

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT)(INS) NO.242 OF 2024

(Arising out of judgement and order dated 09.11.2023 passed by National Company Law Tribunal, Ahmedabad in IA No.109/2022 in Company Petition (IB) No.62/2021)

In the matter of:

Sidharth Bharatbhushan Jain
Erstwhile Shareholder and Director of
M/s Sysco Industries Ltd
6 Kiran Apartments,
Athwagate, Surat 395001

Saurabh Bharatbhushan Jain,
Erstwhile Shareholder and Director of
M/s Sysco Industries Ltd
23 Vasundhara Society,
Behind Big Bazar, Vesu,
Surat 395007

Bharatbhushan Jain
Erstwhile shareholder and Director of
M/s Sysco Industries Ltd
23 Vasundhara society,
Behind Big Bazar, Vesu,
Surat 395007

Appellant

Vs

State Bank of India
Stressed Assets Management Branch
2nd Floor, Paramsiddhi Complex,
Opposite VS Hospital
Near Ellisbridge,
Ahmedabad 380006

Siemens Financial Services Pvt Ltd
Birla, Aurora Towers, Level 21,
Plot No.1080, Dr. Annie Besant Road
Worli, Mumbai 400030

M/s Paisalo Digital Ltd
CSC, Pocket 52, CR Park,
Near Police Station, South Delhi
New Delhi 110019

Respondent

For Appellant:Mr Keith Varghese, Advocate.

For Respondent:Mr. Harshit Khare, Mr Prafful Saini, Advocates for R1.

Mr Nishant Chothani, Mr. Pranjit Bhattacharya, Mr Niyati Shah, Advocates for R2.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

This appeal is against an impugned order dated 09.11.2023 whereby an application filed under Section 43 of the Code was allowed by the Ld. NCLT. The Learned counsel for the appellant submits the Corporate Debtor had supplied certain goods to M/s Pratap Associates, an HUF firm of Appellant No.3 herein and hence a related party. Such goods were supplied before 23.05.2018 and the amount outstanding against Pratap Associates as on 23.05.2018 was of Rs.7,78,31,555/-. M/s Pratap Associates (HUF) could not pay this outstanding to Corporate Debtor. .

2. On 8th September, 2021, M/s Sysco Industries Ltd, the Corporate Debtor, went into CIRP and thus look back period under Section 43 of Code commenced w.e.f. 8th September, 2019.

3. Admittedly the application under Section 43 of the Code was filed per minutes of 4th COC Meeting dated 14.12.2021 wherein Agenda Item No.7 read as under:-

Agenda 7: To file an application under Section 43 and Section 65 separately.

RP informed the COC Members that presently there is procedure of filing the application under Section 43 and Section 65 separately. Also increasing the lookup period is required as the company was not operating since 2019 i.e., more than 2 years before the CIRP commencement date. After a detailed discussion, it was decided and COC approved to file the application under section 43 and section 66 of IBC Finally, it was decided for adding prayer in the application for extension

in look-up period of 5 years than only 2 years. COC also agreed the fees for the advocate.

4. Following prayers were made in application filed under Section 43 of the Code:

a) That this Hon'ble Adjudicating Authority may be pleased to allow enhancement of period specified in Section 46 for a period of 5 years since financials data is only made available until financial year ending March, 2019, in the interest of justice;

b) That this Hon'ble Adjudicating Authority may be pleased to pass appropriate orders or directions under Section 43 of the code against the respondents to contribute an amount of Rs.7,78,31,555/- being outstanding towards related party, in the interest of justice.

5. Now, section 43 of the Code read as under:-

(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.

6. The Ld. NCLT on this application under Section 43 of the Code had passed the following impugned order:-

17. The said section refers to property which has very wide meaning and in our view includes goods. The respondent has admitted that goods were supplied by the CD and the outstanding of Rs. 7.78 crores are not denied. The Respondents have not denied that M/ s Pratap Associates is his HUF which is related party.

18. It is common practice that before commencement of insolvency, the assets of the corporate debtor are stripped many a times by the management. The suspended management conceals the data from the RP during the CIRP process. In the present matter too S. 19 (2) application was filed by the RP.

19. The present case falls squarely within the ambit of S. 43 of the Code so far as transactions with Pratap Associates is

concerned. As such we have no hesitation to hold that transactions are hit by provisions of S. 43 of the Code.

20. In terms of the above observations prayers (a) and (b) are hereby allowed. R-1 to R-3 are directed to deposit the said amount of Rs. 7.78 Crores within a period of 15 days from the date of the order with the Corporate Debtor who in turn should distribute the same to the erstwhile members of COC immediately in their respective share.

21. As regards the transactions with the 3 debtors, the same are transactions in the ordinary course of business of the Corporate Debtor and as the debtors were not made a party before us and without hearing them no orders can be passed and for the reasons stated above we hold that S. 43 is not attracted upon the respondents in the matter. Accordingly prayer (c) is denied.

7. It is the submission of the learned counsel for the appellant such prayers ought not to have been allowed as there cannot be an extension of look back period beyond two years as is envisaged in sub-section (4) of Section 43 of the Code. Heard.

8. In Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd Vs Axis Bank Ltd and Others, (2020) 8 Supreme Court Cases 491, the Hon'ble Supreme Court held as follows:-

21.2 However, merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of [Section 43](#) of the Code, another essential and rather prime requirement is to be satisfied that **such event, of giving preference, ought to have happened within and during the specified time, referred to as "relevant time"**. The relevant time is reckoned, as per sub-section (4) of [Section 43](#) of the Code, in two ways: **(a)** if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and **(b)** if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by [Sections 43](#) and [44](#) of the Code, it ought to be a preferential one answering to the requirements of sub-

section (2) of [Section 43](#); and **the preference ought to have been given at a relevant time, as specified in sub-section (4) of [Section 43](#).**

26. Even when all the requirements of sub-section (2) of [Section 43](#) of the Code are satisfied, in order to fall within the mischief sought to be remedied by [Section 43](#), the questioned preference ought to have been given at a relevant time. In other words, **for a preference to become an avoidable one, it ought to have been given within the period specified in sub-section (4) of [Section 43](#).** The extent of 'relevant time' is different with reference to the relationship of the beneficiary with the corporate debtor inasmuch as, for the persons falling within the expression 'related party' within the meaning of [Section 5 \(24\)](#) of the Code, such period is of two years before the insolvency commencement date whereas it is one year in relation to the person other than a related party. The conceptions of, and rationale behind, such provisions could be noticed in the excerpts from the interim report of Law Reforms Committee, as referred on behalf of the appellants. We may usefully extract the same as under: -

9. Thus for reasons aforesaid, the outstanding being of more than 2 years prior to CIRP commencement date, the relief under Section 43 of the Code would not be available. The respondent, however, shall be at liberty to take alternative action(s) as may be allowed under the Law (inclusive of Section 66 of the Code).

10. In the circumstances we set aside the impugned order passed by Ld. NCLT, with liberty aforesaid.

11. The appeal is disposed of in terms of above. Pending applications, if any, are also closed.

**(Justice Yogesh Khanna)
Member (Judicial)**

**(Mr. Ajai Das Mehrotra)
Member (Technical)**

Dated:14-10-2024

bm