(2021) 01 NCLT CK 0061

In the National Company Law Tribunal

Case No : Interlocutory Appeal No. 1991 Of 2020 In Company Petition No. 2556/ MB Of 2019

Sahara India APPELLANT

Vs

Nandkishore Vishnupant Deshpande And Anr. RESPONDENT

Date of Decision : 07-01-2021

Acts Referred:
Insolvency And Bankruptcy Code, 2016 — Section 5(8), 13, 43, 43(1), 43(2)(a), 43(3), 44, 53

Citation : (2021) 01 NCLT CK 0061

Hon'ble Judges : Suchitra Kanuparthi, J;Chandra Bhan Singh, Member (Technical)

Bench : Division Bench

Advocate : J.P Sen, Onkar Chandurkar, Karishma Kherajani, Ayush J. Rajani

Final Decision : Dismissed

Judgement

Principal Amount,"39,95,00,000/-

Interest,"2,66,33,333/-

Total,"42,61,33,333/-

12. The admission of CIRP of the Corporate Debtor was passed on 13.11.2019 and RP took over the control of Corporate Debtor and issued public,

notice, in pursuance of the public notice, the applicant submitted his claim in Form C claiming entire amount of Rs. 39,95,00,000/ plus interest of Rs.",

2,66,33,333/-.",

13. The resolution professional sought further information from Applicant on 07.03.2020. The Applicant furnished the required document on,

09.03.2020.,

14. On 06.05.2020, the Resolution Professional informed the Applicant that inter

alia that the claim of the Applicant does not form under the head of",

Financial Debt.,

15. The Respondent claimed that the Applicant is clearly attempting to colour the transaction as financial debt, but whereas this is basically an",

operational debt and the nature of transaction is of buyer and seller between Applicant and Corporate Debtor and not that of lender and borrower.,

16. The Respondent was also replying upon clause 5 of MOU which categorically stated that if the deal is cancelled, the seller will refund the advance",

and a compensation will be payable. Therefore, reiterated that it is an operational debt.",

Conclusion:,

17. The execution of MOU with expressed and clear terms of payment of advanced money for receivable of gold stock and jewellery in future was,

arrangement between the Applicant and Corporate Debtor. The said MOU was replaced by loan agreement 15.04.2019. This amounts to novation of,

contract by and between the parties and a completely new terms and conditions of repayment have been agreed between the parties, however, this",

agreement was intended and designed to prefer the creditor and amounts to be preferential transaction in terms of the judgment of Honâ??ble,

Supreme Court in Anuj Jaincase reported in MANU/SC/022/2020. Such arrangement to convert operational debt into financial debt is well covered,

under Section 43 of IBC and section 44. Section 43 and 44 is as follows:,

43. (1) Where the liquidator or the resolution professional, as the case may be, is of theopinion that the corporate debtor has at a relevant",

time given a preference in such transactionsand in such manner as laid down in sub-section (2) to any persons as referred to insub-section,

(4), he shall apply to the Adjudicating Authority for avoidance of preferentialtransactions 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, ifâ?" (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 transfersâ?"",

(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 thatâ?",

(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. â?"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, ifâ?"",

(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.,

44. The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section",

43, by an order:",

(a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;,

(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money,

so transferred;,

(c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;,

(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the",

resolution professional, as the Adjudicating Authority may direct;",

(e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part)",

by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating",

Authority deems appropriate;,

(f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and",

such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the,

preference; and,

(g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or",

operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial",

debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:",

Provided that an order under this section shall notâ?",

(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such,

interest and was acquired in good faith and for value;,

(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or",

the resolution professional.,

Explanation I.â?"For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another",

person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate",

debtor gave the preference, â?"",

(i) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;,

(ii) is a related party, it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the",

contrary is shown.,

Explanation II. â?"A person shall be deemed to have sufficient information or opportunity to avail such information if a public,

announcement regarding the corporate insolvency resolution process has been made under section 13.,

18. In terms of Section 43 (2) (a) the Corporate Debtor by virtue of executing a loan agreement dated 15.04.2019 has converted operational debt into,

a financial debt, with an intention to prefer the creditor and to put him in a beneficial position that he could have been in the event of distribution of",

asset in according with section 53 of IBC.,

19. This sort of arrangement could not have been done in its ordinary course of business, an Operational Creditor who advanced money with an",

intention of buying gold was treated as a lender under the Loan Agreement dated 15.04.2019.,

20. Looking at the factual matrix and scanning of series of events which took place between April and November 2019, DRI seized the assets of",

Corporate Debtor in May 2019, the Corporate Debtor was defending Insolvency Petitions before NCLT, conversion of operational debt to financial",

debt, it is clearly established that the corporate debtor has enhanced/elevated the operational creditor to financial creditor knowing its inability to repay",

money and there is every likelihood of Insolvency and that such loan agreement will give the Applicant unsecured rights in a financial debt.,

21. It is beneficial to refer to para 20 of the judgement of the Honâ??ble Supreme Court in Anuj Jainâ??s case. Para 20 of the case is extracted,

below:,

20. The analysis foregoing leads to the position that in order to find as to

whether a transaction, of transfer of property or an interest",

thereof of the corporate debtor, falls squarely within the ambit of Section 43 of the Code, ordinarily, the following questions shall have to",

be examined in a given case:,

(i). As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?,

(ii). As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the,

corporate debtor?,

(iii). As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have,

been in the event of distribution of assets being made in accordance with Section 53?,

(iv). If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the",

period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to",

whether the same was made during the period of one year preceding the insolvency commencement date?,

(v) As to whether such transfer is not an excluded transaction in terms of Sub-section (3) of Section 43?,

22. In view of the ratio laid down in Anuj Jainâ??s case and looking at the facts of the present case that the CIRP against the Corporate Debtor,

commenced on 13.11.2019, the Loan Agreement dated 15.04.2019 executed by the Corporate Debtor, substituting the earlier MOU dated 07.03.2017",

between the same parties, was created, seven months prior to CIRP, it is concluded that this arrangement is a preferential transaction in terms of Sec",

43 (2)(a) of Code and is well within the two years look back period as prescribed by the code. Therefore, this bench declares that Resolution",

Professional has rightly rejected the claim of Financial Creditor, but has not filed any application under sec.43 for avoidance of transaction, this bench",

has Suo Moto considered the facts and gravity of the transaction to the extent of conversion of Operational Debt to financial debt for the benefit of,

the operational creditor and thus treated the transaction dated 15.04.2019 to be a preferential transaction.,

23. Hence the Bench doth orders as follows:,

â?¢ In the light of aforesaid findings, the Application is dismissed.",

