(2021) 09 NCLT CK 0058

In the National Company Law Tribunal

Case No : I.A.NO.1396/MB/C-II/2020 In C.P (IB) No. 3540/MB/C-II/2018

Pankaj Sham Joshi APPELLANT

Vs

Sunita Poddar RESPONDENT

Date of Decision : 23-09-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(24), 7, 43, 43(1), 43(2), 43(4)(a), 44, 44(1)(d), 53

Citation : (2021) 09 NCLT CK 0058

Hon'ble Judges : Ashok Kumar Borah, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Final Decision : Allowed

Judgement

Ashok Kumar Borah, Member (Judicial)

1. The present application is moved by the Resolution Professional under Section 43 (1) and 44 of Insolvency and Bankruptcy Code, 216 (hereinafter referred to as "Code") of the Corporate Debtor Company namely, GRL Tires Private Limited (hereinafter called as the "Corporate Debtor") seeking following reliefs :-

(a) this Hon'ble Tribunal may be pleased to declare that the transfer of INR 47,26,000/- by the Corporate Debtor to the Respondent No. 1 in F.Y 2018-2019 is a preferential transaction under Section 43 of the Code.

(b) this Hon'ble Tribunal may be pleased to direct the Respondents to jointly and/or severally pay a sum of INR 47,26,000/- to the Resolution Professional/Liquidator of the Corporate Debtor, as the case may be, along with interest at the rate of 18% from the date of receipt of the said amount by the Respondent No. 1 till the date of actual payment or realization, in terms of Section 44(1) (d) of the Insolvency and Bankruptcy Code, 2016.

(c) This Hon'ble Tribunal may be pleased to declare that the preferential transaction entered into between the Corporate Debtor and Respondent no. 1 is illegal and void under Sections 43 and 44 of the Insolvency and Bankruptcy Code, 2016.

(d) To pass such other or further order, as this Hon'ble Tribunal may deem fit under the facts and circumstances of the case.

2. The Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor stood commenced by virtue of an order dated 20.12.2019 of this Tribunal pursuant to the Application filed by Park Chambers Limited under section 7 of the Code.

3. Vide the said Order the Applicant was appointed as Interim Resolution Professional who was subsequently confirmed by the Committee of Creditor (hereinafter referred as the CoC) as the Resolution Professional (RP).

4. The Applicant submits that the Respondent No. 2 and 3 were the directors of the Corporate Debtor at the time when the Corporate Debtor was subjected to preferential transaction.

5. The Applicant submits that as per the audited Financial Statements for the Financial Year ending 2017-18 and 2018-19 of the Corporate Debtor, the Corporate Debtor Company had taken unsecured loans as Long-term and Short-term borrowings from several entities including the Respondent No. 1 herein. The Respondent No. 1 is the wife of the Respondent No. 2 i.e. the director of the Corporate Debtor Company. Hence, the Respondent No. 1 is the related party of the Corporate Debtor Company within the meaning of Section 5 (24) of the Code.

6. The Applicant submits that the Respondent No. 1 had extended an unsecured financial loan to the Corporate Debtor Company for Rs. 1,18,75,000 (Rupees One Crore Eighteen Lakhs Seventy-Five Thousand Only) as on 31.03.2018. However, the amount outstanding to the Respondent No. 1 in lieu of the said loan has been reduced to Rs. 71,49,000/- (Rupees Seventy-One Lakhs Forty-Nine Thousand Only) as on 31.03.2019. The said reduction in the amount outstanding paid to the Respondent No. 1 in lieu of the antecedent debt which revealed that a sum of Rs. 47,26,000/-(Rupees Forty Seven lakhs Twenty Six Thousand Only) was already paid by the Corporate Debtor Company to the Respondent No. 1 during the Financial Year 2018-19.

7. The Applicant further submits that the said payment of Rs. 47,26,000/- (Rupees Forty Seven lakhs Twenty Six Thousand Only) was made by the Corporate Debtor Company in preference to other creditors of the Corporate Debtor, thereby putting the Respondent No. 1 in a beneficial position than other creditors in the event of distribution of assets in accordance of Section 53 of the Code thereby satisfying the criteria of preferential transaction under Section 43 (2) (b) of the Code which reads under :-

43 (2) (a), (b)........

(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.

8. The Applicant further submits that the distribution of assets of the Corporate Debtor if made in accordance with Section 53 of the Code, the Respondent No. 1 would have received a share alongside other unsecured financial creditors of the Corporate Debtor Company on a pro-rata basis. However, the payment of Rs. 47,26,000/- to the Respondent No 1 by the Corporate Debtor Company has put the Respondent No. 1 in a beneficial position above the other unsecured financial creditors of the Corporate Debtor Company.

9. The Applicant submits that the preferential transaction in favour of the Respondent No. 1 was made in the Financial Year 2018-19 i.e. preceding two years of the Insolvency commencement date. Therefore, the said preferential transaction in favour of Respondent No. 1 has been taken place within the look-back period under Section 43 (4) (a) of the Code.

10. The Applicant further submits that there was no business transaction between the Respondent No. 1 and the Corporate Debtor Company. Therefore, the payment of Rs. 47,26,000/- to the Respondent No. 1 is not a transfer in the ordinary course of business affair of the Corporate Debtor Company. As the said payment is in lieu of the antecedent financial debt and not mere a transfer creating any security interest, the said transaction is a preferential transaction under Section 43 (3) of the Code.

11. The Applicant further submits that the Respondent No. 2 and 3, the Directors of the Company were aware of the said preferential transaction made in favour of Respondent No. 1. The Respondent No. 2 and 3 signed the Balance Sheet of FY 2018-19 which reflected the said transaction.

12. The Applicant had formed an opinion and made determination of the preferential transaction by the 49th day from the Insolvency commencement date and is in due compliance with the requirement of Regulation 35A of the CIRP Regulations. The said details of the preferential transaction was reported by the Applicant to the Committee of Creditors (CoC) in its 2nd meeting held on 07.02.2020.

13. The Applicant vide an Email dated 13.05.2020, had requested the Respondents to repay the said amount of Rs. 47,26,000/-. The Applicant had also informed the Respondents that if they fail to repay the said preferential amount, then the Applicant would initiate proceedings before this Hon'ble Tribunal for avoidance of the preferential transaction. The Applicant till date has

received no reply or evidence from the Respondent No. 2 and 3 that the said amount is not a preferential transaction.

14. The Applicant submits that sub-regulation (3) of Regulation 35(A) of the CIRP Regulations requires that upon determination with regard to the preferential transaction, the Resolution professional requires to apply to the Adjudicating Authority within 135th day from the Insolvency commencement date. The said day fell on 03.05.2020 however, due to nation wide lockdown due to Covid-19 pandemic the Applicant was unable to file the Application. After exclusion of the period of lockdown in the State of Maharashtra, the 135th day of CIRP was 20.09.2020 and the Applicant filed the present Application in July, 2020.

15. The Respondent has filed its reply dated 24.11.2020 in their defense and have replied as under.

16. The Respondent submits that the Applicant has filed the Application merely on relying on the balance sheets of the Corporate Debtor for the Financial Years 2017-2018 and 2018-2019 wherein a transaction of payment of certain monies made to Respondent No. 1 in the ordinary course of business is reflected. The Applicant without any enquiry or review of any additional documents or materials alleged and concluded that certain transactions undertaken by the Corporate Debtor are preferential transaction. The said opinion was made without appointing any external agency/auditor/transaction review auditor and without relying on any other materials and documents have also determined the same to be preferential transaction.

17. The Respondent submits that the Applicant had not attempted to contact the Respondent No. 1 for seeking any documents or information as regards to the said transaction. The Respondent further states that the Applicant has suppressed the fact that the Respondent No. 2 had vide letter dated 06.08.2020 had raised objections regarding the Minutes of the first, second and third CoC meeting wherein the Respondent No. 2 had stated that the draft minutes were never circulated to them. The Applicant responded to the said letters vide letter dated 11.08.2020 wherein the Applicant stated that the first and second CoC meeting was attended by the Respondent No. 2. The Applicant had also stated that the minutes of the meeting were circulated to the Respondent within 48 hours and the request to send the minutes once again to the Respondent was made by the Respondent himself. The Applicant also replied as to the third CoC meeting was attended by the Respondent and the Respondent at the time of the meeting had not raised any objection either about the contents of the meeting and also about the former minutes of the meetings.

18. The Respondent submits that the aforementioned fact was not placed by the Applicant before this Hon'ble Tribunal and the present Application should be dismissed.

19. The Respondent submits that the preferential transaction as alleged by the Applicant is made only by relying on the isolated entries without context in the

balance sheets of the Corporate Debtor for the Financial Years 2017-18 and 2018-19. Further the Respondent submits that the Respondent No. 1 had given an unsecured loan to the tune of Rs. 17.97 Crore during the period of August and September, 2013 and the balance as on 31.03.2014 was Rs. 17,82,90,000/-.

20. Out of the said unsecured loan given by Respondent No. 1, an amount of Rs. 51 Lakh was given as an advance to M/s Mind Estates Private Limited for booking of office premises. Out of total amount of Rs. 51 Lakh given as an advance to M/s Mind Estates Private Limited an amount of Rs. 1,00,000/- was given on 25.11.2013 vide cheque no. 029002 drawn on Central Bank of India and Rs. 50,00,000/- was given on 27.11.2013 vide NEFT/RTGS transfer.

21. However, the purchase of commercial office from M/s Mind Estates Private Limited was not materialized due to disruption in business operations resulting in return of Rs. 51 Lakh by M/s Mind Estates Private Limited on 13.09.2018 to the Corporate Debtor due to cancellation of booking. On receipt of Rs. 51 Lakh from M/s Mind Estates Private Limited, the Corporate Debtor returned Rs. 47,26,000/- to Respondent No. 1, whose loan amount was utilized for booking of office premises.

22. The Respondent further submits that the aforesaid transaction was not done in any preference to any of the Creditors since, the money received by the Corporate Debtor from M/s Mind Estates Private Limited was given from the unsecured loan given by Respondent No. 1, hence the same was returned to the Respondent No. 1 on receipt of the same from M/s Mind Estates Private Limited.

23. Further the Respondents submits that it is evident from the the ledgers of the Corporate Debtor Company, that the Respondent No. 1 had been providing loans to the Corporate Debtor in the ordinary course of business since 2013 before the Corporate Insolvency Resolution Process of the Corporate Debtor Company commenced. The said loans were given from time to time to support the Corporate debtor Company in its business endeavors and were also repaid by the Corporate Debtor. Also it is seen that at the Respondent No. 1 had given unsecure interest free loans to the Corporate Debtor to support its business to the tune of Rs. 17,82,90,000/-. The transactions were for the benefit of the Corporate Debtor Company.

24. Therefore, it can be seen that the Respondent No. 1 had been ordinarily providing loans and getting repaid much before the look back period provided under Section 43 of the Code and it is part of the ordinary course of business of the Corporate Debtor, a payment of Rs. 47,26,000/- to Respondent No. 1 when there was Rs. 1,18,75,000/- outstanding from the Corporate Debtor, is nothing but a transaction in the same vein as had been carried out ordinarily for years before the Corporate Insolvency Resolution Process started.

25. The Respondents further submits that all the transactions were bona fide and were entered in ordinary course of business to benefit and assist the Corporate Debtor Company and also till date a large amount of money is owing to

Respondent No. 1 and therefore the said money has either siphoned off to related Parties of the Corporate Debtor or used to defraud or defeat the interest of the Creditors of the Corporate Debtor.

FINDINGS

26. Having considered, the submissions of the Counsel appearing for the Applicant and the Respondents and on perusal of the records placed before this Tribunal, we have noticed that the Applicant has failed to provide substantial proof to term the transaction as the preferential transaction. Moreover, the amount paid to Respondent No. 1 was a mere refund of amount that was advanced to M/s Mind Estates Private Limited for booking of office premises for the Corporate Debtor Company even before the initiation of CIRP proceedings.

27. The Applicant claims that there was no business transaction between Respondent No. 1 and the Corporate Debtor Company in the ordinary course of business but it is observed that until September, 2013, Respondent No. 1 had given unsecured loan to the Corporate Debtor Company to the tune of Rs. 17.97 Crore and the balance as on 31.03.2014 was Rs. 17,82,90,000/- as evident in the Ledger Account of the Respondent No. 1 in the books of the Corporate Debtor Company. Thus, Respondent No. 1 had ordinarily been providing loans and getting repaid which proves that the Corporate Debtor Company and the Respondent No. 1 were into business transactions on regular basis. It is important to point out that the Respondent No. 1 had been providing loans to the Corporate Debtor Company time and again to meet the daily business operation expenses and continue the business activities which is apparent vide leger Account submitted by the Respondent No. 1.

28. It is also pertinent to note that the Financial creditor, i.e. the Respondent No. 1 still owes dues of Rs. 71,49,000/- against the Corporate Debtor unlike other Creditors as shown in Balance Sheet of Corporate Debtor Company year ended 31st March 2019. The transaction of Rs. 47,26,000/- was a mere refund and forms part of regular business transaction. It was a bona fide transaction in regular course of business and not that of a preferential transaction under Section 43 of the Insolvency and Bankruptcy Code, 2016. The applicant has failed to provide such proof or documents to corroborate his submissions and term the transaction between Respondent No. 1 and Corporate Debtor Company as a Preferential Transaction.

29. The Resolution Professional has himself not made out his case and the transaction in question fails to be that of a Preferential Transaction, having been made in Ordinary course of business. There was no intent to deceive the company through this transaction nor the Corporate debtor Company had any other ulterior motive other than merely re-paying the Respondent her advanced amount for booking of office premise with M/s Mind Estates Private Limited.

30. Moreover, the Applicant has failed to conduct Forensic Audit which he was supposed to do, to bring out the relevant facts for moving this Application

forward.

31. With the aforesaid observation we are not inclined to allow the application bearing IA No. 1396 of 2020 In C.P (IB) No. 3540 /MB/C-II/2018 with No Costs.

32. Ordered Accordingly. File to be consigned to records.

