IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

IA No. 126/JPR/2023
In CP No. (IB)- 02/9/JPR/2022

IN THE MATTER OF:

MR. PAWAN GARG, PROP. OF M/S TRADING CO.
...Petitioner/ Operational Creditor

Versus

M/S SEWA STEELS PRIVATE LIMITED & ORS.
...Respondent/ Corporate Debtor

IA No. 126/JPR/2023

MEMO OF PARTIES

Mr. Vikram Bajaj, Resolution Professional of M/s Sewa Steels Pvt. Ltd.
308, 3rd Floor, Pearls Business Park,
Netaji Subhash Place, Pitampura,
Delhi-110034

...Applicant

Versus

Pinki Agarwal
K-A5-12, D.L.F. Phase 2,
Gurgaon- 122002 (Haryana)

...Respondent No. 1

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Sanchi Agarwal
K-A5-12, D.L.F. Phase 2,
Gurgaon- 122002 (Haryana)

...Respondent No. 2

Counsel for Applicant	:	Kunal Godhwani, Adv.
Counsel for Respondents	:	Surendra Kumar, Adv.

Order Pronouncement On: 30.11.2023

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present application bearing IA (IBC) No. 126/JPR/2023 has been filed by Mr. Vikram Bajaj, Resolution Professional ('RP'/ 'Applicant') of M/s Sewa Steels Private Limited ('Corporate Debtor') under Section 43 of the Insolvency & Bankruptcy Code, 2016 ('IBC'/ 'Code') seeking the following reliefs:

   a. *Allow the present application;*
   b. *Kindly, pass an order declaring transfer of amount of Rs. 18,71,000/- to Respondent No. 1 as preferential transaction under Section 43 of the Insolvency & Bankruptcy Code, 2016;*
   c. *Kindly, pass an order declaring transfer of amount of Rs. 41,55,000/- to Respondent No. 2 as preferential transaction under Section 43 of the Insolvency & Bankruptcy Code, 2016;*
   d. *Kindly, pass an order directing Respondent No. 1 to repay the amount of Rs. 18,71,000/- to Corporate Debtor in terms of Section 44(1) of the Insolvency and Bankruptcy Code, 2016;*
   e. *Kindly, pass an order directing Respondent No. 2 to repay the amount of Rs. 41,55,000/- to Corporate Debtor in terms of Section 44(1) of the Insolvency & Bankruptcy Code, 2016;*
   f. *Pass such order or further order(s) as may be deemed fit and proper in the facts and circumstances of the instant case.*

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2. It is seen that in the present matter, an application was filed under Section 9 of the Code by the Operational Creditor namely Mr. Pawan Garg, Proprietor of M/s V. R. Trading Company seeking initiation of the CIRP of the Corporate Debtor namely *M/s Sewa Steels Pvt. Ltd. & Anr.* and the same was admitted by this Adjudicating Authority *vide* Order dated 25.05.2022 wherein Mr. Arun Chadha was appointed as Interim Resolution Professional ('IRP'). Subsequently, the Applicant was appointed as the Resolution Professional ('RP') *vide* order dated 01.09.2022 in IA(IBC) No. 405/JPR/2022.

3. The present application has been filed on the following set of facts:

3.1. It is submitted that on review of the records of the Corporate Debtor, the Applicant noticed that there are number of funds transfer made to Respondent No. 1 who is the Promoter- Director of the Corporate Debtor holding 28.36% equity shares in the Corporate Debtor and Respondent No. 2 who is the daughter of Respondent No. 1 holds 3.36% equity shares in the Corporate Debtor. On 07.01.2023, the Applicant sent an email to Respondents seeking explanation on the receipt of amounts from the account of the Corporate Debtor. The same has also been considered in the 7th meeting of CoC. After that, the Respondents gave their explanation to the aforesaid transactions on 15.01.2023, wherein the Respondents have

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unequivocally admitted that the payments constitute repayments of their unsecured loans.

3.2. After receiving the aforesaid explanation and further review of the records, the Applicant has noted that Respondent Nos. 1 & 2 had extended unsecured loan to the Corporate Debtor which have been paid back to the Respondents during the look back period i.e., period of 2 years prior to CIRP commencement date, in preference to the secured creditors of the Corporate Debtor, outside the ordinary course of business as under:

1. ***Ms. Pinki Aggarwal***

Loan Outstanding as on 01.04.2021 *= Rs. 76,00,000*

Preferential Repayment of Loan during period 01-04-0221 to 21-05-2022 *– Rs. 18,71,000 as under:*

		Opening Bal. = Rs. 76,00,000.00 Cr	
Date	***Debit (Rs.)***	***Credit (Rs.)***	***Balance (Rs.)***
20.05.2021	*500.00*	*0.00*	*7599500.00 Cr*
21.05.2021	*300000.00*	*0.00*	*7299500.00 Cr*
24.05.2021	*1000.00*	*0.00*	*7298500.00 Cr*
24.05.2021	*1652000.00*	*0.00*	*5646500.00 Cr*
31.05.2021	*0.00*	*4600.00*	*5651100.00 Cr*
31.05.2021	*0.00*	*80000.00*	*5731100.00 Cr*
31.05.2021	*1000.00*	*0.00*	*5730100.00 Cr*
31.05.2021	*1100.00*	*0.00*	*5729000.00 Cr*
	1955600.00	***84600.00***	
		Closing Bal. = Rs. 57,29,000.00 Cr	
	Preferential Payments		***1871000***

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2. ***Ms. Sanchi Aggarwal***

***Loan Outstanding as on 01.04.2021** = Rs. 41,25,000*

***Preferential Repayment of Loan during period 01-04-0221 to 21-05-2022** – Rs. 41,55,000 as under:*

		Opening Bal. = Rs. 41,25,000.00 Cr	
Date	***Debit (Rs.)***	***Credit (Rs.)***	***Balance (Rs.)***
28.04.2021	*1000000.00*	*0*	*3125000.00 Cr*
29.04.2021	*1000000.00*	*0*	*2125000.00 Cr*
07.05.2021	*100000.00*	*0*	*2025000.00 Cr*
07.05.2021	*265000.00*	*0*	*1760000.00 Cr*
15.05.2021	*1000.00*	*0*	*1759000.00 Cr*
15.05.2021	*89000.00*	*0*	*1670000.00 Cr*
15.05.2021	*500000.00*	*0*	*1170000.00 Cr*
15.05.2021	*1200000.00*	*0*	*30000.00 Dr*
		Closing Bal. = Rs. 30,000.00	
	Preferential Payments		***41,55,000***

3.3. It is submitted that the aforesaid amount was transferred from the bank account of the Corporate Debtor. The same was discussed in the 11th meeting of CoC. Further, the transactions of preferential repayment of unsecured loan of Respondents have not been made during the course of business as the same pertains to months of April/ May 2021, when the Corporate Debtor was already in default to the secured Financial Creditor, which is evident from the fact that the financial assistance executed by HDFC Bank was declared as NPA on 27.10.2021, as noted in the loan recall notice dated 15.03.2022. Thus, the same squarely falls within the relevant time prescribed under section 43 of the Code.

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3.4. It is submitted that in order to satisfy the test of Section 43 of the Code, it is necessary to satisfy two ingredients i.e., the transfer of funds is on account of the antecedent debt and the transfer has the effect of putting such creditor in a beneficial position then it would have been in the event of liquidation. The respondents were put in beneficial position over the secured creditors, is well established as the Corporate Debtor was in default in servicing the debt of secured financial creditor HDFC Bank at the time when the said transactions were undertaken. It is submitted that both the above ingredients are satisfied as from the Respondents own admission, the transfer is towards the antecedent financial debt and further, Respondents being unsecured creditors are being put in a beneficial position then they would have been in the event of liquidation of Corporate Debtor.

3.5. It is submitted that HDFC Bank Limited is a secured creditor to Corporate Debtor and has a claim of Rs. 18,41,96,632/- (Eighteen Crore Forty-One Lakh Ninety-Six Thousand Six Hundred Thirty-Two Only). Hence, it is clear that the aforesaid transfer to Respondents have given them preference over the secured creditor to the Corporate Debtor. Therefore, the transfer of funds to Respondents falls within the teeth of Section 43 of the Code. Section 43(2) of the Code provides that the Corporate Debtor shall be

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deemed to have given a preference if there is a transfer of property or an interest thereof the Corporate Debtor for the benefit of a creditor and on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor and the transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position then it would have been in the event of distribution of assets being made in accordance with Section 53.

3.6. The respondents have given preference as there is a transfer of property defined under Section 3(27) of the Code, which includes money for the benefit of an unsecured financial creditor and on account of an antecedent debt owed by the Corporate Debtor and the said transfer has the effect of putting such unsecured financial creditor in a beneficial position that they would have been in the event of distribution of assets being made in accordance with Section 53 of the Code. The said transaction has taken place within the relevant time within the meaning Section 43(4)(b) of the Code.

3.7. The reliance has been placed in the case of *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited Etc. Civil Appeal Nos. 8512-8527 of 2019* to state that where the transaction took place within the specified suspect period; the transaction involved a transfer to a creditor on account of a pre-

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existing debt; and as a result of the transaction, the creditor received a larger percentage of its claim from the debtor's assets than other creditors of the same rank or class (in other words, a preference).

3.8. The aforesaid transactions evidently demonstrates that the Respondents have entered into the said transactions with intent to divert the funds and claims of the respondents for payment/ settlement of debts of related parties, while the Corporate Debtor was already deep in debt and barely operational and such transactions had effect of putting the related parties in a preferential position, as they would not have received any amount of distribution is made in accordance with the provisions of Section 53 of the Code. The preferential transactions assailed in this application thus pass the test laid down by Hon'ble Apex Court for adjudication of transactions under Section 43 of IBC, 2016 as under:

S. No.	*CRITERIA*	*FACTS QUA TRANSACTIONS OF CORPORATE DEBTOR*
1.	*As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?*	*The transactions lead to recovery of antecedent debt of related party unsecured financial creditors being Respondent 1 & 2 from the Corporate Debtor, thereby benefiting such creditors.*
2.	*(ii) As to whether such transfer is for or an account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor?*	*The transfer funds/ claims of the Corporate Debtor, purportedly has been made for payment of antecedent debt due to related party unsecured financial creditors being Respondent 3, 4 and 5*

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3.	*(iii) As to whether 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 being made in accordance with Section 53?*	*The forestated transactions have the effect of putting Respondent 1& 2 in a beneficial position as the transaction were undertaken in the months of April/May 2021, when the Corporate Debtor was already in default to the secured financial creditor, which is evident from the fact that the financial assistance extended by HDFC Bank was declared as NPA on 27.10.2021, as noted in the loan recall notice dated 15.03.2022.* *In the given case admitted claims of secured financial creditors in CIRP amount to Rs. 18,41,96,632.86, The Liquidation value of the assets of the Corporate Debtor is not sufficient even to cover the claims of the secured financial creditors.* *As such in the given case the unsecured financial creditors would not have received any distribution under Section 53 of the IBC, 2016 whereas under the transactions Respondent No. 1 has made recovery of Rs. 18.71 lacs and Respondent No. 2 has made recovery of Rs. 41.55 lacs, thus the transactions have effect of putting unsecured financial creditors being Respondent 1 and 2 in beneficial position than in distribution under Section 53 of the Code.*
	(iv) If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date, and if such transfer had been for	*The transactions have been carried with related parties of the Corporate Debtor within a period of 2 year from CIRP commencement date.*

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	the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?	
	(v) As to whether such transfer is not an excluded transactions in terms of sub-section (3) of Section 43?	*The transactions are not in ordinary course of business for following reasons:* *i.The Corporate Debtor was in default in repayment of its obligations to secured financial creditors* *ii. The transferee's/ Corporate Debtor are not engaged in business of borrowing/ lending money.* *iii. The transactions were undertaken to prejudice the recovery of other stakeholders under liquidation and to the benefit of promoter group related entities.*

4. The reply to the said application has been filed by Respondent Nos. 1 & 2 *vide* diary No. 1314/2023 dated 25.04.2023 stating the following:

4.1. It is submitted that M/s Sewa Steels Pvt. Ltd. is a company incorporated under companies Act. It has directors which are family members in present case Mrs. Pinki Aggarwal, Respondent No. 1 was director and wife of Late Sh. Varinder Kumar, another and main director running the business of the company. When the company was in financial crises and needs funds, Late Shri Varinder requested to Respondent No. 1 to withdraw the amount from her EPF account give it to company as a short-term loan for the time being in order to bring the company to come out of the financial crisis which company is facing. Similar request was also made to Respondent No. 2, to withdraw the amount from her EPF account and give it as short-term loan to company so that company could come out of financial crisis.

4.2. Respondent No. 1 had withdrawn the amount from her EFPH account and gave deposit of the amount as loan to the Corporate Debtor with a hope that the situation of the company will improve and she will get her money back. But Covid caused havoc and Sh. Varinder Kumar, husband of Respondent No. 1 expired. The fact is known to Respondent and is on record. The Respondents and family started struggling for meeting her basic needs to live as there was no funds to meet even day to day expense of the family and these circumstances turned out to be bad phase of life and turning point of their life.

4.3. In view of all these circumstances, Respondent No. 1 was facing the starvation situation which compelled the Respondent Nos. 1 & 2 to withdraw their amount given as loan to company to meet their day-to-day expenses in order to make both ends meet. The death of Sh. Varinder Kumar had changed the whole scene of family and the company & Respondent Nos. 1 & 2 came on road and the amount was withdrawn in compelling circumstances to save themselves from this situation. With respect to Respondent No. 2, the money

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was not drawn with any ill motive but hunger has compelled them to withdraw their own hard-earned money.

4.4. It is submitted that RP in spite of having knowledge of death of Sh. Varinder Kumar had tried to point from record the picture in a different manner. The test of preferential transaction is not passed in the case as alleged by RP. The Table drawn has not considered the factual real picture about death of Sh. Varinder Kumar which the RP was aware of. There is no question of benefitting Respondent Nos. 1 & 2 but circumstances explained have to be considered.

5. The Respondent Nos. 1 & 2 *vide* diary No. 1982/2023 dated 14.08.2023 and *vide* diary No. 1981/2023 dated 14.08.2023 filed their Written Submission stating the following:

5.1. It is submitted that this application dated 20.02.2023 filed on 23.02.2023 is barred by limitation provided under Regulation 35A of the IBBI (Insolvency resolution Process for Corporate Persons) Regulations, 2016. The relevant Rule which governs application u/s 43 is Regulation 35A of the IBBI. The said application is not maintainable being time barred. Regulation 35A mandates that on or before 75th day of the insolvency date, the RP shall form an opinion whether Corporate Debtor has been subjected to any transaction under Section 43 of the Code. Thereafter as per (2) a determination is to be made within 115 days of the insolvency commencement date and as per Rule 3 if

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determining not in made then within 135 days has to move before this Authority. In the present case, the insolvency commencement date is 25.05.2022. Thereby there is inordinate delay of 205 days. Reliance has been placed on Regulation 35A of the Code.

5.2. Reliance has been placed on the Judgments:

1) State of Uttar Pradesh vs. Singhara Singh & Ors. AIR 358:1964 SCR (4), 485

2) G. Satyanarayana Murty vs. Nikhil B. Parikh & Ors.

5.3. Secondly, as moratorium had already been declared against Respondent No. 1 by this Adjudicating Authority. Hence, in view of moratorium having been declared against Respondent No. 1, the present application under Section 43 must fail.

6. The Applicant *vide* diary No. 2431/2023 dated 09.10.2023 filed his Written Submissions, stating the following:

6.1. It is submitted that the Hon'ble NCLAT in the matter of *Aditya Kumar Tibrewal Vs. Om Prakash pandey & Ors. Company Appeal (AT) (Ins.) No. 583 of 2021* has held that if time lines under Regulation 35A of the CIRP Regulations are held to be mandatory then the fraudulent transactions will go out of the reach of Resolution Process, and shall cause great inconvenience and injustice to the Corporate Debtor and thus, timelines prescribed under Regulation 35A of CIRP Regulations are directory in nature and not mandatory.

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6.2. It is submitted that the moratorium in terms of Section 96 of the Code does not cover the proceedings initiated under the Code. It is submitted that the Hon'ble NCLAT in the matter of *Ashok Mahindru & Anr. Vs. Vivek Parti, Company Appeal (AT) (Ins) No. 1324 of 2022,* has held that the stay of proceedings under Section 19(2) and Section 66-67 of the Code, is not contemplated under Section 96(1)(b) of the Code.

6.3. Reliance has been placed on the judgment:

i) *Rakesh Kumar Jain Vs. Jagdish Singh Nain & Ors. [Company Appeal (AT) (Ins.) No. 425 of 2022]*

7. We have heard the Ld. Counsels and perused the averments made in the Application, Reply and written submissions along with the documents enclosed with the Application.

8. It is submitted by the Applicant that on review of record of the Corporate Debtor, more particularly, bank statements of the account of the Corporate Debtor it was observed that there were a number of fund transfers made to Respondent No. 1, who is the Promoter-Director of the Corporate Debtor and Respondent No. 2, who is the daughter of Respondent No. 1 and holds 3.36% equity shares in the Corporate Debtor.

9. During the period 01.04.2021 to 21.05.2022 a sum or Rs. 18,71,000/- (Rupees Eighteen Lakh Seventy-One Thousand Only) was paid to Respondent No. 1 as preferential repayment of loan and a sum of Rs. 41,55,000/- (Rupees Forty One Thousand Fifty Five Hundred Only) was paid to the Respondent No. 2

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as preferential repayment of loan which was transferred from the bank account of the Corporate Debtor.

10. It is submitted by the learned counsel for the Respondent that the application filed by the RP is barred by limitation provided under Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which governs application under Section 43 of the IBC. It is also submitted by the learned counsel for the Respondent that when the RP is of the opinion that the Corporate Debtor has been subjected to any transactions covered under Section 43, 45, 50, 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date under intimation to the Board. In the present case, the insolvency commencement date is 25.05.2022.

11. It is also stated by the learned counsel for the Respondent that R1 (wife of Virendra Kumar) and R2 (Daughter of Virendra Kumar) had advanced loan to Corporate Debtor by withdrawing the amount from their PF account giving short term loan to company with the hope that financial condition of company will improve and they will get their money. Due to acute financial hardship in meeting the daily expenses of the family, the said amount was withdrawn from the account of the Company.

12. Learned counsel for the RP has relied upon the judgment passed by Hon'ble NCLAT in *Aditya Kumar Tibrewal V/s OM Prakash Pandey & Ors., company Appeal (AT) (Ins.) No. 583 of 2021*. In the said Judgment, Hon'ble NCLAT

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has held that if timelines under Regulations 35A of the CIRP Regulations are held to be mandatory then the fraudulent transactions will go out of the reach of Resolution Process and shall cause great inconvenience and injustice to Corporate Debtor and thus, timelines prescribed under Regulation 35A of CIRP Regulations are directory in nature and not mandatory.

13. It is also submitted by the Learned counsel for the RP that transfer to respondents is not in ordinary course of business. The Respondents while providing the clarifications have not denied the transaction. The transaction entered with the respondents fall within the purview of Section 43 of the Code.

14. In Anuj Jain Interim Resolution Professional for *Jaypee Infratech Limited V/s Axis Bank Limited Etc. Civil Appeal Nos. 8512-8527 of 2019*, Hon'ble Supreme Court has laid down the test to be satisfied for adjudicating a transaction as a preferential transaction under Section 43 of IBC, 2016.

> *"19.5 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 satisfied 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.*
>
> *20. The analysis foregoing leads to the position that in order to find as to whether a transaction of transfer of property or an*

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interest thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to be examined in a given case:

(i) As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?

(ii) As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate Debtor?

(iii) As to whether 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 being made in accordance with Section 53?

(iv) If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date: and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?

(v) As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?"

15. Section 43(3) provides that for the purposes of sub section (2), a preference shall not include the following transfers-

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(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.

16. The Hon'ble Supreme Court in Anuj Jain (supra) held that the ordinary course of business ought to be seen from the perspective of the Corporate Debtor as well as the transferee. In the case in hand, learned counsel for the Respondent has not submitted that the amount transferred in the accounts of the Respondents was in the ordinary course of the business or financial affair of the Corporate Debtor of the transferee, rather justified the transfer of said amount on humanitarian grounds as Mr. Virendra Kumar passed away during

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COVID-19 and his family suffered a lot due to his death and his family due to financial hardship entered into the stage of starvation.

17. For the purpose of Section 43(2) preference shall not include the transfer falling under Section 43(3) (a) (b) of IBC. Such exception has not been taken by the Respondents rather they have admitted that the transactions were done which is in preference to the other creditors. Prima facie, it is seen that the above said transactions were made in order to divert the funds and claims of the respondents for payment of the settlement of debt of the related parties while the corporate debtor was already deep in debt and barely operational and such transactions have effect of putting the related party in a preferential position as they would not have received any amount if distribution is made in accordance with the provisions of Section 53 of the Code. In view of the above discussions, payment made to Respondent No. 1 of a sum of Rs. 18,71,000/- (Rupees Eighteen Lakh Seventy-One Thousand Only) is a preferential transaction covering all the ingredients of Section 43 of IBC. The payment made to Respondent No. 2 of a sum of Rs. 41,55,000/- (Rupees Forty-One Lakh Fifty-Five Thousand Only) is also declared as preferential transaction under Section 43 of the Insolvency and Bankruptcy Code, 2016.

18. Order under Section 44 of the IBC, this adjudicating authority passes the following order: -

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A) Respondent No. 1 is directed to repay the amount of Rs. 18,71,000/- (Eighteen Lakh Seventy-One Thousand Only) to Corporate Debtor in terms of Section 44(1) of the Insolvency and Bankruptcy Code, 2016.

B) Respondent No. 2 is directed to repay the amount of Rs. 41,55,000/- (Forty-One Lakh Fifty-Five Thousand) to Corporate Debtor in terms of Section 44(1) of the Insolvency and Bankruptcy Code.

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DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

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RAJEEV MEHROTRA,
TECHNICAL MEMBER