



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
KOCHI**

**IA(IBC)163/KOB/2022
IN
CP(IB)/30/KOB/2021**

(Under Section 43(1) and 60(5)(C) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 35(A) of the IBBI (Insolvency Resolution of Corporate Persons) Regulations 2016 and Rule 11 of the NCLT Rules, 2016)

In the matter of:

C. A. Kizhakkekara Kuriakose Jose, RP of ITMA Hotels India Pvt. Ltd., Having a registered office at: K.K. Jose & Associates, Yenvee Complex, Temple Road, Aluva, Kerala- 683 101;

... Applicant

-Versus-

- 1. Jomer Properties & Investments Private Limited**, Jomer Arcade, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016.
- 2. Merero Hotels and Resorts Private Limited, Jomer Arcade**, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016;

... Respondents

- 3. Jose M. M., Jomer Arcade**, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016;
- 4. Merin Jose, Jomer Arcade**, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016.

... Additional Respondents

*(Impleaded vide order dated
16.12.2022 in IA(IBC)/400/KOB/2022)*

In the matter of:
State Bank of India

...Financial Creditor

-Versus-

ITMA Hotels India Pvt. Ltd.

...Corporate Debtor



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/163/KOB/2022
IN

CP(IB)/30/KOB/2021

In re: State Bank of India Vs. M/s. M/s. ITMA Hotels India Pvt. Ltd.

Coram:

Shri. P. Mohan Raj : Member (Judicial)
Shri. Satya Ranjan Prasad : Member (Technical)

Parties / Counsel present (through video conference):

For Applicant : M/s. Panicker and Panicker Advocates.
For Respondents : Mr. Jolly John, Adv.,
Ms. Liza Meghan Cyriac, Adv.,
Ms. Irene Babu, Adv.

Order reserved on: 16.02.2023

Order pronounced on: 03.05.2023

ORDER

1. The present application has been filed by the Applicant being the Resolution Professional (hereinafter referred to as "**RP**") under Section 43(1) and 60(5)(C) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 35(A) of the IBBI (Insolvency Resolution of Corporate Persons) Regulations 2016 and Rule 11 of the NCLT Rules, 2016 for direction directing the respondents 1 and 2 to return the amount paid by the 3 and 4 respondents in preference to other creditors.

2. The facts as narrated in the application and explained by the RP are summarized hereunder:

- i. The CIRP in this matter was initiated *vide* order dated 31.12.2021. The CoC in its 3rd meeting held on 04.05.2022 has decided to conduct a Transaction Audit for which Shri Krishna Raj M. was appointed as Auditor. The Final Report submitted by the said Auditor on 30.05.2022 has been discussed in the 4th CoC meeting held on 01.06.2022.
- ii. In the report it is noted that thirty numbers of payments from 16.03.2020 till 19.07.2021 totalling to Rs 16,08,221/- were made by the Corporate Debtor to Jomer Properties & Investments Private Limited which is a related company to the Corporate Debtor. Similarly, on 28.09.2020, a sum of Rs 40,000/- was paid by the Corporate Debtor to Merero Hotels



and Resorts Pvt Ltd., which is also a company related to Corporate Debtor.

iii. It is stated that the Respondents are related parties of the Corporate Debtor in such a way that Mr. Jose MM and Ms. Merin Jose are the directors common to the Corporate Debtor and other two companies and hence come under the definition of Section 2(24)(d) of IBC 2016. Therefore, these transactions squarely fall in the ambit of Section 43(2) of IBC 2016. Hence, this Applicant has filed this application.

3. On 15.09.2022 Respondents 1 and 2 filed their reply statements. Respondents 3 and 4 have not filed their reply statement. They have stated that Section 43 ought to be read keeping in mind the intention of the legislature in introducing such provision, in order to protect the creditors against siphoning away of corporate assets by the management of the company, who have special knowledge of the company's financial troubles by virtue of its position. Preferential transactions are avoided so that such assets would be available either with the resolution professional or with the liquidator, as the case may be, to put the corporate debtor back on its wheels or if that is not possible, to ensure that the creditors of the corporate debtor get a fair deal.

4. It is stated that the transactions were in the ordinary course of business or financial affairs of the Corporate Debtor and would be excluded under Section 43(3)(a). These payments were done because the Corporate Debtor had taken an unsecured loan from these Respondents and the outstanding amount as on 31.03.2020 was Rs. 2,68,93,967.17 and Rs. 6,49,17,041.00. It is further stated that clause (a) of sub-section (2) of Section 43 is not attracted in any of the cases, and it comes within the meaning of 'deemed to have given a preference', as used in Section 43. The Audited Report of the year 2015-16 clearly proves this fact.

5. It is stated that the loan was availed by the Corporate Debtor in order to Pay the Bank Dues, Pay Back the Unsecured Loans availed by the Company, Part Payment of the Salary Dues payable by the Company as well as for the Completion of the Work of the Hotel Project. Before providing these Unsecured



Loans, these Respondents had also made substantial investments in the Corporate Debtor Company as Equity Investments and these investments remain with the Corporate Debtor till date.

6. It is further stated that these Respondents were in need of money for running their day-to-day activities and were requesting the Corporate Debtor to repay the Unsecured Loan borrowed by them. It was only after a series of requests from these Respondents that the meagre portion of the Borrowed Unsecured Loans was repaid to them from funds available with the Corporate Debtor.

7. On 29.08.2022 the Applicant filed a rejoinder to the reply of the 1st Respondent and submitted that the foundation of the instant application is the observations made by the Forensic Auditor and consequently the Committee of Creditors has directed the Applicant to file this application seeking appropriate direction to Respondents to deposit the said amount of Rs 16,08,221/- into the account of the Corporate Debtor. In paragraph 8 of the reply statement, the 1st Respondent makes an admission of debt by the Corporate Debtor to them to the tune of Rs 2,68,93,967.17 as on 31.03.2020. Therefore, the said amount is an antecedent financial /operational debt or other liabilities as specified in Section 43(2)(a). It is further stated that thirty (30) numbers of payments totalling Rs. 16,08,221/- were made by the Corporate Debtor to 1st Respondent during the look-out period (01.01.2020 to 31.12.2021) as specified in Section 43(4)(a), giving preference to 1st Respondent over other creditors have put them into beneficial position as specified in Section 43(2)(b). Therefore, the admission of the outstanding amount on 31.03.2020 by the 1st Respondent that there is an antecedent debt of Rs 2,68,93,967.17 and placing the 1st Respondent in a beneficial position over other creditors of Corporate Debtor squarely falls within the ambit of Preferential transactions as provided in Section 43 of the IBC 2016.

8. It is further stated that the Corporate Debtor by paying Rs. 16,08,221/- to the 1st Respondent within the look-out period of 01.01.2020 to 31.12.2021, by



giving preference over other creditors essentially proves that the said transactions are preferential transactions, which is covered in Section 43 of IBC.

9. On 29.08.2022, the Applicant filed another rejoinder to the reply of the 2nd Respondent and stated that 2nd Respondent in paragraph 8 of the reply statement stated that there is an admission of debt by the Corporate Debtor to them to the tune of Rs 6,49,17,041/- as on 31.03.2020. Therefore, the said amount is an antecedent financial /operational debt or other liabilities as specified in Section 43(2)(a). It is stated that the payment of Rs 40,000/- made by the Corporate Debtor to 2nd Respondent during the look-out period (01.1.2020 to 31.12.2021) as specified in Section 43(4)(a), giving preference to 2nd Respondent over other creditors have put them into beneficial position as specified in Section 43(2)(b). Therefore, the admission of the outstanding amount on 31.03.2020 by the 2nd Respondent that there is an antecedent debt of Rs 6,49,17,041/- and placing the 2nd Respondent in a beneficial position over other creditors of Corporate Debtor squarely falls within the ambit of Preferential transactions as provided in Section 43 of the IBC 2016.

10. It is stated that the 2nd Respondent has invested in the Corporate Debtor and the said investments still continue essentially proving the relationship between the Corporate Debtor and 2nd Respondent. The transactions contemplated in the application clearly falls under the ambit of Section 43(a) and (b) and being the related company, complies with Section 43(4)(a) of IBC where the transactions were done within the look-out period of two (2) years (01.01.2020 to 31.12.2021). It is stated that the Corporate Debtor by paying Rs. 40,000/- to the 2nd Respondent within the look-out period from 01.01.2020 to 31.12.2021, by giving preference over other creditors essentially proves that the said transactions are preferential transactions, which is covered in Section 43 of IBC.

The point for consideration is:

Whether the respondents indulged in preferential Transactions?



11. The Respondents 1 & 2 are companies related to the corporate debtor. The respondents 3 & 4 are directors of Respondents companies and erstwhile directors of the corporate debtor. The fact that the corporate debtor borrowed certain amounts from the 1st and 2nd respondent companies for the use of corporate debtor is admitted by the respondents. According to the counter filed by the respondents the amounts were received to discharge the loan availed by corporate debtor and to pay the Bank dues etc. Thus, the antecedent debt of corporate debtor is admitted by the respondents.

12. The corporate debtor was admitted into CIRP by order dated 31.12.2021. From the Transaction Audit report reveals that from 16.03.2020 to 19.07.2020, thirty of transactions were made, by which a total sum of Rs.16,08,221/- was paid to the 1st respondent and on 28.12.2020 a sum of Rs.40,000/- was paid to the second respondent.

13. The transactions audit report discloses that above 30 transactions were taken place during the relevant period i.e. within two years look back period from the date of admission of corporate debtor into CIRP on 31.12.2020. Thus, on the applicant side proved that that the total amount of Rs.16,48,221/- was paid by the corporate debtor to the 1 & 2 respondents during the relevant period and it amounts to preferential transactions. Now the burden of proof lies upon the respondents that the transactions stated above does not fall under the preferential transactions. On the respondent side taken a defense that the transactions stated in the Transaction Audit report are arises out of the ordinary course of the business, hence they are not preferential transactions. On the respondent side not elaborated how the payments were made in the ordinary course of business. On the respondent side stated that on 28.09.2020 a sum of Rs.40,000/- was paid to the second respondent for ROC filing charges and taken plea that this transaction has made in the ordinary course of business. The amount was paid towards ROC filing on behalf of second respondent by the corporate debtor. If the amount is paid for ROC filing charges of corporate debtor was, then it comes under the ordinary course of business, but when the amount was paid by the corporate debtor on behalf of second respondent



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/163/KOB/2022
IN
CP(IB)/30/KOB/2021

In re: State Bank of India Vs. M/s. M/s. ITMA Hotels India Pvt. Ltd.

towards ROC filing charges then it will come under the ordinary course of business. By the payments made by the corporate debtor to the 1st and 2nd respondents as mentioned in the transactions Audit report, put the 1st and 2nd respondents in beneficial positions then other creditors of the corporate debtor.

14. For the reasons discussed above it is answered that the respondents indulged in preferential transactions, in consequence the 1st and 2nd respondents are liable to return the amounts to applicant/resolution professional as provided under section 44(d) of IBC 2016. In the result: -

- (i) The 1st Respondent is hereby directed to pay a sum of Rs. 16,08,221/- to the Applicant/Resolution professional within a month from the date of this order; failing which the amount shall carry 12% interest per annum from the date of this order to till the date of realisation of entire amount.
- (ii) The 2nd Respondent is hereby directed to pay a sum of Rs. 40,000/-/-to the Applicant/Resolution professional within a month from the date of this order; failing which the amount shall carry 12% interest per annum from the date of this order to till the date of realisation of entire amount.

Thus, this application is **ALLOWED**.

15. The registry is directed to communicate this order to the respective parties through email.

16. Certified copy of the order be issued on request of the parties as per the procedure.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.05.03 16:02:02 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.05.03 14:42:56 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 3rd day of May, 2023.

Kaushal P.S.