THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

Under Rule 11 of NCLT Rules, 2016

IA No. 3553 of 2019

Mr. Anish Niranjan Nanavaty

…**Applicant**

Vs.

China Development Bank & Anr

. …**Respondents**

And

IA No. 133 of 2020

China Development Bank

… Applicant

IA No. 645 of 2020

Export Import Bank of China

… Applicant

Vs.

Mr. Anish Niranjan Nanavaty

… Respondent

In the matter of

C.P (IB)1386/MB/2017

Ericsson India Private Limited

… Operational Creditor

Vs.

Reliance Communications Limited

… Corporate Debtor

Also

Rule 11 of NCLT Rules, 2016

IA No. 3555 of 2019

Mr. Anish Niranjan Nanavaty

…**Applicant**

Vs.

China Development Bank & Ors.

…**Respondents**

IA No. 126 of 2020

China Development Bank

… Applicant

IA No. 646 of 2020

Export Import Bank of China

… Applicant

In the matter of

C.P. (IB) 1387/MB/2017

Ericsson India Private Limited

… Operational Creditor

Vs.

Reliance Communications Limited

… Corporate Debtor

Order delivered on: 25.06.2024

Coram*:*

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Applicant in MA 133 and 645/2020 And Respondent in MA 3553/2019	Sr. Adv. Darius Khambhata a/w Mr. Sidharth Ranade, Ms. Nishi Bhankharia, Ms. Kaazvin Kapadia and Mr. Pushkar Deo, Advocates i/b Trilegal
For the Applicant in IA 126 and IA 646/2020 and Respondent in IA 3555/2019	Mr. Chetan Kapadia, Sr. Advocate a/w Mr. Siddharth Ranade, Ms.Nishi Bhankharia, Ms. Kaazvin Kapadia and Mr. Pushkar Deo, Advocate i/b Trilegal
For the Applicant in MA 3553/2019, IA 3555/2019 and for Respondent in MA 133 and 645/2020 and IA 126 and 646/2020	Mr. Gaurav Joshi, Sr. Adv a/w Ms. Divya D Jain, Advocates

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The Application MA No. 3553 of 2019 is filed by Resolution Professional of Reliance Telecom Limited in CP IB NO. 1386 of 2017 and IA No. 3555 of 2019 is filed Resolution Professional of Reliance Communications Limited in CP IB No. 1387 of 2017. The facts of the both Applications are identical and issues involved therein are also same except the quantum of amount of in each of two applications. Misc. Application No. 133 of 2020 has been filed by China Development Bank, inter alia, seeking declaration that insolvency commencement date of the

Corporate Debtor, i.e. 15th May, 2018 (which is the date when the Corporate Debtor was admitted into corporate insolvency resolution process) be reckoned as 7th May, 2019 and similar application Misc. Application No. 645 of 2020 has been filed by Exim Bank. ("Both applicants are Respondent in MA 3553 of 2019"). The Respondents in 3555 of 2019 have filed application seeking identical declaration in IA No. 126 of 2020 and 646 of 2020.

2. In view of identical facts and issues involved all these applications, we consider it appropriate to take up the facts in MA 3553 of 2019 for adjudication of all these applications.

MA 3553 of 2019 in CP (IB) 1386 of 2017

3. This Application is filed by the Resolution Professional after observing that the Respondents have collectively received payments from the Corporate Debtor, amounting to Rs. 117 Crores ("Impugned Amount"), prior to commencement of CIRP, which amounts as a preferential payment under Section 43 of the Insolvency and Bankruptcy Code, 2016 ("Code"). The applicant has sought the following relief/declaration.

   A. Declare that the payment of the Impugned Amount by the Corporate debtor to the Respondents constitutes a preferential transaction under Section 43 of the Insolvency Code;

   B. Direct the Respondent No. I to repay/reverse/refund Rs.93.82 crores, part of the Impugned Amount, to the Corporate Debtor;

   C. Direct the Respondent No.2 to repay/reverse/refund Rs.23.45 crores, part of the Impugned Amount, to the Corporate Debtor;

   D. Any other relief, including under Section 44 of the Insolvency Code, that this Hon'ble Tribunal may deem fit.

4. The Corporate Debtor had availed certain facilities in the form of a Term Loan advanced by the Respondents. In view of the defaults thereunder,

the Respondent No.1 filed company petition under Section 7 of the Code against the Corporate Debtor.

5. The payments of the Impugned Amount were made by the Corporate Debtor to the Respondents for withdrawal of the Insolvency Petition filed by the Respondents against the Corporate Debtor and to facilitate the Asset Monetization Process (AMP) of the Corporate Debtor under Reserve Bank of India's (RBI) guidelines for which Joint Lenders' Forum (JLF) required the consent of all lenders of the Corporate Debtor, including the Respondents.
6. The payments of Impugned Amount by the Corporate Debtor is stated to be not in ordinary course of business and allegedly amounts to putting the Respondents in a beneficial position, as more particularly stated in the Application. The Applicant has filed the present Application seeking repayment, refund, reversal of the Impugned Amount from the Respondents.

Events prior to insolvency of the Corporate Debtor

7. The Corporate Debtor had availed certain loan facilities from the Respondents, and thereafter defaulted in repayments under the said facilities. Consequently, Respondent No. I i.e. China Development Bank ("CDB") had filed Company Petition No. 1653 of 2017 under Section 7 of the Code against the Corporate Debtor ("Insolvency Petition").
8. In and around 2017 i.e. the same time, the Indian lenders formed a Joint Lenders' Forum with State Bank of India (SBI) as its convenor in terms of Reserve Bank of India's '*Framework for Revitalising Distressed Assets in the Economy-Guidelines on Joint Lenders' forum and Corrective Action Plan*' dated 26 February, 2014 and entered into an inter-se agreement to monitor and appropriation of the cash flows of the Corporate Debtor. Accordingly, they executed a Trust and Retention Account Agreement ("TRA Agreement") on 23 May 2017. Therefore, all

existing and future cash flows of the Corporate Debtor were, henceforth, being received in the TRA and appropriated in accordance with the consent of SBI.

9. At the relevant point of time, the lenders of the Corporate Debtor were contemplating an asset monetization process ("AMP") for sale of assets of the Corporate Debtor. The Respondents demanded USD 200 million inter-alia (i) to grant consent for the proposed AMP; (ii) to withdraw the Insolvency Petition. This issue was discussed in Core Committee meeting of the lenders dated 26 December, 2017. The relevant portion of the minutes recorded that:

> ***Remittance of funds of US$ 200 Mlo to Chinese Syndicate led by CDB:***
>
> *Mr. Suresh Rangachar (Executive Director, Rcom) briefed lenders on company's efforts for getting Chinese Lenders Syndicate (led by CDB) on board for Asset Monetization.*
>
> *He also informed that CDB is agreeable to come on board for asset monetization process, subject to upfront receipt of US$ 200 Mlo. which shall be adjusted against its pro rata share in asset monetization.*
>
> *Lenders will directly communicate with the CDB seeking clear NOC and other conditions before considering CDB's request; Lenders also instructed company to negotiate with CDB on following terms:*
>
> *(i) Withdrawal of petition from NCLT*
>
> *(ii) NOC in the prescribed format to facilitate Asset Monetization*
>
> *(iii) No further demands for priority payment from Chinese Syndicate till realization of asset monetization proceeds*

(iv) CDB and other Chinese lenders will have only pro rata right over proceeds from asset monetization after adjusting the payment made on priority.

10. Subsequently, State Bank of India, on behalf of the Joint Lenders Forum, provided their no-objection letter ("SBI NOC") dated 28 December, 2017, permitting the Corporate Debtor and Reliance Telecom Limited (RTL who is Corporate Debtor in C.P. (IB) 1387 of 2017) to raise upto USD 200 million on unsecured basis. The SBI NOC, inter alia, also provided that the USD 200 million was to be paid to the Respondents for their consent towards AMP and withdrawal of Insolvency Petition. The SBI NOC inter alia recorded the below:

    1. *In the event that the proposed asset monetization process (i) is delayed beyond timelines acceptable to JLF lenders; or (ii) fails (in the sole determination of the JLF lenders) for any reason, then this Amount will have to be repaid by the promoters of RCOM, from his/ their own resources, and without any recourse to any of the assets of any of the RCOM, RTL or RITL;*
    2. *CDB, for itself and all other banks in the CDB Syndicate shall give the following undertakings/ conditions:*
        i. *The CDB/CDB Syndicate shall not make any further demands for advance payments, other than payment of the Amount, as permitted by this letter*
        ii. *This amount proposed to be paid to CDB/CDB Syndicate will be treated as an advance paid to CDB/CDB Syndicate and same will be adjusted against (i) their allocated share in the monetization proceeds as per the debt distribution proposed by company in the JLF meetings held on 30.10.17 and 21.12.2017, or (ii) their*

allocated share in the any debt repayment/recovery process;

11. On 29th December, 2017, the Corporate Debtor and RTL raised funds to the extent of Rs. 1162 Crore (approx. USD 184 Million) from 5 unsecured creditors i.e. Vishvakarma Equipment Finance Limited, Deep Industrial Finance Limited, Pearl Housing Finance Limited, Shriyam Auto Fin Limited, and Traitrya Construction Finance Limited.
12. Evidently, the Corporate Debtor had taken loans to repay the Respondents. The repayment to the Respondents was not from the funds/revenue of the Corporate Debtor.
13. While the Term Sheets record that the payments were being raised for the purposes of payment to the Respondents, however, the Term Sheets did not mention that in case the AMP fails, the unsecured creditors would have recourse to the promoters only and not the assets of the Corporate Debtor (as was the condition under the SBI NOC). Particularly, the liability towards the said unsecured loans has been reflected in the books of accounts of the Corporate Debtor. As such the RP was bound by the Term Sheets executed by the Corporate Debtor with the unsecured creditors. Accordingly, the unsecured creditors from whom the Corporate Debtor had borrowed funds filed their claims as financial creditors of the Corporate Debtor and their claims have been admitted.
14. On 29th December, 2017, the Corporate Debtor paid a sum of Rs. 117 crores to the Respondents. The monies were received by the Corporate Debtor from the unsecured creditor in the TRA, and payments were made to the Respondents from the TRA.
15. Pursuant to the Impugned Transaction, Respondent No. I withdrew the Insolvency Petition, vide order dated 5 January, 2018, passed by this Tribunal.
16. However, undisputedly, the AMP did not go through as proposed.

17. Brief set of relevant dates, which pertain to the admission of the Corporate Debtor into CIRP, are as under:

    i. **Dated 15th May, 2018,** In a Petition filed by Ericsson India Pvt. Ltd., an Operational Creditor under Section 9 of the Code, this Tribunal passed an order admitting Corporate Debtor and RTL into CIRP ("Admission Order").

    ii. **Dated 30th May, 2018,** The NCLAT passed an order, inter alia, staying the Admission Order. During the stay period, the Corporate Debtor was in control of the erstwhile management of Corporate Debtor and RTL and not the Interim Resolution Professional.

    iii. **Dated 30th April, 2019,** The NCLAT passed an order (i) permitting the withdrawal of the appeal against the Admission Order; and (ii) directing the NCLT to proceed with the CIRP of Corporate Debtor and RTL.

    iv. **Dated 07th May, 2019,** NCLT directed the IRP to proceed with the CIRP of the Corporate Debtor in accordance with law. This date is treated as the Cut Off Date for claims under the CIRP of Corporate Debtor as well as RTL and the IRP issued a fresh Public Announcement for filing of claims.

    v. As per Section 18 of the Code, the IRP took charge of the assets of the Corporate Debtor, including its bank accounts (which included the TRA). The financial creditors, including the Respondents, were informed that the IRP had taken control of the bank accounts of the Corporate Debtor in the I" meeting of the committee of creditors.

Discussion and Findings

18. Heard the Learned Counsel and perused the material on record.

19. It is case of the applicant that (i) the payments were proposed to be made to CDB in the wake of the proposed AMP, whereby other financial creditors would have also recovered certain sums; (ii) the payments made

to CDB were a priority payment, i.e. an advance, made ahead of the realisations from AMP for the other financial creditors.

20. The Interlocutory Applications filed by the Respondents pertain to determination of Insolvency Commencement Date (ICD Date) and their contention is that it should be 07th May, 2019 and not 15th May, 2018. The Respondents have contested the IA 3553/2019 on various other grounds as well. Accordingly, we shall deal with each ground and the response of the Applicant to each of these grounds in the following para.

21. It is undisputed fact that the money was raised by the Corporate Debtor, in terms of term sheet, specifically for the purpose of payment to CDB led Chinese consortium and was deposited in the TRA account, which was under the control and superintendence of the Joint Lender forum; the amount paid to CDB led Chinese consortium was a back to back transaction; the payment to CDB led Chinese consortium was made in terms of specific agreement of JLF to transfer the funds from TRA account; JLF had accorded its consent to this transactions on certain conditions, one of which was that fresh funds shall be raised for the purpose of payment of CDB led Chinese consortium and such payment shall be reduced from the share of CDB led Chinese consortium for the purpose of distribution of proceeds under AMP; and while the CDB led Chinese consortium was a secured creditors, it came to be replaced by Unsecured Creditors, whose claim is stated to be admitted by the Applicant in the Insolvency Resolution process of the Corporate Debtor as unsecured creditor. It is also undisputed fact that the sanction of JLF was accorded with a stipulation that in case AMP fails, the promoters of the Corporate Debtor shall pay the fresh lenders (from whom funds were to be raised for payment to CDB led Chinese consortium) out of their own sources without recourse to the assets of the Corporate Debtor and AMP failed.

A. Whether Monies received in TRA Account are properties of Corporate Debtor and whether these monies were held in trust.

Applicant's submissions

22. The Applicant has contended that the loan facilities as extended by the Respondents to the Corporate Debtor, which remained outstanding, qualify as an antecedent debt under Section 43 of the Code. It is the RP's case that the payment of monies towards part settlement of the loans to the Respondents qualifies as a transfer of property or an interest of the Corporate Debtor as per Section 43 of the Code. The monies, although deposited in the TRA, belonged to the Corporate Debtor. The applicant has contended that the TRA and the monies held thereunder are assets of the Corporate Debtor. Per contra, the Respondents contended that the Corporate Debtor had no right, title, or control over the TRA during the period when the Impugned amount was paid.

23. The Applicant contended that routing of funds through TRA account was meant to ensure that the promoters are not able to siphon off funds of the company and the movement of the funds is monitored. This would not mean that the funds lose the character of being an asset of the company. From the perspective of the Code, the amounts lying in a TRA do not cease to be corporate debtor's asset. Any other interpretation of the character of the funds lying in the TRA, would inevitably lead to a large part of the assets, in form of cash available, being kept out of the corporate debtor's assets during CIRP, which would go against the main object of the Code, i.e. revival of the Corporate Debtor and value maximisation. The funds as held in the TRA, albeit for the benefit of the lenders, continued to remain the assets of the Corporate Debtor, and were only to be monitored and administered by the lenders to ensure that the proposed AMP goes through. The balance amount in the TRA was a part of the assets of the Corporate Debtor and reflected in the balance sheet of the Corporate Debtor, accordingly, the IRP has taken charge, control

and custody of the TRA, and other bank accounts of the Corporate Debtor. The statute mandates the RP to take control and custody of assets which are recorded in the balance sheet of the Corporate Debtor. There is no exclusion of the balances in TRA Account from the assets under the Section 18 of the Code as well as Section 25 thereof, except as contained in Explanation to Section 18 of the Code excluding the *assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment*. The argument that the TRA qualifies as a trust, and therefore, cannot be an asset of the Corporate Debtor, as raised by the Respondent does not come to its aid in view of Section 25 of the Code and applicability of Explanation to Section 18 of the Code is restricted to that section only and does not extend to Section 25 of the Code as held by Hon'ble SC in case of ***Victory Iron Works Ltd. v Jitendra Lohia & Anr.*** ***(2023) ibclaw.in 29 SC***. Further, especially in the context of a Trust and Retention Account, the NCLAT in Sintex Plastics Technology Ltd. v. Mahatva Plastic Products & Building Materials (P) Ltd., 2023 SCC OnLine NCLAT 2 has held that "*therefore, the order to maintain status quo-ante with regard to the corporate debtor and its assets means that the withdrawal of Rs. 116.41 Crores by State Bank of India on 30.06.2021 was against this 'stay order' and this amount should be put back in the account of the corporate debtor, and additionally the hold put by SBI on amount of Rs. 31.27 Crores which is in the the Trust and Retention Account should also be released so that the amount remains as an asset and under the control of the corporate debtor*."

24. The Ld. Counsel relied upon certain decisions delivered by US Court to contend that the earmarked amounts do not lead to a preferential transaction. The Applicant contended that An Application under Section 43 of the Code has to be strictly decided on the basis of the provisions of the Code, and the law laid down by the courts/ Tribunals in India,

particularly Anuj Jain v. Axis Bank and Ors. (2020) 8 SCC 401 Judgment and submitted that the earmarking doctrine (as applicable in the US) would not be applicable to determine whether a transaction amounts to a preference or not under Section 43 of the Code. Importantly, the said earmarking doctrine is not based on the statute and is purely a court made principle. Further, even under the US jurisprudence, it has been held that the earmarking doctrine, as a defence to preference transactions, can be used only where the new creditor is a guarantor to the old creditor.

25. The Ld. Counsel also cited the various paras from the decision of Hon'ble Supreme Court in the case of Anuj Jain v. Axis Bank Ltd., (2020) 8 SCC 401 ("Anuj Jain Judgment") on the concept of "preference" holding as below:

> ***20.1.*** *The basic concept of "preference" as per the law dictionaries and lexicons is the act of "paying or securing to one or more of his creditors, by an insolvent debtor, the whole or part of their claims, to the exclusion of the rest". [P. Ramanatha Aiyar's Advanced Law Lexicon (5th Edn., Vol 3. p. 4002).]*
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> ***20.3****. ……. If the corporate person is in crisis, where either insolvency resolution is to take place or liquidation is imminent; and the transactions by such corporate person are under scanner, any such transaction, which has an adverse bearing on the financial health of the distressed corporate person or turns the scales in favour of one or a few of its creditors or third parties, at the cost of the other stakeholders, has always been viewed with considerable disfavour.*
>
> *21.1.... If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be for the benefit | It may be intended*

benefit or may even be unintended benefit.] of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.

22.3. On a conspectus of the principles so enunciated, it is clear that although the word "deemed" is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e. Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

26. It is settled jurisprudence that the intention of the Corporate Debtor is immaterial in the context of Section 43 of the Code and does not have any impact to determine if a transaction falls within the purview of Section 43 of the Code.

Respondent's Submissions

27. It is the case of the Respondent that the funds or property which are entrusted to an insolvent company for a specific purpose, under conditions that preclude the company's use of these funds for its own purpose, such as in the present case, are held in trust and are not treated as part of the general assets of the Company. It was also contended that a transaction would only be preferential if it would result in depletion or diminution of estate of the corporate debtor, which would otherwise have been available for the other creditors.

Respondent's Submissions

28. The Respondents have contended that (i) the monies received by the Corporate Debtor from the unsecured creditors were earmarked for the specific purpose, viz. repaying the Respondents and therefore were held in trust, and (ii) the monies received from the unsecured creditors were deposited in the TRA, and therefore, do not qualify as an asset of the Corporate Debtor, and accordingly, the payments to Respondents cannot qualify as a preferential transaction. It was the lenders who approved the payment of the monies to the Respondents from the TRA.
29. A transaction would only be preferential if it would result in depletion or diminution of estate of the Corporate Debtor. However, the payment of the Impugned amount did not result in the depletion of the Corporate Debtor's estate, which has also been noted as a mitigating factor in the Transaction Audit Report. One set of secured creditors of the Corporate Debtor have been replaced with other set of unsecured creditors, and therefore has not had an overall impact on the corporate debtor.

Decision

30. Section 43 of the Code requires that 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). The question for consideration is whether it can be said that any

benefit has been given by the Corporate Debtor to the Respondents, and if yes, whether such benefit was in ordinary course of its business.

31. It is not in dispute that the funds were raised from new lenders specifically for making payment to the CDB led Chinese consortium and the amounts were paid. In terms of TRA Account Agreement, the parties had agreed to the appointment of the Account Bank to hold and administer monies deposited and/or to be deposited in the RTL Trust and Retention Account, and the Account Bank had agreed to operate the same on the terms and conditions contained in the Agreement. The State Bank of India (SBI) was designated as Account Bank. The money was raised in terms of the NOC issued by SBI subject to the CDB withdrawing its petition from NCLT and CDB led Chinese Consortium ceding to pro rata right over proceeds from asset monetization after adjusting the payment made on priority.

32. Clause 2.2 of the TRA Agreement provides that "*The Borrower also hereby declares that all the beneficial right, title and interest in and to the RCOM Trust and Retention Account (which, for avoidance of doubts, includes its other sub-accounts as well), the monies therein and the Authorised Investments including any document of title in relation thereto made from RCOM Trust and Retention Account, shall be vested in the Account Bank and held for the benefit and to the order of the Lenders in accordance with terms of this Agreement……All amounts deposited in the Account (including any Authorised Investments) from time to time shall be held in trust, and the monies received and applied as provided in this Agreement ("Trust Property"). No person other than the Lenders and the Intercreditor Bank shall have any rights hereunder as the beneficiaries of or as third-party beneficiaries under this Agreement.*"

33. Clause 2.3 © of the TRA Agreement further provides that "*monies and other payments received by it under this Agreement shall until used or*

applied in accordance with this Agreement, be held in trust for the purposes for which they were received and be segregated from other funds and property of the Account Bank."

34. Clause 7.3 of the TRA Agreement further provides that "*Monies and other property received by the Account Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held in trust for the benefit of the Lenders, for the purposes for which they were received. The Account Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Accounts.*"

35. Clause 2 of Schedule 3 of TRA Agreement further provides that "*Each of the restrictions contained in this Agreement relating to the Accounts shall be for the benefit of the Lenders, the Account Bank and the Intercreditor Bank. Any such restrictions may accordingly, be relaxed or waived, either :-*

(a) by the Core Committee or the Joint Lenders' Forum, or

(b) if the Borrower request and the Core Committee or the Joint Lenders' Forum agrees, provided that the Core Committee shall not be obligated to agree to such request,

and none of the restrictions shall limit the rights of the Lenders, the Account Bank and the Intercreditor Bank under the Financing Documents."

36. The Avoidance Provisions in the Code are for the benefit of the Creditors of Corporate Debtor. The payment, in question, was made by the Corporate Debtor in terms of express consent and knowledge of its financial lenders, for whose benefit amongst other creditors, the Section 43 of the Code has been enacted. In the present case, one debt owed to the Respondents, which was secured, came to be replaced by another unsecured debt and it is undisputed fact that the total debt owed to the Corporate debtor remained unchanged, but has resulted into better

positioning of the secured lenders of the Corporate Debtor in terms of section 53 of the Code.

37. We have no hesitation to say that the money lying in TRA account is assets of the Corporate Debtor in terms of section 18(1)(f) and Section 25 of the Code and the Explanation to Section 18 only excludes assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment. The money, in question, was borrowed by the Corporate Debtor, though for specific purpose, but it can not be said that such money was owned by a third party, as such borrowing has the effect of binding the corporate debtor to repay the same. However, it is undisputed fact that the money was raised for specific purpose and the term sheet with new lenders (who lent the money as unsecured loan with specific stipulation for making payment to CDB led Chinese Consortium), the Corporate Debtor as well as Account Bank were obligated to utilise the money for the purpose, for which it was received. To this extent, it can be said that the money was received from new lenders and held in TRA account in trust by the Corporate Debtor as well as Account Bank. Accordingly, we are of considered view that it can be said that the Corporate Debtor has extended any preference to the Respondents by making payment in terms of JLF monitored settlement with the Respondents, which resulted into making such payment. We consider it appropriate to clarify here that payment to a creditor out of general pool of funds lying in TRA Account may constitute as preference given by a Corporate Debtor based on facts of each case. However, if a money is received for specific purpose, the Account Bank herein was obligated to allow payment in accordance with such specific stipulation only and was precluded from allowing payment to any other person, but the Respondents. In case, the person administering the TRA account allows the utilisation of specific funds for purpose other than the specified purpose, of which it is privy and also

has knowledge, such request of the Corporate Debtor for making payment to person other than specified person, may fall within the scope of section 43 of the Code.

38. We do not find force in the contention of the Applicant that since the money was raised from New Lenders binding the Corporate Debtor to repay the same in case AMP fails, whereas it should have been obligation of the Promoters of the Corporate Debtors in terms of SBI' NOC, it shall lose its character as money received in trust for making payment to CDB led Chinese Transaction. This may, at best, become a ground to contest the claim of New Lenders for admission in the CIRP of the Corporate Debtor. Admittedly, the Applicant has admitted the claim of new lenders, though contending that he was bound by the terms contained in the term sheet with lenders. However, we are of considered view that the Applicant was seized of total understanding amongst the parties in relation to this transaction and all financing documents as well as documents leading to such financing are within his knowledge. He was well within his rights to approach this Tribunal to decide the liability of the Corporate Debtor in relation to New Lenders, if he is of the view that such lending was in violation of JLF terms and SBI NOC in this relation.
39. In view thereof, we are of considered view that the monies paid to the Respondents out of money raised from New lenders do not result into any preference having been given by the Corporate Debtor.

B. Whether the Transaction is in Ordinary Course of Business or financial affairs

Applicant's submissions

40. The payments made to the Respondents were not made in their due course. The payments were made to the Respondents on the threat of insolvency and requirement of no objection for the AMP and therefore, by no stretch can be termed as being in ordinary course of business. The

payments made to the Respondents were not even made from the regular accruals or cash flows of the Corporate Debtor, but the Corporate Debtor had to raise funds through unsecured creditors to make the said payments. Given that payment was towards advance to the Respondents in the hope of AMP concluding (which eventually did not take place), it cannot be said that the payments were made in ordinary course of business. A payment made after borrowing funds to repay another creditor by no means can be said to be in ordinary course of business. This exact intent of Section 43 was to avoid such transactions.

41. The Impugned Transaction did not result in any value enhancement for the Corporate Debtor. The Impugned Transaction cannot be said to be a part of the undistinguished common flow of business of the Corporate Debtor. The Corporate Debtor was evidently reeling under debts with some of the lenders having declared NPA prior to the Impugned Transaction. Therefore, the Impugned Transaction cannot be construed as being in the ordinary course of business of the Corporate Debtor. Further, the proviso to Section 43 of the Code states 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.

Respondent's Submissions

42. The Impugned Transaction is in the ordinary course of business, since SBI issued the SBI NOC for the Impugned Transaction, and that Impugned Transaction was with the consent of all parties concerned. The Impugned amount was paid towards the relevant principal outstanding dues as per the financing documents, as opposed to amount payable pursuant to an acceleration event. Borrowing monies from various financial institutions to run the business of the corporate debtor is in the ordinary course of business. In the current scenario, the Corporate Debtor has merely raised monies on an unsecured basis to repay the outstanding principal dues of the Respondents, which was a secured loan,

at the behest of the lenders. Further, this repayment has not only ensured that the Corporate Debtor was not pushed in to insolvency in 2017 but has also resulted in replacement of a secured debt with an unsecured debt. Any action which relieves the financial burden on the corporate debtor cannot be termed outside the ordinary course of business.

43. It is also stated that the Apex Court in Anuj Jain (Supra) has held (in the context of Section 43) that ordinary course of business would mean those transactions that were in the undistinguished common flow of business done. In that case, the transaction (mortgage of assets to secure the lenders of the debtor's holding company) was held not to be in the ordinary course of business.

Decision

44. In the context of Section 43, the Apex Court in Anuj Jain (Supra) observed that the underlying concept of Section 43 is to disregard such transactions which appear to be preferential '*so as to minimize the potential loss to other stakeholders in the affairs of the corporate debtor, particularly its creditors*'. In the present case, the money was raised from New Lenders and paid to the Respondents on back to back basis, and such repayment resulted into withdrawal of Section 7 application by the Respondents. This, in itself, demonstrates that the raising of funds from new lenders (unsecured) and payment to Respondents (secured lenders) to allow the JLF to proceed with its AMP program was to minimize the potential loss to other stakeholders in the affairs of the corporate debtor. It is not relevant that the corporate debtor got finally admitted to Insolvency Resolution Process pursuant to another application and AMP failed, as the circumstances at the time the decision to raise money to pay the Respondents are deciding factor and the events occurring thereafter can not be taken into consideration to decide whether the transaction was intended to minimize the loss to other stakeholders.

45. The Apex Court in Anuj Jain (Supra) also observed that any transfer made by the Corporate Debtor which results in acquiring any enhancement in its value or worth would be excluded from the ambit of Section 43 of the Code. In the present case, the replacement of a secured debt by an unsecured debt happening on account of transaction of borrowing and paying to CDB led Chinese Consortium, was in ordinary course of financial affairs of the Corporate Debtor as it resulted into retirement of a secured debt by unsecured debt, thus releasing the security over the assets of the Corporate Debtor resulting into enhancement of its capacity to offer more security. In case of Anuj Jain (Supra), the Hon'ble Supreme Court held that -

> *28.2.2. In other words, the whole of conspectus of sub-section (3) is that only if any transfer is found to have been made by the corporate debtor, either in the ordinary course of its business or financial affairs or in the process of acquiring any enhancement in its value or worth, that might be considered as having been done without any tinge of favour to any person in preference to others and thus, might stand excluded from the purview of being preferential, subject to fulfilment of other requirements of sub-section (3) of Section 43.*

46. In view of the foregoing, we are of considered view that the payments to the Respondents were in ordinary course of financial affairs of the Corporate Debtor, and hence, are otherwise saved by the exception carved out in section 43(3) of the Code.

C. Other Contentions

47. The Respondents have also stated that the Resolution Professional has failed to form an independent opinion on the nature of transaction. The Respondent relied upon the decision in case of Nitesh Kumar More, Resolution Professional of SPS Steels Limited v. SPS Steels & Prs., IA

1200 of 2019 in CP(IB) 1342 of 2017, NCLT Kolkata Bench; and Harsh Chander Arora, RP of Miditech Pvt. Ltd., CA 743 of 2018 in CP(IB) 432 of 2017, NCLT New Delhi.

48. Since, we have already held in the preceding para that the transaction, in question, does not fall within the scope of section 43 of the Code, we are not proceeding any further in this relation.

D. Whether Insolvency Commencement Date is 15th May 2018 or 7 May 2019

49. It is the RP's case that the Impugned Transaction was undertaken during the relevant time ((i.e. between 15th May 2017 to 15th May 2018 which is within 1 year since Respondents are not related party) as prescribed under Section 43 of the Code in relation to a non-related party. The Respondents however, have sought to argue that the insolvency commencement date ("ICD") for the purposes of the Corporate Debtor ought to be 7th May, 2019. It is the Respondents' case that once the ICD is declared to be 7th May, 2019, the Impugned Transaction would be beyond the lookback period as prescribed under Section 43 of the Code. In this regard, the Respondents have filed Misc Application No. 133 of 2020 and Misc Application 645 of 2020 in CP No. 1386 of 2017.

Submission of Applicant in MA 133 of 2020 and MA 645 of 2020, who are Respondents in MA 3553 of 2019

50. The Corporate Debtor was initially admitted to insolvency vide order dated 15th May, 2018, however the operation and effect of the order was stayed by the NCLAT on 30th May, 2018. Thereafter, from 30th May, 2018 till 7th May 2019, the control and operations of the Corporate Debtor were handed over to the erstwhile management and admittedly, no moratorium was in force. Further, the Corporate Debtor (under its erstwhile management) was allowed to make payments to service and repay its debts. For the purpose, the decision of Hon'ble NCLAT in case

of *Puneet Garg v. Ericsson India Pvt. Ltd 2019 SCC Online NCLAT 143* was referred to. The following steps are stated to have been taken by the RP based on the CIRP commencing on 7th May, 2019.

a. The RP filed an application being M.A. No. 1756 of 2019 seeking a declaration that '*7 May 2019 should be treated as the date for invitation of claims from creditors*'.
b. The RP issued a public announcement calling for claims as on 7 May 2019.
c. This Tribunal vide order dated 24 September 2019 extended the CIRP by a further period of 90 days i.e. till 10 January, 2020 noting that the CIRP period (180 days) would expire on 12 October 2019. For the CIRP period to expire on 12 October 2019, the commencement of CIRP must be from 7 May 2019.
d. This Tribunal vide order dated 24 January 2020 in MA 274 of 2020 noted that the CIRP period (330 days) would expire on 10 March 2020. For the 330 days CIRP period to expire on 10 March 2020, the commencement of CIRP must be from 7 May 2019.

51. In the event, ICD is assumed to be the date of the Admission Order, the necessary consequence will be that these liabilities that have been incurred during the CIRP of Corporate Debtor till vacation of stay order by Hon'ble NCLAT, may not form part of the insolvency resolution process costs as defined under the Code. Thus, a stricter interpretation will result in increased litigation and/or confusion regarding the status of such claims i.e. subsequent to the date that the RP is seeking to treat as the ICD.

Submission of Respondent in MA 133 of 2020 and MA 645 of 2020, who is Applicant in MA 3553 of 2019

52. The Insolvency Commencement Date is a statutorily defined under Section 5(12) of the Code as: "the date of admission of an application for

initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be." This cannot be changed/ altered based on facts and circumstances of a particular case. Accordingly, the ICD for the corporate debtor is 15th May, 2018, and therefore, cannot be amended to be 7th May, 2019, as that date was allowed by this Tribunal only for the purpose of taking claims as on that date on record. the mere admission/ verification of claims as on a particular date cannot have a bearing on the ICD or its alteration thereof.

53. The stay on the CIRP from 30th May 2018 to 30th April 2019 ("Stay Period") was by virtue of the order passed by the Hon'ble NCLAT. During the Stay Period, subject to the NCLAT Stay Order, the financial creditors could dispose of assets of the Corporate Debtor, and the Corporate Debtor incurred additional liabilities. If commencement date for the purposes of the claims was also taken as 15th May, 2018, these additional liabilities as incurred during the Stay Period, may not have been accounted for, resulting in increased litigation/confusion.

54. The Admission Order as passed by this Hon'ble Tribunal was only stayed by Hon'ble NCLAT, and not quashed, and therefore, its effect and consequences cannot be completely wiped out. The stay granted by Hon'ble NCLAT would not have the effect of wiping out the Admission Order passed by this Tribunal dated 15th May 2018, which only remained inoperative for the stay period. In **Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn., (1992) 3 SCC 1**, the Supreme Court held as follows:

> "*10.... While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the*

date of the passing of order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because în spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending."

55. It is also noteworthy that the RP had filed an extension application in January, 2020, on the basis that the 270 day period was expiring on 3 February, 2020, with a view to seeking a further extension beyond 3 February, 2020. The Respondents had filed an affidavit supporting the extension application and did not raise the issues/concerns regarding the computation of the 270-day period, commencing from 15th May, 2018. The Applicant in IA 133 of 2020 was represented by an Advocate who had also supported the Application. Therefore, the ICD as per the Code, for the purposes of the present CIRP would continue to be 15th May, 2018.

Decision

56. Section 5(12) of the IB Code, 2016 defines "**insolvency commencement date**" to mean "*the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be*".

57. Admittedly, the admission order was passed on 15th May 2018 and was stayed by Hon'ble NCLAT and came to be vacated on 30 April 2019. During this period, the management of the Corporate Debtor was restored to erstwhile management. The NCLAT directed for commencement of CIRP on 7 May, 2019 and this Tribunal, on an application, allowed the acceptance of claims of creditors as on 7 May, 2019. The Hon'ble Supreme Court in case of Shree Chamundi Mopeds Ltd. has explained the effect of order staying an Order and has held that the stayed order exists but remain suspended.

58. It was argued by the Counsel for Resolution Professional that this Tribunal's Order dated 15th May 2018 admits the Corporate Debtor into CIRP; appoints the Resolution Professional; and declares the commencement of moratorium. All these three came to halt on account of Hon'ble NCLAT order dated 30 may 2018 staying the operation of Order dated 15 May 2018.

59. Hon'ble NCLAT's order dated 30 May 2018 reads as

> *"i. Until further orders, the impugned orders dated 15.05.218 and 18.05.2018, passed by the Adjudicating Authority, Mumbai Bench in C.P. (IB) 1385, 1386 & 1387 (MB)/2017, shall remain stayed. The Resolution Professional will allow the management of the Corporate Debtors to function. He may attend the office of the Corporate Debtors, till further orders is passed by this Appellate Tribunal. Thereby, the Corporate Insolvency Resolution Process initiated against the Corporate Debtors namely 'Reliance Infratel Ltd.' 'Reliance Telecom Ltd.' and*

'Reliance Communications Ltd.' shall remain stayed until further orders

ii. The Financial Creditors/ Joint Lenders Forum with whom the assets of the Corporate Debtors have been mortgaged as also the Corporate Debtors are given liberty to sell the assets of the Corporate Debtors and to deposit the total amount in the account of the lead bank of the Joint Lenders Forum which shall be subject to the decision of these appeals."

60. On perusal of the order dated 30.05.2018 it is noted that the Hon'ble NCLAT had state the operation of admission order, however, the RP was continued to hold office as Resolution Professional of the Corporate Debtor without having any power or duties in relation to such office.

61. Hon'ble NCLAT's order dated 7 May 2019 reads as

"2. Having heard learned counsel for the parties and in view of the order passed by the Hon'ble Supreme Court in Writ Petition Civil No. 845 of 2018 'Reliance Communications Limited & Ors. Vs. State Bank Of India & Ors.' on 24.04.2019 as noting subsist in these appeals, we allow the Appellants to withdraw all these appeals. All the Interim Orders passed in these appeals are vacated. The Adjudicating Authority (National Company Law Tribunal) will proceed with the matter in accordance with law.

3. The Appellant(s) and others are allowed to bring this order to the notice of Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, who will fix the case 'for orders' on 07.05.2019, on which date the parties will appear."

62. This led to issuance of oral directions on 07.05.2019 by this Tribunal, which were stated in the public announcement by the Resolution Professional. The public announcement states that "*This public announcement is re-issued in light of the oral directions of the Hon'ble*

National Company Law Tribunal, Mumbai Bench dated 07.05.2019. In light of the oral directions of the Hon'ble National Company Law Tribunal, Mumbai Bench on 07.05.2019, the Interim Resolution Professional has invited claims as on 07.05.2019, given that the financial position of the Corporate Debtor may have significantly changed from the initial date of the commencement of Corporate Insolvency Resolution Professional."

63. The order dated 09.05.2019 in MA 1765/2019 has excluded the period the period of stay on admission order stating that

> "*Given the law laid down by Hon'ble NCLAT, a certain period where the court proceeding is pending for which RP was restrained from working should be excluded. In the circumstances, Application deserves to be partly allowed regarding the exclusion of the period from 30.05.2018 to 30.04.2019.*
>
> *The Applicant has also sought a declaration that 07.05.2019 should be treated as a date do the invitation of the claims from the Creditors. There is no occasion to pass any declaration under the Rule and Regulations which should guided factor for discharging the duties of IRP/RP. Therefore, we d not need to give any declaration at this stage to give an effect as to what should be the date for the invitation of claims.*

64. The order dated 09.05.2019 clearly reveals that the exclusion was granted taking into consideration the stay on operation of admission order and it cannot be said that Insolvency Commencement date was reckoned with reference to any other date than the admission order dated 30.05.2018. Further, this Tribunal had refused to give declaration on what should be date for invitation of claims. It is admitted given proposition that the period of stay in the CIRP period is excluded for the purpose of the determination of 180 days and 330 days as the case may

be. Accordingly, it cannot be said that determination of these time lines in any of this Tribunal orders after excluding the stay period has resulted into postponing the insolvency commencement date, which in any case is the date of order of the admission in terms of express definition provided in the court. Accordingly, we have no hesitation to conclude that the insolvency commencement date shall be 30.05.2018, which is date of order passed by this Tribunal admitting the Corporate Debtor in the insolvency CIRP.

Order

65. For the reason stated above MA 3553 of 2019, MA 133 of 2020 and MA 645 of 2020, filed in CP (IB) 1386 of 2017, are dismissed and disposed of accordingly.

66. As the facts and the prayers in IA 3555 of 2019 are similar as in MA 3553 of 2019, and the facts and the prayers in IA 126 of 2020 and IA 646 of 2020 are similar as in MA 133 of 2020 and MA 645 of 2020, all these three IAs are also dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)