IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

MA 310/2018 in CP (IB) 1139(MB)/2017

(Under Section 43 and 44 of the IBC, 2016)

Mr. Sumit Binani

Resolution Professional ... Applicant

Vs

Excello Fin Lea Ltd. ... R1

Tirumala Balaji Alloys Pvt Ltd. R2

In the matter of

State Bank of India ... Petitioner

Vs

Monnet Ispat & Energy Limited ... Corporate Debtor

Order delivered on 06.08.2018

Coram: Hon'ble Shri B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Applicant : Mr. Krishnava Dutt, Ms. Adity Chaudhary, Mr. Swapnil Gupte, i/b Argus Partners

For the Respondents : Ms. Akshata Naik, Mr. Tushad Cooper Mr. Krishna Patel, Mr. Karl Tamboly

Per B.S.V. Prakash Kumar, Member (Judicial)

ORDER

Order Pronounced on 25.07.2018

It's an MA310/2018 filed by the Resolution Professional (RP) u/s 43 & 44 of the Insolvency and Bankruptcy Code, 2016 (in short "the Code") against R1 namely, Excello Fin Lea Ltd. and R2 namely, Tirumala Balaji Alloys Pvt. Ltd., for refund of ₹23,48,40,274 from R1 and for refund of ₹5,68,38,355 from R2 to the Applicant/the RP of the Corporate Debtor along with interest of @18% per annum on the ground that the payments this Corporate Debtor made to these two Respondents fall within the ambit of preferential transactions as referred u/s 43 of the Code, therefore, the applicant/Resolution Professional has sought for directions u/s 44 of the Code.

Historical facts are as follows:

2. It's an admitted fact that records of the Corporate Debtor disclose that it availed loan of ₹23crores at an interest rate of 18% per annum from R1 and ₹5crores at an interest rate of 15% per annum from R2 showing as these monies came to the Bank Accounts of the Corporate Debtor from R1 and R2 on the dates as mentioned below:

First Respondent:

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Received
5.10.2016	2554002100002680	PNB RPR (Punjab National bank, Raipur)	Current Account	7,50,00,000
5.10.2016	2554002100002680	PNB RPR (Punjab National bank, Raipur)	Current Account	7,50,00,000
5.10.2016	2554002100002680	PNB RPR (Punjab National bank, Raipur)	Current Account	5,00,00,000
6.10.2016	65254133186	SBI (erstwhile SBOP)	Current Account	3,00,00,000
	TOTAL			**23,00,00,000**

Second Respondent:

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Received
8.10.2015	278640000025	HDFC	Current Account	4,00,00,000
9.10.2015	278640000025	HDFC	Current Account	1,00,00,000
	TOTAL			**5,00,00,000**

3. It is fact that this corporate debtor has been in losses since long, but as to the loan taken from R1 in three transactions on 5.10.2016, the corporate debtor repaid ₹20crores on 15.11.2016, i.e. within 40 days from the date of borrowing, the interest paid on 29.11.2016; as to remaining ₹3,00,00,000 shown as taken by the Corporate Debtor from R1, the principal was repaid on 6.1.2017, and interest of ₹10,80,000 was shown as paid on 21.3.2017, i.e. within 80 days from the date of borrowing, details are as follows:

First Respondent

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Paid ₹
15.11.2016	278640000025	HDFC	Current Account	20,00,00,000
29.11.2016	65254133186	SBI (erstwhile SBOP)	Current Account	37,60,274
21.03.2017	65254133186	SBI (erstwhile SBOP)	Current Account	3,00,00,000
31.3.2017	65254133186	SBI (erstwhile SBOP)	Current Account	10,80,000
	TOTAL			23,48,40,274

4. As to R2 loan, the records of the corporate debtor discloses that repayment was made to R2 on 11.7.2016, 13.7.2016, 28.10.2016, 31.3.2017 as mentioned below:

Second Respondent

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Paid ₹
11.7.2016	65254133186	SBI (erstwhile SBOP)	Current Account	34,38,081
13.7.2016	65254133186	SBI (erstwhile SBOP)	Current Account	2,50,00,000
28.10.2016	2554002100002680	PNB RPR	Current Account	2,50,00,000
31.03.2017	65254133186	SBI (erstwhile SBOP)	Current Account	34,00,274
	TOTAL			5,68,38,355

5. Now the case of the Resolution Professional is that the promoters of Corporate Debtor hold 99.4% shareholding in R1, and 50% shareholding in R2. Regarding remaining 50% in R2, it has been held by the close relatives of the promoters of Corporate Debtor Company, i.e. Rungta Family, therefore these two Respondent Companies fall within the definition of "Related Party" as defined u/s 5 (24) of the Code. He further says, since these two transactions having taken place within two years before Insolvency commencement date, i.e. 18.7.2017, as per section 43 (4) of the Code, the Resolution Professional, construing them as preferential

transactions, sought for refund of the said payments along with interest @ 18%.

6. To this, the answer of R1 Counsel is, since the Lenders invoked SDR (Strategic Debt Restructuring) mechanism on 22.8.2015 pursuant to of the Corporate Debtor financial position going down on account of huge losses during F.Y. 2014-15 and the lenders having refused to extend credit facilities, for the corporate Debtor was suffering from financial crunch and not in a position to raise any funds, the Corporate Debtor availed loan of ₹20,00,00,000 from R1, a registered NBFC on the dates aforementioned for a short period and repaid the same in November, 2016 as per the terms agreed between them, thereafter, it again raised additional ₹3,00,00,000 from R1 in January, 2017 and again repaid the same in March, 2017 itself.R1 Counsel submits that for proceeds of these loans were taken for utilisation towards general corporate purposes and working capital needs, they have to be treated as transactions taken place **in the ordinary course of business** as mentioned in the exception to the preferential transaction defined u/s 43 of the Code.

7. Likewise, R2 counsel also submits that his case is slightly on different footing because the shareholding of the promoters is only 50% in R2 and R2 is managed by Rungtas, moreover R2 having provided loan to meet the dire requirement of the debtor just as R1 provided, this transaction, according him this transaction shall also be treated as transaction taken place **in the ordinary course of business.**

8. Looking at the given facts, it is evident that the promoter family (Jajodia family) of the corporate debtor holding 99.4% shareholding in R1 and that the transactions of repayment to R1 by the debtor is within two years' period preceding the insolvency commencement date, i.e. 18.7.2017. As to R2 company is concerned, the promoter family of the corporate debtor has 50% shareholding in it, in respect to remaining 50% of shareholding in R2, it has been held by the close relatives of the promoter directors, and this transaction has also been taken place within two years' period preceding the insolvency commencement date.

9. In the backdrop of this factual position, before going into application u/s 43 of the Code to the facts available, let us visit the text of Section 43 to find out as to whether R1 and R2 are related parties to the Corporate Debtor or the promoter directors of Corporate Debtor as defined under the Code

and also to find out as to whether these transactions are preferential transactions as defined u/s 43. The text of Section 43 is as follows:

"***Section 43***

1[(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.**]"*

10. On having gone through this section, to understand this concept of avoidance of preference, it is essential not only to look back (look-back period) into the relevant period prescribed before onset of insolvency to find out as to whether such transactions fall within the ambit of avoidable preference or not, but also to find out as to on what concept it has been originated. It is not that this concept has all of sudden come into vogue in IBC, 2016; it was there under other enactments repealed while bringing this Code into force, of course they are not as detailed as in this Code. But this avoidance of preference doctrine is very much prevalent in other countries, such US, UK and many other countries.

11. If you see the meaning of preference in the parlance of insolvency/bankruptcy, it is ascertainable that preference means ***a transfer to a creditor that is recoverable by liquidator/Resolution Professional, if such transfer at a relevant time is deemed to have unduly improved his position to the detriment of other creditors of the debtor estate in the event of liquidation.*** A question may arise, as to why it becomes preference when debtor is under obligation to repay to such creditor. The answer to the said question lies in the section itself, but the section being snappy, I have attempted to elaborate it. Don't be under the mistaken impression that something not present in the Code is propagated by me for the first time, it has been there not only in the Insolvency and Bankruptcy Code, but it is there all over the World, more specially in UK and US, from where we have riveted and made them succinct into one section, that is section 43 of the Code.

12. As we all know that so long as company is doing well and able to discharge its obligations without instilling any kind of fear in the minds of the creditors about pay-ability of the company to them, they don't mind to whom the company paying before and to whom it is paying later, but when the company started going down, countdown will start more to the creditors,

because they are not sure as to whether their debt from the debtor is fully realisable or not.

13. Insolvency/bankruptcy no doubt looks always harsh on the creditors of the debtor, because the unsecured creditors will only receive a portion of his claim against the debtor, at times, he may very well not receive anything at all. In a situation like this, creditor will have anxiety to realise before others realise, on the other creditor gets fear – because others would realise before he gets something on pro rata basis in the event of liquidation. One – opting for a possibility to take out their value before it has gone to others, two – to ensure that its entitlement to its dues remain on par with the same class of creditors in the event of liquidation. Is it not looking that these two thought process are paradoxical to each other? Yes, obviously paradoxical, because the creditor who is able to realise his dues in full through preference tries to slip off from the line of waiting along with others, if the same creditor, when fails to get it, cries out against another who is paid his dues out of turn. Though looking odd, it is reality. If it stops here, we can remain content that it is the attribute of man, believing so; remaining will go for legal course against the debtor and preference creditor.

14. If we examine the other situation, that is in the present case, if the man in the line of creditors and the man screened under the corporate veil is one and the same, i.e., the promoters and the people connected to promoters, called as insiders/related parties, and if themselves devour remains of the debtor in the name of loans given to the company, what will happen to the outsiders who have given loans, what do they do, who have no role in the debtor company going down? In this case, it is an advantageous situation, of course people in driving seat can drive it in the way they want, it is no doubt true that promoter family has almost cent percent shareholding in R1, as to the Corporate Debtor, the same promoter family headed by Sandeep Jajodia runs this corporate debtor also, therefore management of both the companies, the corporate debtor and R1 run by the same family. Even if directors are different, it can't be conceived that management of these two companies are different, but whether such situation is fit into the definition given to Related Party or not.

15. Is it that these promoters, when Debtor Company does well, would give anything extra over and above the interest upon the principal to the creditors? What do these creditors get after the insiders have creamed off

everything from the corporate debtor? It is a million-dollar question that this corporate debtor and its subsidiaries have gone down, but the promoter wholly owned companies doing investment business by loaning crores of rupees has not gone down. Of course, it cannot become a reason to slap the promoters with a relief in this case, but it can be a reason to say that others money is also as good as the money of the promoters, there can't be any preferential treatment to the debts payable to the promoters.

16. Now in this case, the explanation of R1 & R2 who run by the promoters and their relatives is, the money loaned by R1 & R2was immediately paid back to them because they helped out the corporate debtor when nobody came forward to help them. No material for what purpose this money came in, how it was spent, except this explanation to this application. What do we have to call it? No doubt we know every company is an independent entity, it liabilities will not fall upon others, including promoters, but it does not mean, when around ten thousand crores of rupees are payable to outsiders, can the promoters take out their money from the company leaving other creditors behind them? It cannot be so. Though company is an independent entity, it is always run by human beings, who are they, they are promoters, thereby the onerous duty is cast more upon them to ensure the remains of the company equally distributed as per waterfall mechanism available under section 53 of the Code. May be this money is pittance, when compared to thousands of crores payable to the creditors; at least these promoters must seemingly remain honest to their creditors. Having regard to this case, the Resolution Value of the corporate debtor is not even one third of the admitted claims collated by the Resolution Professional, the restructuring ushered through resolution plan could not even meet the claims of secured creditors, the claims are more than ten thousand crores, but value of the resolution plan is bringing in only around 2,800crores. Since loans have become irregular for more than three years before filing this case, the promoters knew well, it is not salvageable. When it is known that company is in all respects insolvent, how could the promoters self-deal with the funds of the company?

17. Most fundamental doctrine underlying the field of insolvency/ bankruptcy is equality of distribution of the debtor's assets among his creditors. This objective cannot be achieved if the debtor is free to prefer favourite creditors by distributing assets unequally shortly before onset of insolvency, if such conduct is allowed, liquidation/bankruptcy distributions

would become largely meaningless. It is not surprising to say that equality of treatment of creditors is the oldest and most frequently advanced goal of preference law. In legal terminology, it is called as doctrine of **pari-passu** (on equal footing) **treatment of creditors of the same class** so that every creditor of the same class will inter se receive a proportionate share from the Corporate Debtor's property in return for the debt owed. A preference occurs when a company pays specific creditor or group of creditors and by doing so makes the creditor "better off" than the majority of other creditors before the company going into insolvency.

18. The elements that are requisite u/s 43 to prove that it is a preferential transaction are as follows: –

(i) *To invoke this provision, Corporate Insolvency Resolution Process/liquidation shall be commenced.*
(in this case, CIRP has been set in)

(ii) *The Resolution Professional/Liquidator shall be of the opinion that payment made to a specific creditor/group of creditors shall be of as stated in sub-section 2 of Section 43 of the Code.*

(RP has categorically mentioned that it is falling within the ambit of subsection 2 of section 43)

(iii) *There shall be transfer of property/interest of the debtor to 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*

(In this case, the corporate debtor paid back the debt owed to the companies run by the promoters and their relatives.)

(iv) *And it shall be for the benefit of the creditor/surety/ guarantor on account of an antecedent financial/ operational debt or other liabilities owed by the Corporate Debtor.*

(In this case, transactions are antecedent debts, and they were paid to benefit the companies run by the promoters and their relatives – the reason for holding it for the benefit of the Respondents is it is a deeming fiction applicable to the transaction, provided transfer is satisfied as transaction within look back period, as to this fact, it has been held as transaction with R1 and part of transaction with R2 falling within relevant time)

(v) *Such transactions shall have the effect of putting such creditor/surety/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 of the Code.*

(In the given case, it is true by these transactions; both the creditors have been put in beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53 of the Code)

(vi) *This transaction, in the* ***case of related party,*** *shall have happened during the period of two years preceding the insolvency commencement date.*

(It is an admitted fact that these two transactions happened within two years before commencement of CIRP (RELEVANT TIME) and it is also a fact that Sandeep Jajodia is the promoter and CMD of the Corporate Debtor and his family has above 24% shareholding in the Corporate Debtor. And Sandeep Jajodia and family members have 99.4% shareholding in R1 Company. As to R2 is concerned, Sandeep Jajodia and his family has 50% shareholding in R2, remaining 50% is held by Rungta family, related to Jajodia family. As per the definition of "related party in relation to the corporate debtor" under section 5 (24), the RP says that since Mr Sandeep Jajodia has been continuing as CMD of this Corporate Debtor and simultaneously he and his family owned above 99% shareholding in R1 Company and 50% shareholding in R2 Company, the RP counsel says R1 and R2 are related

parties to the Corporate debtor, but he has not mentioned under which clause of section 5 (24), they fall as related parties. On perusal of this subsection 5 (24), we are unable to ascertain under what clause of this sub-section they will become related parties. From (a) to (m) of subsection 24, it has not been said anywhere promoter family having common shareholding in the Corporate debtor and the beneficial creditor will make corporate debtor transaction with beneficial creditor as related party transaction. However it is apparent to naked eye that these two transactions are related party transactions, because the living persons under the corporate veil in both the corporate debtor and R1, R2 is one and the same. Still for this Bench could not label the transactions as recognisable under subsection 24 of section 5 of the Code, I am unable to conceive these transactions as related party transactions.

(vii) *This transaction, in the case of person/persons other than related party, shall have happened during the period of one year preceding the insolvency commencement date.*

(Since this Bench has not held them as related parties, now the point left to identify is as to whether these preference transactions fall within one year before commencement of CIRP, proceeding in this line, I hold that these transaction with R1 is admittedly within one year immediately before admission of this company petition, that is 18.07.2017, as to R2, the transactions dated 28.10.2016 (of ₹2.50crores) and 31.03.2017 (of ₹34,00,274) fall within one year before commencement of CIRP. Therefore, transaction of ₹23,48,40,274 with R1 falls within the period of one year, as to transaction with R2 for an amount of ₹2,84,00,274 falls within one year, rest of the transaction showing against R2 falls outside the relevant time of one year.)

(viii) *If such transfer is made in the ordinary course of business or financial affairs of the Corporate Debtor* ***or*** *the*

Transferee, such transfer shall not be construed as preferential transaction.

(Regarding this point, the counsel of R1 & R2 argued that if the transactions have been done in the ordinary course of the financial affairs of the Respondents, that is enough to construe that transaction is in the ordinary course of business as per the section, because the word "or" being used in between the corporate debtor and the transferee, it has to be read either in respect of the financial affairs of the corporate debtor or the transferee. For this point needs detailed discussion, it has been discussed in the following paras so as to hold that the word "or" has to be read conjunctively, not disjunctively.)

(ix) *If such transfer creating a security interest in property acquired by the Corporate Debtor brings in new value at the time or after signing of the security agreement to the Corporate Debtor and if the same is registered with an Information Utility on or before 30 days after the Corporate Debtor receives possession of such property, such transaction shall not also be construed as preferential transaction.*

(Not applicable to the given facts)

(x) *Any transfer made in pursuance of order of Court, ipso facto cannot be deemed as precluded from avoidance of preferential transaction.*

(Not applicable to the given facts)

19. The defence the Counsel of R1 and R2 raised against the relief sought by the RP is that these transactions having happened during the ordinary course of business, they shall not be treated as preferential transactions.

20. Since subsection 2 of section 43 is deeming provision, once transfer has occurred within relevant time for the benefit of creditor or surety or guarantor towards antecedent debt effecting beneficial position to transferee over the same class of creditors in the event of liquidation, it is to be deemed as avoidable preference transaction.

21. When such presumption has arrived on the given facts, if the transferee takes defence of ordinary course of transaction, then burden lies upon such transferee, to prove that transfer is made in the ordinary course of business. We shall remember that RP need not prove that it has not been out of ordinary course of business.

22. Under Indian Law, i.e. Insolvency & Bankruptcy Code, intention or desire of the Corporate Debtor is irrelevant in deciding whether such transaction is preferential transaction or not. As to other Bankruptcy laws, more specially under UK Law, **the desire** of the Corporate Debtor has to be proved but that is not the case in our country whereby, the ratio decided by foreign courts cannot blindly be taken as precedent to decide the cases under this code. If such transaction has effect of providing any beneficial position to a person received benefit of it more than what he is entitled to under Section 53, it is to be deemed that such transaction is a preferential transaction.

23. If this company history is looked into, it is evident that it was irregular in making payments to the creditors for the last 3-4 years, moreover it is not the case of these two Respondents that this company was doing very well and all of sudden because of some unforeseen events the company has become insolvent just before filing this Company Petition. Though it is not a point required to be dealt with under this Section of law to test as to whether the corporate debtor was insolvent at the time the payment was made, for the sake of clarity, if you see the cash flow of the company, it is evident that it has been not in a position to pay its bills since long. This is evident that the Company petition showing that the account of this Corporate Debtor with the Financial Creditor has become NPA since before 2015. So on cash flow basis, the Corporate Debtor has become insolvent on being not able to make regular payments to the creditors. If you go by balance sheet as for insolvency since the company has been in losses for more than two years preceding insolvency commencement date, on that basis also, it has to be construed that company has become insolvent two years before insolvency commencement date. Besides this, the company has failed to clear the statutory demands even on the basis of legal action test also. It has to be construed as insolvent long before insolvency commencement date. So the debtor company in all respects is insolvent as on the date of making payments to R1 and R2. Of course, no mandate is given under the Code to determine triggering of insolvency before passing

admission order under section7 or section 9 or section 10; therefore it is not an issue under Indian Law. Here in this case, since R1 is fully owned by the promoter family and R2 is also fully owned by the promoter family and the relatives of the promoter family and the same not being disowned by these Respondents, it has to be construed that the corporate debtor not doing well has been in the knowledge of the Respondents, moreover since they themselves saying that they funded the company because it has been in problems, it is tell-tale story that these Respondents fully aware that these payments are preference payments. And further, that it is necessary to ascertain the knowledge of the transferee so as to declare transfer is preference, it is only to ascertain as to whether elements of section 43 have been complied with or not. That is found as complied with.

24. Now the point for discussion left is as to whether these transfers are in the ordinary course of business or not.

25. The Respondents submit that when nobody came forward to provide finance to the company owing to its size of liability exposure, the Respondents upon seeing the resolution passed by the corporate debtor board, they provided short term loans to the corporate debtor; they had to be paid as agreed between the corporate debtor and the respondents individually, accordingly the corporate debtor repaid along with interest, therefore the respondents submit, they shall be treated as transfers in ordinary course of business. The Respondents have gone a step further saying that these transfers are within the ordinary course of financial affairs of the respondents, because the respondents keep financing the companies, in the same process they have provided finance to the corporate debtor as well. And for having section envisaged that transfer could be either in the ordinary course of business or financial affairs of the corporate debtor or the transferee, it need not be of in the ordinary course of the corporate debtor. If such is the case, not even single case falls within the ambit of section 43 of the Code. Only thing that has to be seen is, as to whether such transfer is in the ordinary course of business or financial affairs in between the corporate debtor and the transferee, otherwise this defence will not be a defence to the transferee, indeed this defence would be a monster to swallow up the main section itself. To make it meaningful, it is imperative to know where from this provision has come. This clause (a) of subsection (3) of section 43 is not present in UK law, but it is there in section 547 (c) (2)

(A) of US Bankruptcy Code, in fact, it is bodily lifted from there. If you see the comparative table we can understand it easily.

26. In section 547 of US Code, it has been envisaged that transfer **"made in the ordinary course of business or financial affairs of the debtor and the transferee",** since it is bodily lifted, normal understanding comes from US law is generally applicable, of course another country adopting it need not take out as it is from foreign law, the country adopting it can change it to its suitability, nothing wrong in it. But we have to see as to any such change giving any meaning or not is necessarily to be looked into. To my understanding, if the conjunctive word "or" present in US law is replaced with disjunctive word "and", the draftsman would have mentioned about it in the Bill, but I have not come across such explanation either in the Bill or objectives. Another point is if "OR" is read as given in the legislation, it will not only remain absurd, but it takes away the main provision of avoidance of preference transaction from the Rule Book. It is quite possible, it may be a transfer in its ordinary course of the transferee, because the transferee company or any other person need not be an insolvent, or it might be like any other act in its regular business in its perception. If such is the understanding, transferee's act of ordinariness will not let any act of the corporate debtor action become avoidable preference. If this 'OR' is read as given in the legislation, then it will not uphold the objective of main provision that is avoidance of preference, therefore to uphold the main objective of section 43, 'OR' in between corporate debtor and transferee shall be read as AND as given in US Code. And we know Honorable Supreme Court has read many a times "OR" as "AND" and "AND" as "OR" in various statutes, for that matter in IBC itself as to section 8, in subsection (2) (a), 'AND' in between existence of dispute, if any, and record of the pendency of suit is read as 'OR' so as to give effect to the phraseology and objective of the statute. To understand this 'or' and 'and' for one another, let us look into some paras of ***Mobilox Innovations Private Limited vs. Kirusa Software Private Limited - (2018) 1 SCC 353:***

> *"38. It is, thus, clear that so far as an operational creditor is concerned, a demand notice of an unpaid operational debt or copy of an invoice demanding payment of the amount involved must be delivered in the prescribed form. The corporate debtor is then given a period of 10 days from the receipt of the demand notice or copy of the invoice to bring to the notice of the operational creditor the existence of a dispute, if any. We have also seen the notes on clauses annexed to the Insolvency and Bankruptcy Bill of 2015, in which "the existence of a dispute" alone is mentioned. Even*

otherwise, the word "and" occurring in Section 8(2)(a) must be read as "or" keeping in mind the legislative intent and the fact that an anomalous situation would arise if it is not read as "or". If read as "and", disputes would only stave off the bankruptcy process if they are already pending in a suit or arbitration proceedings and not otherwise. This would lead to great hardship; in that a dispute may arise a few days before triggering of the insolvency process, in which case, though a dispute may exist, there is no time to approach either an arbitral tribunal or a court. Further, given the fact that long limitation periods are allowed, where disputes may arise and do not reach an arbitral tribunal or a court for up to three years, such persons would be outside the purview of Section 8(2) leading to bankruptcy proceedings commencing against them. Such an anomaly cannot possibly have been intended by the legislature nor has it so been intended. We have also seen that one of the objects of the Code qua operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the insolvency resolution process prematurely or initiate the process for extraneous considerations. It is for this reason that it is enough that a dispute exists between the parties.

39. It is settled law that the expression "and" may be read as "or" in order to further the object of the statute and/or to avoid an anomalous situation. Thus, in Samee Khan v. Bindu Khan (1998) 7 SCC 59 at 64, this Court held:

> *"14. Since the word "also" can have meanings such as "as well" or "likewise", cannot those meanings be used for understanding the scope of the trio words "and may also"? Those words cannot altogether be detached from the other words in the sub-rule. Here again the word "and" need not necessarily be understood as denoting a conjunctive sense. In Stroud's Judicial Dictionary, it is stated that the word "and" has generally a cumulative sense, but sometimes it is by force of a context read as "or". Maxwell on Interpretation of Statutes has recognised the above use to carry out the interpretation of the legislature. This has been approved by this Court in Ishwar Singh Bindra v. State of U.P. [AIR 1968 SC 1450: 1969 Cri LJ 19]. The principle of* ***noscitur a sociis*** *can profitably be used to construct the words "and may also" in the sub-rule."*

40. In Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.(2008) 4 SCC 755 at 765, this Court held:

> *"26. It may be noted that Section 86(1) (f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in Section 86(1)(f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 404).*
>
> *27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide*

a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(f) means "or"."

41. In a recent judgment in Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P. (2013) 15 SCC 677 at 718, this Court held:

> *"93. Besides the above two decisions, which discuss about the methodology of interpretation of a statute, we also refer to the following decisions rendered by this Court in Ishwar Singh Bindra [Ishwar Singh Bindra v. State of U.P., AIR 1968 SC 1450 : 1969 Cri LJ 19], wherein in para 11 it has been held as under: (AIR p. 1454)*
>
> > *"11. ... It would be much more appropriate in the context to read it disconjunctively. In Stroud's Judicial Dictionary, 3rd Edn., it is stated at p.135 that 'and' has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of 'or'. Sometimes, however, even in such a connection, it is, by force of a context, read as 'or'. Similarly in Maxwell on Interpretation of Statutes, 11th Edn.,* ***it has been accepted that 'to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions "or" and "and" one for the other'."***
>
> *94. We may also refer to para 4 of the decision rendered by this Court in Director of Mines Safety v. Tandur and Nayandgi Stone Quarries (P) Ltd. [(1987) 3 SCC 208]: (SCC p. 211, para 4)*
>
> > *"4. According to the plain meaning, the exclusionary clause in sub-section (1) of Section 3 of the Act read with the two provisos beneath clauses (a) and (b), the word 'and' at the end of para (b) of sub-clause (ii) of the proviso to clause (a) of Section 3(1) must in the context in which it appears, be construed as 'or'; and if so construed, the existence of any one of the three conditions stipulated in paras (a), (b) and (c) would at once attract the proviso to clauses (a) and (b) of sub-section (1) of Section 3 and thereby make the mine subject to the provisions of the Act. The High Court overlooked the fact that the use of the negative language in each of the three clauses implied that the word 'and' used at the end of clause (b) had to be read disjunctively. That construction of ours is in keeping with the legislative intent manifested by the scheme of the Act which is primarily meant for ensuring the safety of workmen employed in the mines."*

27. For the sake of clarity, let us look into the comparative chart of US, UK & India law in respect to preference:

Section 239 of Insolvency Act (UK)	**Section 547 of Bankruptcy Code (US)**	**Section 43 Insolvency and Bankruptcy Code 2016**
239 Preferences (England and Wales).	**Section 547 Preferences**	**Section 43** **Preferential transactions**

		and relevant time
(1)This section applies as does section 238. (2)Where the company has **at a relevant time** (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section. (3)Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference. (4)For the purposes of this section and section 241, a company gives a preference to a person if— (a)that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and (b)the company does anything or suffers anything to be done which (in either case) has the effect of putting that person	**(a)** In this section— (1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease; (2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation; (3) "receivable" means right to payment, whether or not such right has been earned by performance; and (4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension. **(b) Except as provided in subsections (c) and (i) of this section**, the trustee may avoid any transfer of an interest of the debtor in property— (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made— (A) on or within 90 days before	1[(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**

into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done. (5)The court shall not make an order under this section in respect of a preference given to any person **unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection** (4)(b). (6)A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been **influenced in deciding to give it by such a desire** as is mentioned in subsection (5). (7)The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of	the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if— (A) the case were a case under <u>chapter 7</u> of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. **(c)** The trustee may not avoid under this section a transfer— (1) to the extent that such transfer was— (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange; (2) to the extent that such transfer was in payment of a debt incurred by the debtor **in the ordinary course of business or financial affairs of the debtor <u>and</u> the transferee, and such transfer was**— (A) ***made in the ordinary course of business or financial affairs of the debtor <u>and</u> the transferee***; or (B) made according to ordinary	**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 <u>or</u> the transferee;*** (b) any transfer

that thing from constituting the giving of a preference. *240 "Relevant time" u/ ss. 238, 239* (1)Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given— (a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below), (b)in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency,F1. . . [F2(c) in either case, at a time between the making of an administration application in respect of the company and the making of an	business terms; (3) that creates a security interest in property acquired by the debtor— (A) to the extent such security interest secures new value that was— (i) given at or after the signing of a security agreement that contains a description of such property as collateral; (ii) given by or on behalf of the secured party under such agreement; (iii) given to enable the debtor to acquire such property; and (iv) in fact used by the debtor to acquire such property; and (B) that is perfected on or before 30 days after the debtor receives possession of such property; (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor— (A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor; (5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt	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

administration order on that application, and (d) in either case, at a time between the filing with the court of a copy of notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 and the making of an appointment under that paragraph.] (2)Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1) (a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company— (a)is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or (b)becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference; but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is	secured by such security interest exceeded the value of all security interests for such debt on the later of— (A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or (ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or (B) the date on which new value was first given under the security agreement creating such security interest; (6) that is the fixing of a statutory lien that is not avoidable under section 545of this title; (7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation; (8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or (9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,425. **(d)** The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The	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.]

entered into by a company with a person who is connected with the company. (3)For the purposes of subsection (1), the onset of insolvency is— [F3 (a) in a case where section 238 or 239 applies by reason of an administrator of a company being appointed by administration order, the date on which the administration application is made, (b) in a case where section 238 or 239 applies by reason of an administrator of a company being appointed under paragraph 14 or 22 of Schedule B1 following filing with the court of a copy of a notice of intention to appoint under that paragraph, the date on which the copy of the notice is filed, (c)in a case where section 238 or 239 applies by reason of an administrator of a company being appointed otherwise than as mentioned in paragraph (a) or (b), the date on which the appointment takes effect, (d)in a case where section 238 or 239	liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee. **(e)** (1) For the purposes of this section— (A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and (B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee. (2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made— (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B); (B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of— (i) the commencement of the case; or (ii) 30 days after such transfer	

applies by reason of a company going into liquidation either following conversion of administration into winding up by virtue of Article 37 of the EC Regulation or at the time when the appointment of an administrator ceases to have effect, the date on which the company entered administration (or, if relevant, the date on which the application for the administration order was made or a copy of the notice of intention to appoint was filed), and (e)in a case where section 238 or 239 applies by reason of a company going into liquidation at any other time, the date of the commencement of the winding up.]	takes effect between the transferor and the transferee. (3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred. **(f)** For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition. **(g)** For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section. **(h)** The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency. **(i)** If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider. Search	

28. In the same line, I believe with all humility 'OR' in between the Corporate debtor and the transferee shall be read as 'AND', accordingly I read 'OR' as 'AND'. After this interpretation, the transfer made in the ordinary course of the business or financial affairs of the corporate debtor **and (or)** the transferee, it will become explicit that ordinary course of business or financial affairs in between the corporate debtor and the

beneficial creditor will become ordinary course of business, but not ordinary course of business independent of each other can become a case to take out ordinary course of business independent of the corporate debtor as defence.

29. For the reasons stated above, this Bench hereby orders that R1 shall restore entire transferred amount impugned in the application AND that R2 shall restore transfers made on 28.10.2016 and 31.03.2017 aggregating to ₹2,84,00,274 along with 12% interest till the date of realisation to the corporate debtor within 30 days from the date order is made available to the parties.

30. Accordingly, this application is partly allowed directing the Registry to send this copy to the parties immediately.

SD/-

RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

SD/-

B.S.V. PRAKASH KUMAR
MEMBER (JUDICIAL)