

NATIONAL COMPANY LAW TRIBUNAL
COURT-V, MUMBAI BENCH

2. IA/5737/2024 C.P. (IB)/683(MB)2022

IN THE MATTER OF

Ashika Global Securities Private Limited

Vs

Evyavan Mercantile Private Limited

U/s 7 of the Insolvency and Bankruptcy Code, 2016

Order Delivered on 07.05.2026

CORAM:

MS. LAKSHMI GURUNG
MEMBER (J)

SH. CHARANJEET SINGH GULATI
MEMBER (T)

Appearance through VC/Physical/Hybrid Mode:

For the Applicant: Adv. Aniruth Purushothaman (PH)

For the Respondent: Appeared but not marked appearance

ORDER

IA/5737/2024: - The above IA is listed for pronouncement of the order. The same is pronounced in open court, vide a separate order.

Sd/-
CHARANJEET SINGH GULATI
Member (Technical)
//Zakir//

Sd/-
LAKSHMI GURUNG
Member (Judicial)

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT – V

IA 5737 of 2024 in CP 683 of 2022

Order under Section 43 of the Insolvency and Bankruptcy Code, 2016.

Ashika Global Securities Private Limited

Having address at:

701, 7th Floor Raheja Centre, Nariman Point,
Mumbai – 400 021

... Applicant/ Resolution Professional

Versus

**Ms Rita Aditya Kedia (Suspended Director of
Corporate Debtor)**

Having address at:

C-4306, DB Woods, Krishna Vatika Marg,
Gokuldham, Goregaon (East), Mumbai – 400 063

...Respondent No. 1

**Ms Sharda Bubna (Suspended Director of
Corporate Debtor)**

Having address at:

B-4502, DB Woods, Krishna Vatika Marg,
Gokuldham, Goregaon (East), Mumbai – 400 063

...Respondent No. 2

IN THE MATTER OF:

Ashika Global Securities Private Limited

Having address at:

701, 7th Floor Raheja Centre, Nariman Point,
Mumbai – 400 021

...Financial Creditor

Versus

Evyavan Mercantile Private Limited

Having address at:

414, Manish Chambers, Sonewala Road,
Goregaon East, Mumbai – 400 063.

...Corporate Debtor

Order Pronounced on: 07.05.2026

Coram:

MS. LAKSHMI GURUNG, HON'BLE MEMBER (J)

SH. CHARANJEET SINGH GULATI, HON'BLE MEMBER (T)

Appearances:

For the Applicant: Adv. Aniruth Purusothaman G. (PH)

For the Respondent: Adv. Shamant Satiya i/b Adv. Ruturaj V. Bankar R1 and R2 (PH)

ORDER

1. The present Interlocutory Application was originally instituted by Mr. Shailesh Bhalchandra Desai, in his capacity as the Resolution Professional of M/s. Evyavan Mercantile Private Limited (hereinafter referred to as the "**Corporate Debtor**"), under Section 43 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**" or the "**Code**"). In terms of Resolution plan approved by this Adjudicating Authority vide order dated 23.02.2026, whereof the rights, benefits, and recoveries arising out of Preferential, Undervalued, Fraudulent and Extortianate ("**PUFE**") transactions/applications stood vested with the creditor. Thereafter, M/s. Ashika Global Securities Private Limited, the entity in whom the aforesaid PUFEE recovery rights stood vested, filed an application seeking substitution in the present IA. Vide order dated 06.04.2026, this Tribunal allowed the said substitution and permitted M/s. Ashika Global Securities Private Limited (hereinafter referred to as the "**Applicant**") to be substituted in place of the erstwhile Resolution Professional, Mr. Shailesh Bhalchandra Desai, for the purpose of prosecuting the present Application. In the above background, the present Application is being pursued by the Applicant in its capacity as the creditor in whom the rights and recoveries under the PUFEE applications stand vested, seeking, inter alia, the following reliefs:

- a. Consider the present application IA of 2024 under Section 43 of IBC, 2016;
- b. Direct the Respondent No. 2 to make such contributions to the Corporate Debtor aggregating to sum of Rs. 138.30 Lakhs as stated in this Application with regard to the financial benefit extended by way of preferential treatment to other creditors which falls within the look back period in terms of section 43 of the Code;
- c. Pass appropriate directions / orders in terms of Section 44, of the Code including for recovery/ restoration of legitimate amounts due to the Corporate Debtor;
- d. Impose such fine under section 71, 72 and 73 of the Code upon the Respondents as this Hon'ble Tribunal may deem fit.
- e. And for such other/further order(s) and/or directions as the facts ad circumstance of the case may warrant.

FACTS OF THE CASE & SUBMISSION OF THE APPLICANT IN BRIEF:

2. The Corporate Insolvency Resolution Process ("**CIRP**") in respect of the Corporate Debtor was initiated vide order dated 02.11.2023 passed by this Tribunal in Company Petition No. 683/MB/2022 filed by M/s. Ashika Global Securities Private Limited (**'Financial Creditor'**) under Section 7 of the IBC.
3. The Corporate Debtor, originally incorporated on 21.07.2005 as Highstreet Mercantile Co. Private Limited, underwent a name change to Evyavan Mercantile Private Limited on 27.09.2023, approximately one month prior to the commencement of CIRP. The Corporate Debtor is engaged in the business of stock trading.
4. The suspended directors of the Corporate Debtor at the time of commencement of CIRP included Ms. Rita Aditya Kedia (Respondent No. 1), who was appointed as director on 16.08.2005, and Mrs. Sharda Bubna (Respondent No. 2), who was inducted as a director on 09.06.2021. Both directors were suspended upon commencement of the CIRP pursuant to Section 17 of the IBC. It is pertinent to note that Respondent No. 2 is the spouse of the late Mr. R.S. Bubna (DIN: 01320911), who was a past director of the Corporate Debtor and who passed away on 10.07.2021.

5. Being aggrieved by the admission order dated 02.11.2023, Respondent No. 1 filed an appeal before the Hon'ble National Company Law Appellate Tribunal ("NCLAT"). The matter came up for hearing on 24.11.2023, and the Hon'ble NCLAT passed an order directing that the Committee of Creditors be constituted and allowed to proceed further in accordance with law, however, no Form G (public announcement of invitation of Expression of Interest) may be issued till the next date of hearing.
6. During the CIRP, New Haribhakti Business Services LLP was appointed as Transaction Auditor to conduct an audit of the Corporate Debtor's transactions for the period from 01.04.2019 to 30.11.2023. The Transaction Auditor after examining the books of accounts made available to him, submitted Transaction Audit Report (hereinafter referred to as "TAR") dated 20.03.2024, which discloses that certain transactions undertaken by the Respondents are preferential in nature within the meaning of Section 43 of the Code.
7. The Applicant submits that the Hon'ble Supreme Court in *Anuj Jain (IRP of Jaypee Infratech Limited) v. Axis Bank Limited & Anr. (Civil Appeal Nos. 8512–8527 of 2019)* has laid down the parameters for determining whether a transaction falls within the ambit of Section 43 of the Code. The Hon'ble Court held that, for a transaction to qualify as preferential, it must satisfy the ingredients of sub-sections (2) and (4) of Section 43 and must not fall within the exclusions under sub-section (3).
8. It is submitted that, as per the Tally data and ledger entries of the Corporate Debtor, loans aggregating to ₹3,053.60 Lakhs were received from Mr. R.S. Bubna, erstwhile director during the period 04.07.2018 to 05.07.2021, out of which ₹468.65 Lakhs was repaid. Upon his demise, the outstanding balance of ₹2,584.95 Lakhs was transferred to the account of Mrs. Sharda Bubna, Respondent No. 2. The Total loan from Respondent no. 2 apart from the said transfer, was ₹1749.60 lakhs and the total repayment made to Respondent No. 2 during the period 01.04.2018 to 30.11.2023 was ₹591.55 Lakhs.
9. The RP further submits that while repayments of inter-corporate loans were regular up to Financial Year 2017–18, no repayments were made to other unsecured creditors from

01.04.2019 onwards. It is submitted that during the look-back period, i.e., from 03.11.2021 to 02.11.2023, a sum of ₹138.30 Lakhs was repaid to Respondent No. 2.

10. According to RP that the said repayment, in question pertains to antecedent unsecured debt and that no repayments were made to other similarly placed unsecured creditors during the same period. The financial records of the Corporate Debtor reflect outstanding dues towards multiple creditors, including trade payables and long-term borrowings, which remained unpaid, while preferential payments were made to Respondent No. 2 who is a suspended director, a related party within the meaning of Section 5(24) of the Code, and therefore the transaction falls within the extended look-back period applicable to related parties.
11. The RP submits that the aforesaid conduct has resulted in Respondent No. 2 being placed in a more beneficial position than other creditors in the event of distribution of assets under Section 53 of the Code. It is contended that such selective repayment defeats the scheme of equitable distribution envisaged under the Code and squarely falls within the mischief of Section 43(2).
12. On the aforesaid basis, it is submitted that the repayment of ₹138.30 Lakhs falls within the ambit of Section 43 of the Code and is liable to be avoided under Section 44, and that Respondent No. 2 be directed to refund the said amount to the Corporate Debtor.
13. In its written submissions dated 24.02.2026, the RP further submitted that the Transaction Auditor had sought clarifications from the Respondents on multiple occasions regarding significant observations, to which the Respondents consciously refrained from responding. The applicant submits that the payments made to Respondent No. 2 were not in the ordinary course of business and resulted in the deprivation of other rightful creditors from their legitimate share of the Corporate Debtor's assets.

CONTENTION OF THE RESPONDENT NO. 1 AND RESPONDENT NO. 2

14. Per contra it is the case of the respondents that the present application is misconceived, not maintainable and liable to be dismissed. It is contended that the application has been

filed in suppression of material facts and is based on an incomplete and misleading narration of events.

- 15.** The Respondents submit that the timeline of events is as follows: The CIRP was initiated vide order dated 02.11.2023. The RP sent an email dated 03.11.2023 informing the Corporate Debtor of his appointment as Interim Resolution Professional. On 10.11.2023, the RP addressed an email to both Respondents requesting documents. Respondent No. 1 filed an appeal before the Hon'ble NCLAT, which was heard on 24.11.2023, and the Hon'ble NCLAT passed an order directing that the Committee of Creditors be constituted and allowed to proceed further in accordance with law, however, no Form G may be issued till the next date. The RP had filed a previous application on 05.10.2024, which was dismissed on 29.11.2024. The present Application under Section 43 was filed on 05.12.2024.
- 16.** It is contended that the RP was well aware of the fact that there is no stay order and could have carried out his duties.
- 17.** The Respondents contend that the present Application is not maintainable and is liable to be dismissed at the threshold as being barred by limitation under Regulation 35A of the Regulations, 2016.
- 18.** It is contended that the Insolvency Commencement Date ('ICD'), being 02.11.2023, the last date for filing the Application was 11.03.2024 (i.e 130th day). However, the present Application has been filed on 05.12.2024, which is 398 days after the ICD constituting a delay of 268 days beyond the prescribed timeline. The learned counsel emphasized that the RP has neither explained this inordinate delay nor sought condonation of the same. It was further contended that the fact that the RP filed another application on 05.10.2024 which was dismissed on 29.11.2024 unequivocally establishes that the RP was fully aware that no stay order was in effect and that he was required to carry out his duties in accordance with law, yet he failed to file the present Application within the stipulated time.
- 19.** The Respondents further submit that the RP has failed to demonstrate how the amount of ₹138.30 Lakhs has been computed or how each transaction satisfies the ingredients

of Section 43. It is contended that no transaction-wise analysis, supporting documentation, or cogent reasoning has been provided to substantiate the allegation of preferential treatment.

- 20.** The Respondents contend that the RP has placed an incomplete TAR on record. The TAR was prepared without all relevant documents, as evident from Annexure 3 of the TAR report. The RP has relied solely on this incomplete report to conclude that certain transactions are preferential, without applying independent mind or forming his own reasoned opinion, contrary to Regulation 35A of the CIRP Regulations. This reliance on an incomplete and unverified report undermines the credibility and legality of the Application.
- 21.** It is also contended that no relief has been sought against Respondent No. 1 and no allegation has been made against her in the Application. In the absence of any cause of action, her impleadment is stated to be erroneous and the Application is liable to be dismissed qua Respondent No. 1.
- 22.** Respondents contend that the Applicant has failed to establish any balance of convenience in its favour. The balance of convenience lies wholly with the Respondents. In view of the above, the Respondents submit that the Application is misconceived, untenable, and devoid of merit, and it deserves to be dismissed at the threshold with exemplary costs for abusing the process of law and wasting the time of this Hon'ble Tribunal.
- 23.** In its written submissions dated 24.02.2026, the Respondents contended that the alleged repayments to Respondent No. 2 formed part of the ordinary course of business and financial affairs of the Corporate Debtor, as the Corporate Debtor had historically financed its operations through unsecured loans from its directors and shareholders, with repayments made as funds permitted. The Respondents submitted that the transactions qualified for exclusion under Section 43(3)(a) of the Code, as the ledgers demonstrated a continuous running account with inflows and repayments over several years, and Respondent No. 2 had provided new value by advancing fresh funds during the look-back period. Reliance was placed on the decision in *Charu Desai v. HDFC*

Bank Ltd., wherein it was held that repayments made in terms of sanction conditions and in line with prior conduct fall within the exception under Section 43(3) of the Code.

24. Without prejudice to the aforesaid, it is contended that the impugned transactions were carried out in the ordinary course of business and financial affairs of the Corporate Debtor. It is submitted that the Corporate Debtor had historically raised funds from its directors and shareholders in the form of unsecured loans, and repayments were made as and when funds were available. The transactions, therefore, form part of a running account and fall within the exception under Section 43(3) of the Code.

ANALYSIS AND FINDINGS

25. We have heard the learned counsel for the RP, Applicant and the Respondents and perused the documents on record. The following issues arise for our consideration:

- (I) Whether the present Application is barred by limitation under Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016;
- (II) Whether the RP has independently formed an opinion as required under Section 43(1) of the Code, or has mechanically relied upon the Transaction Audit Report;
- (III) Whether the Transaction Audit Report is unreliable
- (IV) Whether the repayment of ₹138.30 Lakhs to Respondent No. 2 constitutes a preferential transaction within the meaning of Section 43(2) read with Section 43(4) of the Code; and whether the exceptions under Section 43(3) are attracted;
- (V) Whether any cause of action is disclosed against Respondent No. 1

26. Before proceeding to analyse the issues, it is necessary to set out the relevant provisions of Section 43 of the Code in extenso:

43. Preferential transactions and relevant time. -

- (1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.*

(2) *A corporate debtor shall be deemed to have given a preference, if–*

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

(3) *For the purposes of sub-section (2), a preference shall not include the following transfers–*

- (a) *transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;*
- (b) *any transfer creating a security interest in property acquired by the corporate debtor to the extent that –*
 - i. *such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and*
 - ii. *such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:*

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) *A preference shall be deemed to be given at a relevant time, if –*

- (a) *it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date;*
or
- (b) *a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.*

27. Now we proceed to examine each issue in light of the above provision of law:

**ISSUE I: WHETHER PRESENT APPLICATION IS BARRED BY
LIMITATION UNDER REGULATION 35A**

28. The Respondents have raised a preliminary objection to the maintainability of this Application on the ground that it has been filed beyond the timeline prescribed under Regulation 35A of the IBBI Regulations, 2016. It is submitted that the Insolvency Commencement Date ('ICD') is 02.11.2023 and that the Resolution Professional was required to file the Application within 130 days therefrom, i.e., on or before 11.03.2024. The present Application having been filed on 05.12.2024, there is a delay of approximately 268 days beyond the prescribed period. It is further contended that no application for condonation of delay has been filed.
29. There is no dispute as to the dates. The Application has been filed beyond the 130-day period contemplated under Regulation 35A. Regulation 35A serves as a procedural guide to the Resolution Professional and imposes a time schedule to ensure that avoidance investigations proceed with diligence during the CIRP. It does not, however, operate as a jurisdictional bar. The issue that arises for consideration is whether the timeline prescribed under Regulation 35A is mandatory, non-compliance of which renders the Application not maintainable, or whether the provision is directory.
30. The aforesaid issue stands settled by the recent judgment of Hon'ble National Company Law Appellate Tribunal in *Jasvinder Singh Makan v. Anish Kumar Sanghi (RP), CA (AT) (Ins.) No. 735 of 2025*, decided on **06.02.2026** wherein it is held that:

*“64. This Appellate Tribunal in ‘Aditya Kumar Tibrewal, Resolution Professional vs. Om Prakash Pandey, Suspended Director & Ors.’, [(2022) ibclaw.in 278 NCLAT] [Company Appeal (AT) (Ins) No. 583 of 2021], examined the effect of the timelines prescribed under Regulation 35A of the CIRP Regulations for forming an opinion and filing an application relating to preferential transactions. While doing so, the Tribunal followed the law laid down by the Hon'ble Supreme Court in ‘Surendra Trading Company vs. Juggilal Kamlatpat Jute Mills Company Ltd. & Ors.’, [(2017) ibclaw.in 08 SC] [(2017) 16 SCC 143], wherein it was held that procedural timelines are generally directory in nature unless the statute expressly provides otherwise. **This Appellate Tribunal observed that Regulation 35A only prescribes a time schedule to guide the Resolution Professional and does not take away the substantive power to pursue avoidance transactions under the Code. It was further noted that avoidance proceedings are meant to protect the interests of***

the creditors and the asset pool of the Corporate Debtor and therefore cannot be defeated on technical or procedural grounds. In view of this legal position, the Tribunal held that an application under Section 43 of the Code is not rendered non-maintainable, merely because the opinion was not formed or the application was filed within the indicative timelines mentioned in Regulation 35A. Applying this principle to the present case, the Appellant's objection that the application under Section 43 was time-barred cannot be accepted, and the Adjudicating Authority was justified in entertaining and deciding the application, which clearly supports the case of the Respondent."

[Bold for Emphasis]

31. In view of the above binding precedent, the objection raised by the Respondents on the ground of limitation under Regulation 35A cannot be sustained. The delay in filing the present Application does not, by itself, extinguish the jurisdiction of this Adjudicating Authority to consider the Application on merits. We accordingly reject the preliminary objection raised by the Respondents on this ground.

ISSUE II: WHETHER THE TRANSACTION AUDIT REPORT IS UNRELIABLE;

32. The Respondents contend that the TAR is incomplete, having been prepared without all relevant documents, and that the present Application founded thereon is therefore unsustainable. Reliance is placed on Annexure 4 to the Application, which enumerates documents not furnished to the Transaction Auditor.

33. However, we observe that the Transaction Auditor sought information and clarifications from the Respondents on several occasions, inter alia, vide emails dated 30.03.2024, 05.04.2024, 15.04.2024, 29.04.2024 and 15.05.2024, as evidenced by Annexure 3. The Respondents failed to respond and did not furnish the requisite documents. The alleged incompleteness of the TAR, if at all, is thus attributable to their own non-cooperation. A party who withholds material cannot subsequently assail the report on the ground of insufficiency of data resulting from such withholding.

34. The principle that no party can take advantage of its own default as affirmed by the judgement of Hon'ble NCLAT in ***Rajesh Toshniwal and Anr. v. Kamal Nayan Jain and Ors.*** squarely applies in the present case wherein it has been held as under:

*35. It is also to be recalled that since beginning of the CIRP, the suspended directors of the CD were non-cooperative with the IRP/RP and it is also evident from the record that they did not provide relevant documentary evidence to the IRP/RP and even did not make any effort to retrieve the data contained in the laptops seized by the police and therefore, in this background the RP was constrained to provide the documents which he could collect from the banks and other third parties. Since, the **Suspended Directors of the CD including the appellants were at fault, in not providing the documents/financial statement of the CD to the IRP/RP, they cannot take this defense that the material available with the Transaction Auditors was not sufficient.***

[Bold for emphasis]

35. Accordingly, the incompleteness of the TAR, having arisen from the Respondents' own deliberate non-cooperation, cannot constitute a ground for dismissal of the Application.

ISSUE III: WHETHER THE RP HAS INDEPENDENTLY FORMED AN OPINION UNDER SECTION 43(1)

36. As extracted above Section 43(1) empowers the Resolution Professional to file an application only if he "is of the opinion" that the Corporate Debtor has given a preference at a relevant time. The formation of such opinion is a jurisdictional precondition. The Respondents contend that the RP has acted mechanically on the Transaction Audit Report without independent application of mind, thereby failing to satisfy the mandate of Section 43(1) of the Code, which requires the Resolution Professional to be "of the opinion" that the Corporate Debtor has given a preference at a relevant time before making an application.

37. In ***Alok Tripathi v. Mohit K. Gupta (Liquidator), Company Appeal (AT) (Insolvency) No. 1817 of 2024***, the Hon'ble NCLAT held that when the Liquidator has had a Transaction Audit Report prepared and has, on the basis thereof, formed a conclusion

that the transaction is preferential, it cannot be said that he has not applied his mind independently. Reliance upon the Transaction Audit Report for the purpose of forming an opinion for filing an application under Section 43 is tenable in law and in such opinion formed has not to be shown or demonstrated by any other or specific document.

38. The Resolution Professional has given his own findings from page 18 of the application in relation to these transactions and provided a conclusion in regards to the transaction which is as follows:

Conclusion

11.6 Considering the above facts, the repayment of loan amounting to 138.30 Lakhs to the Respondent No. 2 during the lookback period is classified as preferential in nature. Respondent No. 2 ought to be directed to make such contribution to the tune of Rs 138.30 Lakhs into the account of the Corporate Debtor which is nothing else but payment made to Related Party in preference to unsecured creditor.

39. Hence, it cannot be said that the Resolution Professional has failed to form independent opinion in the present case.

ISSUE IV: WHETHER THE IMPUGNED TRANSACTION CONSTITUTES A PREFERENTIAL TRANSACTION UNDER SECTION 43(2) READ WITH SECTION 43(4), AND WHETHER THE EXCEPTIONS UNDER SECTION 43(3) ARE ATTRACTED

40. Section 43, as extracted above, sets out the conditions that must be satisfied for a transaction to qualify as preferential. The present issue for consideration pertains to whether the requirements contemplated under Section 43(2) of the Insolvency and Bankruptcy Code, 2016 stand satisfied in the facts of the present case.

41. In regards to the contention that whether the transfer is in regards to the antecedent financial debt, we note from the record produced herein, the ledger accounts and Tally data, establishes that an outstanding loan from Respondent no. 2 was ₹1749.60 lakhs apart from the said transfer ₹2,584.95 Lakhs outstanding in the name of late Mr. R.S. Bubna was transferred to the account of Respondent No. 2 upon his demise. During the

look-back period, a sum of ₹138.30 Lakhs was repaid to Respondent No. 2. Consequently, the repayment constitutes a transfer of the Corporate Debtor to a creditor on account of an antecedent financial debt and satisfies Section 43(2)(a).

- 42.** It has been submitted on behalf of the Respondents that the impugned repayments of Rs. 138.30 Lakhs cannot be characterised as payments towards an "antecedent financial debt" within the meaning of Section 43(2)(a) of the Code, on the ground that during the very same look-back period, Respondent No. 2 continued to advance fresh sums to the Corporate Debtor, thereby rendering the account a running and mutual one in which the repayments were made against new value rather than against pre-existing debt.
- 43.** This Tribunal is unable to accept the said submission. Section 43(2)(a) of the Code provides that a corporate debtor shall be deemed to have given a preference if there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor. The requirement is that the debt in respect of which the transfer is made must be antecedent that is, it must have existed prior to and independently of the transfer impugned.
- 44.** The record in the present case bears testimony to the existence of antecedent financial debt owed by the CD to Respondents. The Transaction Audit Report dated 20.03.2024, prepared by the Transaction Auditor, New Haribhakti Business Services LLP, records that the Corporate Debtor had, in aggregate, borrowed a sum of Rs. 4,798.97 Lakhs from the late Mr. R.S. Bubna and Respondent No. 2 during the period of FY 2018-2022. Upon the demise of Mr. R.S. Bubna on 10.07.2021, the outstanding loan in his name amounting to Rs. 2,584.95 Lakhs was, transferred to the account of Respondent No. 2 on 23.11.2021. The total loan advanced by Respondent No. 2 in her own name, apart from the said transfer, was Rs. 1,749.60 Lakhs. Against the aggregate outstanding, repayments totalling Rs. 591.55 Lakhs were made to Respondent No. 2 during the period 01.04.2018 to 30.11.2023. Out of this, a sum of Rs. 138.30 Lakhs was repaid during the look-back period, between 03.11.2021 to 02.11.2023. The ledger account of Respondent No. 2 in the books of the Corporate Debtor, being Annexure 4 to the Application, corroborates this position and demonstrates that at the commencement of the look-back period, a substantial and pre-existing outstanding credit balance stood in

the ledger account of Respondent No. 2. The repayments amounting to Rs. 138.30 lakhs made during the look-back period are accordingly held to be in discharge of, a pre-existing and subsisting financial liability; consequently, the same constitute an antecedent financial debt within the meaning of Section 43(2)(a) of the Code.

45. The contention that the fresh advances of Rs. 71 Lakhs made by Respondent No. 2 during the look-back period transform the nature of the impugned repayments so as to remove their character as payments against antecedent debt is legally untenable. The Code does not provide for a netting of advances against impugned repayments for the purposes of Section 43(2)(a). The existence of a pre-existing outstanding balance which is not in dispute and is borne out by the ledger is sufficient to establish that the repayments were made on account of an antecedent financial debt within the meaning of the provision. Furthermore, as held by the Hon'ble Supreme Court in *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited, (2020) 8 SCC 401*, the concept of "new value" as a basis for exclusion from the ambit of preferential transactions operates under clause (b) of sub-section (3) of Section 43, which is confined to transfers creating a security interest in property acquired by the Corporate Debtor. It has no application to the unsecured loan repayments that are the subject matter of the present Application.

46. Accordingly, this Tribunal holds that the ingredient under Section 43(2)(a) of the Code namely, that the impugned transfer is for or on account of an antecedent financial debt owed by the Corporate Debtor is satisfied on the facts and record of the present case. Under Section 43(2), conditions have to be satisfied for invoking deeming provision. One under clause (a) *there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor* and the other under clause (b), *the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53*. Both conditions must be conjunctively fulfilled. Having recorded our finding on clause (a) above, we now proceed to examine whether the ingredient under clause (b) is also satisfied on the facts of the present case.

- 47.** It is further established from the record that during the look-back period, no repayments were made by the Corporate Debtor to any other unsecured creditor, the Corporate Debtor having ceased servicing all other inter-corporate loans from 01.04.2019 onwards. The selective repayment of Rs. 138.30 Lakhs to Respondent No. 2 during the lookback period, to the exclusion of all other similarly situated unsecured creditors, placed her in a materially more beneficial position than she would have occupied had the assets of the Corporate Debtor been distributed in accordance with the waterfall mechanism prescribed under Section 53 of the Code. Section 43(2)(b) is accordingly attracted. In the facts of the present case, we held that both conditions under Section 43(2)(a) and 43(2)(b) are satisfied.
- 48.** From the record we note that Respondent No. 2, Ms. Sharda Bubna, is a Suspended Director and shareholder of the Corporate Debtor, and therefore qualifies as a "related party" within the meaning of Section 5(24)(a) of the Code. The insolvency commencement date in the present matter is 02.11.2023, and the applicable look-back period for a related party under Section 43(4)(a) of the Code is two years preceding the said date, i.e., 03.11.2021 to 02.11.2023. The TAR and the ledger accounts of the Corporate Debtor confirm that the impugned repayments of Rs. 138.30 Lakhs to Respondent No. 2 were made during this look-back period. The requirement of Section 43(4)(a) is accordingly satisfied.
- 49.** The deeming provision, however is rebuttable, if it is established that impugned transactions are in the ordinary course of business.
- 50.** The Respondents have contended that the impugned repayments fall within the exception carved out under Section 43(3)(a) of the Code, which excludes from the ambit of a preferential transaction any transfer made in the "ordinary course of business or financial affairs" of the Corporate Debtor and the transferee. It is urged that the Corporate Debtor had, since inception, been financed through unsecured loans from its directors and shareholders, with repayments made periodically as and when funds were generated, and that the impugned repayments form part of this long-standing and routine financing arrangement. Reliance has also been placed on the ledger accounts to demonstrate a running account with continuous inflows and outflows.

51. The Hon'ble Supreme Court in Anuj Jain (supra) at paras 28.2.2 and 28.6.2 settled the construction of Section 43(3)(a) as follows:

28.2.2 Another feature of vital importance is that the matter is examined with reference to the dealing and conduct of the corporate debtor; and qua the health and prospects of the corporate debtor. Applying the well-known principles of noscitur a sociis, whereunder the questionable meaning of a doubtful word could be derived and understood from its associates and context; and usefully recapping that the scheme of Section 43 of the Code is essentially of scanning through the affairs of the corporate debtor and to discredit and disregard such transaction by the corporate debtor which tends to give unwarranted benefit to one of its creditor/surety/guarantor over others, in our view, the purport of clause (a) of sub-section (3) of Section 43 is also principally directed towards the corporate debtor's dealings. In other words, the whole of conspectus of sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of Section 43.

28.6.2 Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of "ordinary course of business" of a particular corporate entity only if it falls in place as part of "the undistinguished common flow of business done"; and is not arising out of "any special or particular situation" as rightly expressed in Downs Distributing Co. Though we may assume that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it

would create encumbrances over its properties to secure the debts of its holding company. In other words, we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the homebuyers. In the given circumstances, we have no hesitation in concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate.

[Bold for Emphasis]

52. From the reading of the above paragraphs it is evident that a transaction qualifies as being in the ordinary course of business only if it forms part of the "undistinguished common flow of business done" and does not arise out of "any special or particular situation." Secondly, and most significantly, the enquiry under Section 43(3)(a) is directed primarily at the conduct and affairs of the Corporate Debtor, and a transaction can be said to be without any "tinge of favour to any person in preference to others" only when it fits seamlessly into this undistinguished flow.
53. We are unable to hold that the standard so laid down for being in the ordinary course of business is satisfied in the present case, having regard to the following material features borne out from the record. First, with effect from 01.04.2019, the Corporate Debtor ceased making repayments to any other unsecured creditors, while continuing to service, selectively and exclusively, the loan obligations of Respondent No. 2 its own Suspended Director throughout the look-back period. Second, the Respondents have failed to place on record any loan agreement, repayment schedule, board resolution, or other documentary material evidencing that the financing arrangement was sanctioned or conducted in the ordinary course of business.
54. These features collectively establish that the impugned repayments did not arise out of the undistinguished and common flow of the Corporate Debtor's business but arose, on the contrary, from a particular and discernible situation: the selective and exclusive discharge to a related party in the face of continuing defaults towards all other unsecured creditors.

55. In this regard, we place reliance on the judgment of the *Hon'ble NCLAT in GVR Consulting Services Pvt. Ltd. v. Pooja Bahry (erstwhile RP of NTL Electronics India Pvt. Ltd.) (2023) ibclaw.in 261 NCLAT*, wherein it was held:

37. Taking financial assistance from related and non-related parties which transactions are subject of enquiry in the present Appeal cannot be held to be ordinary course of business of the Corporate Debtor. The expression "ordinary course of business" or "financial affairs of the Corporate Debtor" has to be read "ejusdem generis". The expression "financial affairs of the Corporate Debtor" cannot be given an extended meaning as contended by Learned Counsel for the Appellants that all financial transactions done by the Corporate Debtor is covered within expression "financial affairs" hence the loan taken by the corporate debtor from different related and non-related parties is part of the financial affairs cannot be accepted. The Judgement of the Hon'ble Supreme Court in "Anuj Jain" (Supra), the emphasis has been given that transaction must fall into place as part of the undistinguished common flow of the business done. Undistinguished common flow of the business of the Corporate Debtor does not contemplate any such or particular situation where the Corporate Debtor's claim that its financial position became unstable due to market condition and had started arranging money from their relatives and other parties. Money arranged from relative and other parties by the Corporate Debtor thus cannot be held to be part of ordinary course of business or part of financial affairs.

[Bold for emphasis]

56. The Hon'ble NCLAT expressly held that financial assistance from related parties in distressed circumstances does not constitute ordinary course of business. Therefore, in our considered view, case for exception under Section 43(3)(a) is not made out.

57. As regards Section 43(3)(b), this Tribunal finds it has no application whatsoever to the present facts. That provision concerns transfers creating a security interest in property acquired by the Corporate Debtor and has no bearing on unsecured loan repayments.

58. The Respondents have also placed reliance on the judgment of the *NCLT in Charu Desai v. HDFC Bank Limited [MA 1254/2018]*. This Tribunal notes that the said order pertained to the repayment of a loan to a scheduled commercial bank in terms of sanction conditions, pursuant to a consistent and regular borrower-lender relationship with no change in repayment behaviour during the look-back period, and involved a

purely arm's-length transaction with an unrelated institutional lender as per repayment schedule of the loan. During the course of hearing on 28.04.2026 it is admitted by Respondents that there was no written contract for the loan by Respondent No. 2 and as and when CD required fund, it was granted by Respondent No. 2 and when required back, part payments were made. The facts of the present case are materially distinguishable: The Impugned Transaction involves repayment to a related party who is a Suspended Director-shareholder; from 01.04.2019 onwards, the Corporate Debtor ceased servicing all other unsecured creditors; and during the look-back period it selectively channelled funds exclusively to Respondent No. 2. The principle in Charu Desai, applies to regular, arm's-length banking transactions conducted consistently and cannot be extended to protect payments made exclusively to a related party while all other similarly situated creditors remained unpaid. We, therefore, hold that the facts of Charu Desai are distinguishable and do not support the Respondents' case.

59. In view of the foregoing, this Tribunal holds that the repayment of Rs. 1,38,30,000/- (Rs. 138.30 Lakhs) made by the Corporate Debtor to Respondent No. 2 during the look-back period constitutes a preferential transaction within the meaning of Section 43(2) read with Section 43(4)(a) of the Code, and that no exception under Section 43(3) is available to the Respondents in the present case.

ISSUE V: WHETHER ANY CAUSE OF ACTION IS DISCLOSED AGAINST RESPONDENT NO. 1

60. On a careful perusal of the Application, the pleadings, and the prayers set out at page 19 of the Application, this Adjudicating Authority is unable to identify any preferential transaction, any transfer, or any specific relief sought against Respondent No. 1. The entirety of the case of the Applicant is confined to the repayment of ₹138.30 Lakhs to Respondent No. 2 during the look-back period. Respondent No. 1's status as a suspended director is noted, but no transaction involving Respondent No. 1 has been pleaded, particularised, or sought to be avoided.

61. In the absence of a cause of action against Respondent No. 1, her continued impleadment in the present Application is not warranted in law. A party may be impleaded in proceedings only where a cause of action is disclosed against her or where

she is a necessary party to the relief sought. Therefore, neither condition is satisfied in this case.

ORDER

- 62.** In view of the facts of the case and circumstances of the case, we are of the opinion that the impugned transaction squarely falls under section 43 of the Code, 2016. the Respondent No. 2 is directed to repay/refund the amount of Rs. 1,38,30,000/- to the Account of the Corporate Debtor within a period of 30 days from the pronouncement of this order together with interest at the rate of SBI PLR + 2% from the date/dates of transaction to the date of repayment.
- 63.** The present Application is dismissed qua Respondent No. 1, Ms. Rita Aditya Kedia, as no cause of action or preferential transaction has been established against her, and no relief has been sought against her. Further, we don't consider to pass any order in terms of prayer (d).
- 64.** Accordingly, I.A. No. 5737 of 2024 in CP(IB) No. 683/MB/2022 filed by the Resolution Professional is **partly allowed**.
- 65.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-

CHARANJEET SINGH GULATI

Hon'ble Member (T)

/Smeet Talati, LRA/

Sd/-

LAKSHMI GURUNG

Hon'ble Member (J)