be classified as preferential transactions, and since being hit by the provisions contained under Section 43 of the I & B Code, 2016. The said directions of Ld. Adjudicating Authority are extracted hereunder: -

- “i. The subject transactions are declared as Preferential Transactions in terms of Section 43 of the I & B Code, 2016.*
- ii. The Respondent No.1 is directed to restore an amount of Rs.24,29,874/- (Rupees Twenty Four Lakhs Twenty Nine Thousand Eight Hundred and Seventy Four only) to the Corporate Debtor within 30 days from the date of receipt of this order.*
- iii. The Respondent No.2 is directed to restore an amount of Rs.25,53,233/- (Rupees Twenty Five Lakhs Fifty Three Thousand Two Hundred and Thirty Three only) to the Corporate Debtor within 30 days from the date of receipt of this order.*
- iv. The Respondent No.3 is directed to restore an amount of Rs.11,50,000/- (Rupees Eleven Lakhs Fifty Thousand only) to the Corporate Debtor within 30 days from the date of receipt of this order.”*

3. Before we attempt to venture to consider the rival contentions of the parties to the proceedings, it will be apt to observe that the Company Appeal

stood initiated before the Registry of this Appellate Tribunal on 03.05.2022. The Appeal was accompanied with it, an **IA No.421/2022**, wherein the Appellant has prayed for, an exemption from filing the certified copy of the Impugned Order, as mandated by Rule 22(2) of the NCLAT Rules, 2016, which prescribes that “every appeal has to be accompanied with a certified copy of the Impugned Order under challenge”. The said Application thus preferred, seeking exemption from filing a certified copy remained pending and no endeavour was made by the Appellant ever, to press upon the appeal to override the implications of Rule 22(2) of the NCLAT Rules, 2016, and thus, the appeal would be treated to have been preferred without supplying the certified copy of the Impugned order. But owing to the fact that, the statute under the I & B Code, 2016, and particularly that as contained under the rules, as framed under Section 469 of the Companies Act, 2013, provides for a complete exemption from filing the certified copy of a document as contemplated under Rule 31 of the NCLAT Rules, 2016, we grant an exemption to the Appellant from producing the certified copy of the Impugned Order and proceed to hear, the Appeal on merits. Accordingly, **IA No. 421/2022** would be treated to have been disposed of.

4. The brief facts on the merits of the matter are, that the Corporate Debtor (CD) M/s. Right Engineers and Equipment India Private Limited, are said to have availed financial assistance from M/s. Sir. M. Vishveshwaraya

Co-operative Bank Limited (hereinafter to be called as a Financial Creditor).

At the stage when the financial assistance was extended on 17.10.2016, Appellant No. 1 and Appellant No. 2 were the Directors of the Corporate Debtor, and Appellant No. 3 had the status of being that of wife of Appellant No.2. In the proceedings of CIRP, stood initiated against the CD, factually it had come up that, the Financial Creditor had extended a financial assistance of Rs.14,80,00,000 (Rupees Fourteen Crore and Eighty Lakhs) by virtue of a loan agreement which was executed on 17.10.2016, and under the terms of the loan agreement, the said financial assistance was extended for the purposes to facilitate the Corporate Debtor to augment and expand the business of manufacturing, designing, assembly & import and to generally deal with all kind of machinery, equipment, tools, moulds and automation products for all kind of users, and also to act as a consultant and as a manufacturer of cranes.

5. For the purposes of taking the financial assistance under the loan agreement of 17.10.2016, the Corporate Debtor is said to have encumbered plant and machinery, furniture and fixtures, and other equipment in the form of Hypothecation deed and had mortgaged the factory land and building, which was situated at No. 66 Jigani Industrial area, 1st Phase, Bangalore, with the total land thus mortgaged being 43,087 sq.ft with a built-up area of 28,838 sq.ft, shown to be standing in the name of the company as per the

revenue records, are in the name of the company. The said mortgage was created by the surrender of the title deeds of the aforesaid land, which stood as a guarantee for the purposes of availing financial assistance under the agreement of 17.10.2016. The Corporate Debtor has also offered by way of a security, the stocks of the raw material, work in progress and the finished goods and all receivables in the form of Hypothecation.

6. The Corporate Debtor after being put into operation and after availing the aforesaid detailed financial assistance under the loan agreement of 17.10.2016, had felt a dearth of financial assistance, as the estimated construction cost of the project had exceeded the estimated cost under the plan and the generation of revenue, fell short, of expectation to make it a viable going concern. Hence the company i.e., the Corporate Debtor, in order to meet the expenses had to avail an additional financial assistance by way of term loan of Rs.10,40,00,000 (Rupees Ten Crore Forty Lakhs) and a secured cash credit of Rs.4,40,00,000 (Rupees Four Crore Forty Lakhs) in the month of October, 2016.

7. It is the case of the Corporate Debtor that, owing to the fact that there had been a business slump and economic downturn in the economy, of the country, he faced financial crunches and hence could not make repayments as scheduled under the terms of agreement for the amount of financial assistance taken on 17.10.2016 and, the additional term loan and secured

cash credit taken on October 2016, in a timely manner. As a consequence thereto, the Financial Creditor had issued a repayment notice of the agreed installments as per the terms and conditions contained in the loan agreement of 17.10.2016, which was expected to be paid by the Appellant from time to time.

8. The Corporate Debtor and its erstwhile Directors i.e. the Appellant No. 1, 2, and Appellant No. 3 herein, had acceded and have accepted the fact that, they have committed a default and breach of loan agreement in remittance of the debt taken by them.

9. As a consequence of the aforesaid fact, the company was placed to face the CIRP Proceedings under Section 7 of I & B Code, 2016, initiated by the Financial Creditor and was ultimately admitted to the CIRP Proceedings by an order passed by the learned Adjudicating Authority on 29.10.2019. By the same order passed, on the same date, the learned Adjudicating Authority had appointed the Respondent herein, as to be an Interim Resolution Professional (IRP), in order to carry out the Resolution Process in respect of the Corporate Debtor, and while undertaking the said process and invitation of claims was made by the Respondent. The Respondent contends that, he had received a total claim due to be paid by the Corporate Debtor as to be Rs.15,00,09,200 (Rupees Fifteen Crore Nine thousand and Two Hundred).

10. The Respondent had come up with the case before the learned Adjudicating Authority that, on receipt of the aforesaid claim, the Committee of Creditors(CoC) asked the Respondent to examine the details of the transactions, of the Corporate Debtor to find out whether there has had been any preferential transaction falling to be within the ambit of Section 43 of the I & B Code, 2016, which has been carried by the Corporate Debtor to bypass the CIRP process, and whether there has been any transaction which has been maliciously carried by the Corporate Debtor to drain out the resources of the CD by undervaluation of the property as contemplated under Section 45 of the I & B Code, 2016 and also to flag any such other various flagrant transactions committed by the Corporate Debtor in order to facilitate successful conclusion of the CIRP Process.

11. The Committee of Creditors (CoC) met on 09.11.2020 for the purposes to deliberate upon as to whether there had been any of the transactions which had been carried by the Corporate Debtor, in violation of Sections 43, 45, 50 & 66 of the I&B Code, 2016, and in the same meeting, the Chartered Accountant who was appointed for this purpose submitted a draft report, with a detailed analysis of the Books of Accounts and the transactions which were carried by the Corporate Debtor. Based on the same, which the Respondent had ultimately arrived at a conclusion that there is a potential probability of a preferential transaction having been carried

contrary to the provisions under Section 43 for an amount of Rs.81.33 lakhs and a potential fraudulent transaction under Section 66 for an amount of Rs.78.81 lakhs. It is on the basis of this report which has been submitted in compliance of the decision, taken in the Committee of Creditors (CoC) meeting on 09.11.2020, the Respondent is said to have filed an Interlocutory Application, being IA No. 482/2020, invoking the provisions contained under Section 43 of the I & B Code, 2016. The plea as raised in the aforesaid IA thus preferred by the Respondent, under Section 43 was based upon the final Forensic Audit Report dated 20.11.2020, which apparently showed that, there had been a flagrant violation of Section 43 and Section 66 of the I & B Code, 2016, as some of the identified transactions were found to be classified as preferential transaction with which we would be concerned in the instant appeal. In the report that was submitted on 20.11.2020, it was observed by the Chartered Accountant that, during the course of a Forensic Audit they, based on available material have identified some preferential transactions carried out and certain non-compliances, which was apparent from the general review of the Financial Statements and Books of Accounts of the Corporate Debtor, and also based on the oral submissions and statement made by the management. The preferential transactions which were thus identified in the forensic report, were referred to in the document, which was annexed with the Forensic Audit Report, which contains the details of the transactions, as it was assessed to be for an amount of

Rs.24,29,874 (Rupees Twenty Four Lakh Twenty Nine Thousand and Eight Hundred and Seventy Four). It is that during the course of the proceedings, while the learned Adjudicating Authority was considering the propriety of the allegations leveled in IA No. 482/2020, if had recorded the statements and objections, which were filed by the Appellant No. 1 & 2 and upon considering the aforesaid statement and objections, along with the additional affidavits and the reply of the 3rd Appellant, which was filed on 23.03.2021. After considering all these facts, the learned Adjudicating Authority by the Impugned Order of 02.02.2022 had proceeded to declare that some of the transactions, which were made in flagrant violation amount to be a preferential transaction under Section 43 of the I & B Code, 2016.

12. It is to be noted that in the IA thus preferred before Ld. Adjudicating Authority, the Respondent herein (the RP) had modulated the relief in the following manner:-

- “a) Declare a payment of Rs.49.83 lakhs, constitutes as a preferential transaction violating Section 43 of the I&B Code, 2016.*
- b) Reverse the advance repayment transactions made to the respondents as detailed in Paragraph 8 above, and direct the amount of Rs.49.83 lakhs to be paid by the Corporate Debtor to the Respondent to be returned and vested in the Corporate Debtor.*
- c) Such other orders as this Appellate Tribunal may deem fit in the facts and circumstances of the case, in the interest of justice and equity.”*

13. The Suspended Directors of the Corporate Debtor, who were opposite party no.1 & 2 in the proceedings before the learned Adjudicating Authority, had submitted their reply vide Diary No.1043 dated 23.03.2021, praying for that the application IA No.482/2020 preferred by the Respondent, has no legs to stand and the same deserves to be dismissed in limine because the elements provided under law for the purpose to determine a transaction as the preferential transaction under Section 43 of I & B Code, 2016, were not satisfied and thus the application deserves rejection. Upon the contest being put in by the Appellants herein, the Resolution Professional in order to override and to respond to the argument extended by the Appellants in their objection, had filed an additional affidavit on 08.11.2021, seeking to restore an amount of Rs.11,50,000 (Rupees Eleven Lakh and Fifty Thousand) against Appellant No. 3 in addition to the amount of Rs.49,83,107.90 (Rupees Forty Nine lakh Eighty Three Thousand and One Hundred and Seven and Ninety Paisa) as initially claimed against the Appellant No. 1 & 2 in IA No. 482/2020.

14. It was submitted by the Respondent before the Ld. Adjudicating Authority that on noticing certain related party transactions in the Audited Balance Sheet up to 2018, he had appointed M/s. Nagadheep Satyanarayana, the Chartered Accountant, and upon his resignation M/s. Hegdde Raj & Ullody, the Chartered Accountants, Bangalore to conduct forensic audit of

the accounts and to review the accounts for a period of two years in the case of related parties, and for a period of one year in other cases before the commencement of the CIRP. The forensic audit report thus prepared was deliberated upon in the meeting of CoC on 09.11.2020 and based on such, IA was filed before the Ld. Adjudicating Authority for grant of reliefs as stated above.

15. The Ld. Adjudicating Authority after considering such audit report, giving ample opportunity to the Respondent to refute the report, after recording the statement of Mr. C M Nagaraj, one of the Suspended Directors of the company, the Appellant No. 2 herein, who had questioned the credibility of the Forensic Audit Report of 09.11.2020, after referring to the relevant portion of the said forensic report, which held certain transactions as to be the preferential transactions the details of which has been discussed in Para 7 of the Impugned order, after considering the statement and the stand taken by the Respondent/Liquidator who had submitted that the Appellant No. 1 & 2 have not re-paid the amount of Rs.49.83 lakhs, has concluded that classified the said amount is to be held as to be the preferential transaction made by the Corporate Debtor. Further, the learned Adjudicating Authority after considering the evidence on record, the stand of Appellant No.1 & 2 herein on the credibility of the Forensic Audit in view of the disclaimer clause, the original Forensic Audit Report of 09.11.2020 and

the additional Audit Report dated 03.11.2021 had arrived at a conclusion that, the Appellants(Respondents in the Company Petition) had failed to substantiate their stand, and dispute the bank statement on which the Auditors had based their Forensic Audit Report and to repudiate the claim of CoC and the liquidator and therefore, the amount referred, thereto in IA No. 482/2020 which was subsequently modified by the Respondent herein, by making an addition to the amount to the tune of Rs.11,50,000 (Rupees Eleven Lakh Fifty Thousand), will have to be treated as preferential transactions. Further, the Ld. Adjudicating Authority had rightly come to the conclusion that the documents submitted by the Appellants herein did not substantiate that the claim made by them in their defence to IA No. 482/2020, that they have failed to show any valid document in support of this submissions except for taking a solitary stand, without placing any evidence on record, or any supporting documents, that the aforesaid transactions were carried by the Corporate Debtor in the ordinary course of business. Once the Appellants took a stand that the aforesaid two transactions identified to be preferential transactions, were actually carried during the ordinary course of business of the Corporate Debtor, the burden of proof under Section 101 of Evidence Act, to prove to the contrary, had shifted upon the Appellants to show that the transactions identified in the Forensic Audit Report, were not the transaction, which will be falling under Section 43 of the I & B Code. They having failed to do so, the conclusion,

which has been arrived at by the learned Adjudicating Authority, declaring the transactions, as to be the preferential transactions and the consequentially directing Respondent No.1, Respondent No.2 and Respondent No.3 to the Company Petition to restore the amount of Rs.24,29,874/-, Rs.25,53,233/- and Rs.11,50,000 respectively correct in law, is contrary, to what has been attempted to be argued by the learned counsel for the Appellant based upon the grounds taken by them in the Memorandum of Appeal, to the effect that the findings which had been recorded are perverse and contrary to the record and based upon wrong appreciation of the statement and evidence, which was place by the Respondent and particularly the Forensic Audit Report of 09.11.2020 and the additional Forensic Audit Report of 03.11.2021.

16. The question of law which the learned counsel for the Appellants has attempted to argue before this Appellate Tribunal was from a very limited perspective, that, whether the learned Adjudicating Authority could have at all allowed the application under Section 43, without considering the objections filed by the Appellant and secondly, whether in the absence of the material particulars being placed before the learned Adjudicating Authority, it should have gone ahead to hold conclusively that the transactions were preferential transactions under Section 43 of the I & B Code. In fact, both the substantial questions, which have been pressed upon by the Appellant runs contrary to the finding, recorded by the learned Adjudicating Authority,

who did consider the inferences drawn from the Forensic Audit Report and additional Forensic Audit Report, about the two transactions which were identified and found to be a preferential transactions and fraudulent transaction and they were established to have not been conducted during the normal course of business, which could not be prove to the contrary by the Appellant. In fact, in accordance with the findings recorded, it is seen that the Appellants have utterly failed to discharge their responsibility to establish their defence that the said two transactions were conducted during the ordinary course of business. Having failed to do so, they cannot take advantage of their own inaction that too, particularly when the findings have been recorded by the learned Adjudicating Authority was based upon the un rebutted Forensic Audit Reports and the additional Forensic Audit Report.

17. The second contention which has been raised by way of a substantial question was that, certain materials were not considered by the Ld. Adjudicating Authority while ruling the said transactions to be a preferential transaction, is contrary to the recording in the Impugned Order, wherein the learned Adjudicating Authority while extracting the relevant portion from the Audit Reports, has dealt in its Para 7 of the Order as to how the inferences on the preferential transactions have been drawn, which have been detailed based on the contents in the Forensic Audit Reports. This, read in consonance to the statements, recorded by the learned Adjudicating

Authority as extracted in the concluding paragraphs of the Impugned Order will show that the Ld. Adjudicating Authority has considered all material placed before it. Thus the second question too is answered against the Appellant. Under Section 43 of the I & B Code, 2016, the basic parameters which are required to establish a transaction to be a preferential transaction, as envisaged under Section 43(1), is that the grounds as contemplated under Section 43(2)(a) and Section 43(2)(b) are to be satisfied which provides that, if there is any transfer or even a marginal transfer of interest by the Corporate Debtor, to the benefit of a creditor or a surety or a guarantor on account of an antecedent financial debt or operational debt or other liabilities owned by the Corporate Debtor and secondly, if such transfer under clause (a) has an effect of putting such creditor or surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets made in accordance with Section 53 of the Code, would be deemed to be a transaction, which is preferential in nature and having not been carried under normal course of business. In section 43(3) of the Code, certain exceptions have been provided.

18. The transactions, which have been detailed and determined by the Forensic Auditors in their report do not fall to be nor it was established to be falling under the exceptions as contemplated under Section 43(3) of I & B Code, 2016, and even on bare perusal of the observations, made in Para 7 of

the Impugned Order under challenge, it can be seen that the Appellant has not even endeavoured to establish the defence he has mounted that it was a transaction made in normal course of business and that it would be falling under the exceptions contemplated under Section 43(3) of the I & B Code, 2016. The Appellant cannot take the advantage of his own wrong by his failure to discharge his responsibilities as statutorily envisaged under Section 101 of the Evidence Act. Since the Impugned Order is based upon a sound logical reasoning upon considering the statement and evidences on record, the observations made therein does not suffer from any perversity or misappreciation of evidence by the learned Adjudicating Authority which would call for any interference.

Hence, the **Company Appeal (AT) (CH) (Ins) No.184/2022** lacks merit and the same is accordingly ‘dismissed’.

The Interlocutory Applications if any will also stand ‘closed’.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

06.03.2025
GKJ/TM/MS