**(2023) 02 NCLT CK 0034**

**In the National Company Law Tribunal**

**Case No :** CA No. 886/2019 In CP (IB) No. 337/Chd/Hry/2018

**Suresh Kumar Rakesh Kumar Vs Nav Jyoti Agro Foods Pvt. Ltd ?**

**Date of Decision :** 09-02-2023

**Acts Referred:**
Insolvency and Bankruptcy Code, 2016 — Section 9, 14, 43, 44

**Citation :** (2023) 02 NCLT CK 0034

**Hon'ble Judges :** Harnam Singh Thakur, Member (J);Subrata Kumar Dash, Member (T)

**Bench :** Division Bench

**Advocate :** Niharika Sohal, Deepankur Sharma

**Final Decision :** Disposed Of

## Judgement

Subrata Kumar Dash, Member (Technical)

1. In the present matter Corporate Insolvency Resolution Process (CIRP) against M/s NavJyoti Limited ("Corporate Debtor") was initiated vide order dated 12.02.2019 of this Adjudicating Authority on an application filed under section 9 of the Code. Subsequently, a moratorium under section 14 of the code is declared. Further, the applicant/Resolution Professional was appointed as Resolution Professional by this Adjudicating Authority vide order dated 26.03.2019. Presently, in the instant Company Petition, the Resolution professional has filed an application, i.e., IA No. 1107/2019, for liquidation of the corporate debtor, which is pending approval before this Adjudicating Authority.

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The present application is filed by Resolution Professional against the directors of the Suspended Board of Directors of the Corporate Debtor under section 43 & 44 of the Insolvency & Bankruptcy Code, 2016 (herein referred to as 'Code')

2. It is submitted that in the audit accounts of the corporate debtor during the period of two years preceding the insolvency commencement date, the transaction auditor has identified a number of transactions which fall under section 43 ( Preferential Transactions) under the Code.

 

3. It is further submitted that in the transaction audit report, it has been observed that Manoj Kumar (Respondent No. 2/Director) received a remuneration of Rs. 60,000/- p.m during the FY 2017-18,, totalling to Rs 7,20,000.00. However, in FY 2018-19, in April-May,, remuneration of Rs.2,00,000/-p.m. totalling Rs 4,00,000/- has been debited in books of accounts. Also, TDS has been deducted on it at Rs. 6,000/-p.m. It is further observed that Corporate Debtor has incurred/booked a loss of Rs 59,79,12,277.31 in FY 2017-18 and Rs 60,61,58,321.04 in FY 2018-19 (till CIRP date 28.01.19). In spite of these losses in FY 2017-18 & FY 2018-19, an uneven increase in remuneration from Rs. 60,000/- to Rs. 2,00,000/- per month is not justified and does not seem to be in the normal course of business. The Corporate Debtor has booked remuneration to Manoj Kumar ( Respondent No.2) of Rs 7,20,000.00 and Rs 4,00,000.00, respectively, which has resulted in an excess loss to the Company. Hence the transaction of Rs. 2,80,000/- ( Rs. 4,00,000-Rs. 1,20,000) in F.Y. 2018-19 falls within the purview of preferential transaction under section 43 of IBC 2016. Similarly, the remuneration of Mr. Rajinder Kumar (Respondent No.1 /Director) has been increased from 60,000/- per month to Rs. 2,50,000/- per month in the FY 2018-19 for two months without any justification. Therefore, excessive payment of Rs. 3,80,000/- ( Rs. 5,00,000-Rs. 1,20,000) in F.Y. 2018-19 with Respondent No.1 falls within the purview of section 43 of the Code.

4. The reply on behalf of Respondents (Suspended Directors) has been filed vide Diary No.996 Dated 05.02.2020, wherein it is stated that the above said increase in remuneration, which is treated as a preferential transaction by the Resolution Professional, is supported by Board resolution dated 01.04.2018 (AnnexureR-1 of the Reply). It is submitted that the increased remuneration is credited in the books of accounts in the ledger of Directors, but the payment of the same was not made and is still outstanding in the account. Hence in the absence of any payments to suspended directors cannot be considered a preferential transaction under the code.

5. We have heard the learned counsel for the applicant and the respondent and carefully perused the record available.

6. This application has been filed consequent to the findings in the transaction audit report that the erstwhile directors had received unevenly increased remuneration for the financial year 2018-19. However, the company has been booking heavy losses during the period. According to the applicant, this falls under the provisions of Section 43-preferential transactions. In this connection, a reference is made to the decision of the Hon’ble Supreme Court in the case of Anuj Jain IRP for Jaypee Infratech Ltd. Vs. Axis Bank Ltd. etc. [2020] ibclaw.in 06 SC, which held that:

28.1 Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

 

1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.

4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of Section 43.

5. In yet further step, such of the scanned and scrutinised transactions that are found covered by clause (a) of sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question 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 per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of Section 43.

6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of Section 43.

7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall

 

be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

7. It may be noted that vide administrative order dated 14.12.2022 of this Adjudicating Authority, the applicant-Resolution Professional has filed clarification vide Diary No. 01080 dated 02.01.2023 on the point whether the increased remuneration has been credited in the bank account of the respondents. Through the above affidavit, it is stated that no payment has been made. Further, the similar averments as made in the main application have been reiterated, for the sake of brevity, the same are not repeated herein.

8. Further, in the present case, it is not argued by the applicant-Resolution Professional whether the beneficiary-respondent is involved in the transaction and stands in the capacity of creditor or surety or guarantor qua the corporate debtor. In view of the above decision, the transactions referred by the applicant do not involve the transfer of property or an interest thereof, of the corporate debtor benefitting the creditor or a surety or a guarantor for or an account of the antecedent financial debt or operational debt or other liability owed by the corporate debtor. Thus, the present application fails and is dismissed accordingly.

 