(3)

IN THE NATIONAL COMPANY LAW TRIBUNAL, SPECIAL BENCH-I, CHENNAI

IA/593/CHE/2022 in IBA/441/2019

(Filed under Section 25 & 43 r/w Rule 11 of the NCLT Rules, 2016)

In the matter of **PREMIER FUTSAL MANAGEMENT PRIVATE LIMITED**

CHITRA SRINIVAS
Resolution Professional
M/s Premier Futsal Management Private Limited
Registration No. IBBI/IPA-002/IP-N00249/2017-18/10734
Flat B7, GR Flats,
Anbu Nagar First Street, Valasaravakkam,
Chennai- 600 087.

... Applicant

-Vs-

1. Celebrity Football League Private Limited
   Having Registered Office at No 1, Royal Enclave
   Besant Avenue, Adyar,
   Chennai – 600 020.

2. Mr. X.S. Britto
   Ex- Director of Premier Futsal Management Private Limited

3. Mrs. Vimala Rani Britto
   Ex- Director of Premier Futsal Management Private Limited

4. Mrs. Nithya Ganapathy Subban
   Director of Premier Futsal Management Private Limited.

5. Mr. Dinesh Raj
   Director of Premier Futsal Management Private Limited.

6. Mr. Abhinandan Balasubramanian
Director of Premier Futsal Management Private Limited.

... Respondents

CORAM

SANJIV JAIN, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)

Order Pronounced on ***31st August 2023***

ORDER

Per : Sameer Kakar, Member (Technical)

Under Adjudication is this Application filed by the Applicant Resolution Professional seeking the following reliefs:-

> *"a) Declare that the 1st to 6th Respondents are liable under Sec.43 IBC, 2016.*
>
> *b) Direct Respondent No 1 to refund the amount of Rs. 44,33,603/- which was used for payment of its TDS and professional fees, back to the Corporate Debtor*
>
> *c) Pass such further or other orders/ directions as may be deemed fit and proper in the facts and circumstances of the case and thus render justice."*

2. It is stated that in IBA/441/2019 vide order dated 31.01.2020 this Tribunal had ordered the CIRP of the Corporate Debtor and appointed one Mr. Kedarram Ladha, as the IRP.

3. It is stated in para 2 of the Application that 14 COC meetings were conducted by the IRP, however the COC neither confirmed the IRP as the RP nor appointed another Insolvency professional as the RP.

4. Subsequently, in IA/930/CHE/2021 filed by the erstwhile IRP, the Applicant herein was appointed as the RP by virtue of this Tribunal order dated 03.01.2022.

5. It is stated that in the 15th meeting of the COC held on 21st January, 2021 the suspended Board of Directors categorically stated that they did not have any accounting information with them as the same was handled by the erstwhile Directors viz., Mr. Xavier Britto and Mrs. Vimala Rani Britto. It is further stated that the majority shareholders controlled the books of accounts of the company.

6. It is stated that, on contacting the authorized representatives of the erstwhile directors they promised to extend all support and furnish the accounts of the CD for the year 2017-18 onwards, so that audit of the Accounts could be completed on time.

7. It is stated that, the Applicant/ Resolution Professional contacted Axis Bank, George Town Branch, Chennai for inclusion as

Authorised Signatory for the Account and sought Bank Statements for the period since account opening to till date, which was duly provided to her on March 17, 2022. On perusal of the Bank Statements it was found that an amount of Rs. 2,10,00,000/- (Rupees two crores ten lakhs only) was transferred to Mr. R. Arun, Chartered Accountant for payment of TDS.

8. It is stated that on perusal of the Ledger Account of R. Arun it was noticed that an amount of Rs. 1,64,50,093/- was paid towards TDS payable of the CD and an amount of Rs. 44,01.743/- was paid towards TDS of Celebrity Football League Private Limited the parent entity of the Corporate Debtor. Thus it seems prima facie that the funds of the CD have been utilised for payment of TDS of its Parent Entity, having common Promoters and Directors as the CD.

9. It is stated that the Applicant/ Resolution Professional contacted Mr. R.Arun, Chartered Accountant and sought explanation with regard to the amount transferred to him for the purpose of TDS payments and TDS actually paid by him.

10. It is averred in para 6 of the Application that, in response to the enquiry, he acknowledged to have paid an amount of Rs. 1,64,50,093/- towards TDS of the CD and an amount of Rs. 44,01,743/- towards the TDS of its Parent entity M/s. Celebrity Football League Private Limited and also adjusted an amount of Rs. 31,860/- an professional fees for payment of TDS on behalf of Celebrity Football League Private Limited.

11. Further it is stated that the Chartered Account informed by mail that he had paid the TDS on the advice and instruction of the erstwhile management. The copies of communication between the Applicant/ Resolution Professional and the Chartered Account, copies of TDS Challans are furnished as proof of the avoidance transaction in Annexure-3, 4 & 5 of the Application typeset.

12. In para 8 of the Application it is stated that the Applicant/ Resolution Professional could not conduct transaction audit / forensic audit since as on date of filing this Application, she is yet to receive the audited books of the CD for the period 2017- 18 onwards.

13. It is stated that the transaction highlighted *Supra* fits under the contents laid down under Section 43 of Insolvency and Bankruptcy Code, 2016. Thus this present Application has been filed by the seeking to pass an order declaring 1st to 6th Respondents liable under Sec.43 of the IBC and by directing Respondent No. 1 to refund an amount of Rs. 44,33,603/- (Rupees Forty Four Lakhs Thirty Three Thousand Six Hundred and Three only) to the Corporate Debtor.

14. The Respondents in this matter have not filed any Reply/Counter statement.

15. Heard the submissions made in detail. The relevant section is extracted hereunder for reference:-

Section 43:

"...(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…"

16. Sub – section (2) Section 43 of IBC, 2016 lays down the scope of preference given by the Corporate Debtor, which is as follows;

(i) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of

(a) a creditor or
(b) a surety or
(c) a guarantor for or on account of an antecedent financial debt or operational debt or
(d) other liabilities owed by the corporate debtor;

17. In the present case, transfer has been made by the Corporate Debtor to its parent entity viz. Celebrity Football League Private Ltd. The said parent entity, is neither a creditor, nor a surety or a guarantor. Further, transfer of the TDS amount by the Corporate Debtor to its parent entity viz. Rs.44,33,603/- cannot be construed as an antecedent financial debt or operational debt; or other liabilities owed by the Corporate Debtor. Thus prayer b) seeking to refund of Rs.44,33,603/- to the Corporate Debtor does not fall under any of the parameters stipulated under Section 43(2) of Insolvency and Bankruptcy Code, 2016.

18. The Hon'ble SC in the matter of ***Anuj Jain Interim Resolution Professional For Jaypee Infratech Limited –Vs- Axis Bank Limited etc. [2020 SCC OnLine SC 237]*** has categorically laid down that for a transaction to be considered as a preferential transaction, the twin requirements of clause (a) and (b) of sub-section (2) coupled with the applicable requirements of either clause (a) or clause (b) of sub-section (4), Section 43, as the case may be, should be satisfied. The relevant para's of the said judgment are extracted hereunder:-

"18.1. Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when 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 specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in Section 44. **If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be 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 as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.**

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

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

18.3. However, even if a transaction of transfer otherwise answers to and comes within the scope of sub-sections (4) and (2) of Section 43 of the Code, it may yet remain outside the ambit of sub-section

(2) because of the exclusion provided in sub-section (3) of Section 43."

19. Thus, in the absence of the same, the present Application filed by the RP does not satisfy the requirements as contemplated under Section 43 of Insolvency and Bankruptcy Code, 2016 and ***Anuj Jain Interim Resolution Professional For Jaypee Infratech Limited –Vs- Axis Bank Limited etc [2020 SCC OnLine SC 237].*** This Application is accordingly dismissed with no order as to cost.

SAMEER KAKAR
MEMBER (TECHNICAL)

SANJIV JAIN
MEMBER (JUDICIAL)

Vinita Varshini. K

Order pronounced under Rule 151 of NCLT Rules 2016, by Hon'ble Judicial Member Sanjiv Jain on behalf of the Bench Comprising of Sanjiv Jain, Member (Judicial) and Sameer Kakar, Member (Technical).

(COURT OFFICER)