NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins)No. 368 of 2021

IN THE MATTER OF:

Sahara India
A Registered Firm with
The Registrar of Firms,
Lucknow having
Registration No. – 168582
Sahara India bhawan,
1, Kapoorthala Complex,
Aliganj, Lucknow
U.P-226 024 **...Appellant**

Vs.

1.Shri Nandkishor
Vishnupant Despande
Resolution Professional of
Royal Refinery Pvt. Ltd.
Having office at:
708, 7th Floor,
Raheja Centre, Nariman Point
Mumbai, Maharashtra – 420 021 **...Respondent No.1**

2.Royal Refinery Pvt. Ltd.
3-E, Trishla Premises Co-Op Society Ltd.,
3rd Floor, 122 Sheikh menon Street,
Mumbai, Maharashtra – 400 002 **... Respondent No.2**

Present:

For Appellant	**:**	**Mr. Kumar Anurag Singh, Mr. Anando Mukherjee and Mr. Zain A. Khan, Advocates**
For Respondents	**:**	**Mr. Kaustav Som, Mr. Arjun Krishnan for R-1&2, Liquidator**

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present appeal has been filed by the Appellant- 'Sahara India' under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the impugned order dated 07th January, 2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Mumbai Bench in I.A No. 991 of 2020 in CP(IB) No. 2556/MB/2019.
2. The Appellant is a registered firm with the Registrar of Firms, Lucknow having registration number 168582 with its registered office at Sahara India Bhawan, 1, Kapoorthala Complex, Aliganj, Lucknow. The Appellant has remitted the principal amount of Rs. 39,95,00,000/- in various tranches commencing from April, 2018 to February, 2019 in accordance with the 'Memorandum of Understanding' (MOU) dated 07th March, 2017 with the Corporate Debtor (CD)/Respondent (in CIRP) for supply of future goods in the form of gold coins/Gold ornaments. The golds were supposed to be supplied by the CD any time after January, 2019. As per MoU *(appearing at page 67 - Annexure A of the Appeal Paper book)* vide para 1 reflects clearly that all such advance payments will not attract any interest. It is also stated at para 3 of the MOU that both the parties have agreed to fix the price of Gold coin/Gold ornaments at the prevailing

market rate of the day when Gold coin/Gold Ornaments demanded is physically delivered to the Buyer as per the location(s) specified by the Buyer. The Seller also agrees to give 2% discount on the prevailing market price of Gold and will not charge making charges and delivery charges on the future demand by the Buyer (after January, 2019) and at the time of delivery of quantity. The Buyer has a right to assign its obligations and rights as per this MOU to its nominee(s) without taking prior consent of the Seller and the Seller shall not cause any hindrance are raise any objection in the same. The Seller gives at least 30 days' notice showing its unwillingness to continue the understanding as reached between the parties and the buyer is ready to give a mutually agreed compensation as well as refund the excess amount, if any.

3. The Ld. Counsel for the Appellant has submitted that they have informed the CD vide its letter dated 04th February, 2019 to supply of 10 kg Gold coins (100 points of 100 gram each) as obligation in accordance with the MOU. It is also submitted by the Appellant that the CD vide its letter dated 06th February, 2019 has confirmed to supply the same once it is manufactured which will take about 3 weeks' time due to their pre-occupied manufacturing job. Since CD did not supply to them so the Appellant again asked the CD vide its letter dated 28th February, 2019 to confirm supply as they failed to do so within three weeks. The CD vide its

letter dated 04th March, 2019 again communicated to the Appellant that they are pre-occupied with earlier job orders and there is a lack of factory staffs so they communicated to them that it will take 3-4 months' time and accordingly, the Appellant vide its letter dated 05th March, 2019 asked the CD to refund the amount as there is too much delay without any hope that it will come soon and rather as a CD, you are further asking for 3- 4 months' time whereas the Appellant's customer are in dire need. The CD informed the Appellant vide its letter dated 11th March, 2019 to convert the advance amount of the Appellant into unsecured loan with 10% p.a. rate of interest on outstanding amount till full and final payment of the same are made to them. However, the Appellant accepted the offer after communicating the notice of default to the CD in between there are other correspondence also.

4. It is also submitted by the Ld counsel for the appellant that 'Corporate Insolvency Resolution Process' (CIRP) was initiated against the CD on 13th November, 2019 by the Adjudicating Authority. As a result of which the 'Resolution Professional' (RP) took over the control of the CD and invited public notice and claim. Accordingly, the Appellant has submitted its claim in Form-C. The RP exchanged communication with the Appellant for reconciliation of amount maintained in the books of the CD and apparently there were some difference on the interest account. The Appellant in spite

of submitting all the details vide its two emails, the RP still considered the claims of the Appellant, not in the category of the 'Financial Debt' and as a result of the Appellant has challenged the decision of the RP before the Adjudicating Authority vide its I.A No. 991 of 2020 in CP(IB) No. 2556/MB/2019. However, even the Adjudicating Authority vide its impugned order dated 07th January, 2021 has taken a different a stand and dismissed the petition of the Appellant by comparing the facts of the Appellant's case partially with Anuj Jain Case (Anuj jain IRP Vs. Axix bank Ltd.) 2020 8 SCC 401 and refused to classify the claim of the Appellant amounting to Rs.42,61,33,333/- as 'Financial Debt'.

5. The Ld. Counsel for the Appellant has submitted that the Adjudicating Authority has not only rejected the claim of the Appellant but has treated the same as preferential transaction in term of Section 43(2)(a) of the Code. Considering that this has been within the two years look back period as required by the Code.

6. The Ld counsel for the Appellant has also submitted that the transactions is purely a 'Financial Debt' and the Adjudicating Authority cannot consider the same as 'preference transaction' without their being an avoidance application by the RP or the Liquidator under Section 44 of the Code. It was also submitted by the Appellant that the MOU gets substituted by the loan agreement and this amounts to novation of the earlier agreement with

an entirely new agreement as per Section 62 of the Indian Contract Act, 1872. The Ld. Counsel for the Appellant also submitted that they are not in any way related party with the CD. However, they could not confirm whether this was the first transaction with the CD or there was earlier transaction also. They have also cited the various judgments as stated below:

- Prayag Polytech (P) Ltd. Vs. Shivalik Enterprises (P) Ltd IB 312 (ND) 2019
- Swiss Ribbons (P) Ltd. Vs. Union of India (2019) 4 SCC 17

7. It was also stated by the Ld. Counsel for the Appellant that Section 43 of the Code relates to transactions pertaining to a transfer of property or a security interest thereof. However, in the present case, it is not so. They have further stated as follows:

> *"ln Anuj Jain (supra) the Hon'ble Supreme Court had categorically held that for a transaction to fall within the mischief of Section 43 of the Code, both the twin requirements of clause (a) and (b) of sub-section 2 coupled with either clause (a) or (b) of sub – section 4 needs to be satisfied, the observation of the Hon'ble Supreme Court is*

being reproduced below for the convenience and ready reference of this Tribunal:

" 18.1. Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has, at a relevant time, given a preference in such transactions and in such manner as specified in subsection (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in section 44. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference(…)"

"19. In order to understand and imbibe the provisions concerning preference at a relevant time, it is necessary to notice that as per the charging parts of Section 43 of the Code i.e., sub-sections (4) and (2) thereof a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clause (a) and (b) of sub-section (2) coupled with the applicable requirements

of either clause (a) or clause (b) of sub-section (4), as the case may be. are satisfied."

8. The Ld. Counsel for the Appellant has also stated that that Section 44 of the Code provides that it is the RP or the Liquidator who is supposed to file an application for initiation of action under Section 43(1) of the Code and also stated that Transaction to be classified as a 'Preferential transaction' it is sine qua non that the transaction fulfils the Twin Condition of Section 43 and that an avoidance Application has been made to the Adjudicating Authority under Section 43(1) of the Code. The Appellant in a summarized way further presented that the Operational debt was converted to financial debt because of the inability of the CD to supply the goods as required under the MOU, in spite of granting some leverage to the CD. Hence, at the request of the CD, the advance for supply of goods get converted into the unsecured loan with specified percentage of interest and hence prayed to the Tribunal for setting aside the impugned order dated 07th January, 2021 in IA No. 1991 of 2020 in CP(IB) No. 2556/MB/2019 and to declare all the proceedings carried out in furtherance of the impugned order as null and void etc.

9. The Adjudicating Authority while passing the impugned order dated 07th January, 2021 has observed at para 18 to 23 as depicted below:

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 Hon'ble Supreme Court in Anuj Jain'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 Jain'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:

• In the light of aforesaid findings, the Application is dismissed."

10. The Ld. Counsel for the Respondents have submitted that the Appeal is infructuous in view of the Liquidation order dated 16th April, 2021 passed by the Adjudicating Authority in IA No. 59/2021 in CP(IB) No. 2556/MB/2019. It was submitted by the Ld. Counsel for the Respondents that the Liquidation order is not under challenge and continues to remain in effect. It was further submitted by the Ld. Counsel for the Respondent that once the CD liquidation order continues to be in effect, the present appeal is infructuous and that the questions and issues raised in the appeal have presently become entirely academic and is of no legal consequence and no useful purpose will be served in the adjudication of this appeal. The Respondent has also submitted that the Liquidator is a different Insolvency Professional and not the Respondent No.1 as

appearing in the appeal. With the passing of the Liquidation order, the RP is no longer with the CD and hence, the RP is become *functus officio.* The other Insolvency Professional Mr. Arihant Nenawati, has become the Liquidator of the CD. They went on to submit that in accordance with the Regulation 12 of the IBBI (liquidation process) Regulation, the Liquidator has issued a public announcement dated 27.04.2021 calling for claims from stakeholder of the CD within 22nd May, 2021. However, as learnt by the Appellant that the Appellant has not filed its proof of claim before the Liquidator. Hence, present appeal is infructuous on the face of it. As far as the issue on merits are concerned, that the nature of claim has made by the Appellant vide its proof of claims submitted on 03.03.2020 cannot be categorized in any way as financial debt under Section 5(8) of the Code. The amount entered into through MOU was subsequently mentioned for supply against the provisions of goods and not is a Financial debt per se. They categorically stated that in MOU, it is an advanced payment towards further supply of gold coins and jewelry and the same is to supply after January, 2019. Hence, the disbursement of amount was not against the consideration of time value of money as required under Section 5(8) of the Code and was at best and advance payment for supply of goods and hence, it is an operational debt as per section 5(21) of the Code. They have also

cited the Judgment of Hon'ble Apex Court – Swiss Ribbons (P) Ltd. Vs. Union of India, (2019) 4 SCC 17, which held as follows:

> *"42. A perusal of the definition of ―financial creditor‖ and ―financial debt‖ makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an ―operational debt‖ would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.*
>
> *….51. According to us, it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United*

Kingdom and in this country. Apart from the above, the nature of loan agreements with financial creditors is different from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business.

Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately.

Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable.

51.Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously

an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."

11. It was also submitted by the Ld. Counsel for the Respondents that Section 5(8) of the Code does not qualify financial debt resulting from conversion of operational debt into a financial debt at a later date and that too has been done within a very short period of commencement of CIRP process. It was also stated that the loan agreement dated 15.04.2019 between the Appellant and the CD allows for any conversion of the purportedly disbursement amount to financial debt from any other category of debt under the Code, the same is void for contravening the provisions of the Code. In this regard, it is submitted that in light of the overriding provision in Section 238 of the Code and the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta, 2021 SCC Online SC 194, para 87, it is no longer res integra that provisions of the Code can override a bilateral commercial contract with the CD, such as the Loan agreement. It is also stated that the terms of the Loan Agreement that there was no certain schedule for repayment of the purported loan amount. Clause 3, 4 & 5 of the loan agreement:

"3. Interest and Due Date

3.1 – The said loan shall carry an interest @10% p.a. and any reset in the rate of interest shall be effective from the

subsequent quarter upon mutual agreement of the lender and the borrower.

3.2. - The due date for payment of interest shall be within seven days from the close of Financial year on March 31, every year. The final interest against the loan shall be payable on the date of maturity of the loan.

4.Tenure of loan

The loan shall be for a period of 5 years. The repayment period for the loan shall be commencing from 1.04.2019 and first installment of interest shall be payable on 31.03.2020.

5.Repayment

The entire amount of said loan is repayable in the fifth year, however, the repayment can be made earlier by the borrower. The borrower shall be entitled to prepay the loan any time to the Lender without any prepayment charges with prior notice of 15 days in advance."

The above terms of the purported Loan Agreement clearly shows that only the schedule for payment of installments of the interest amount was agreed, and that the Loan Agreement did not provide for a clear repayment schedule of

the purported principal amount. There was no specification of the installment amount. Further, the Loan Agreement also did not provide for the consequences of any default on the part of the CD.

12. It is also stated by the Ld Counsel for the Respondents that the Loan Agreement was a sham and collusive document to give fraudulent preference to the Appellant:

a. No legal remedy was undertaken by the Appellant to recover its operational debt dues or ask for performance of the MOU, despite such remedy being available in the form of arbitration. This goes against common business sense, and the only plausible reason for this was that the Appellant was aware that the CD was about to go into insolvency, and both parties colluded to improve the position of the Appellant in anticipation of insolvency;

b. An extremely long period of 5 years was given for repayment, with the principal of purported interest amount. The loan agreement itself was self-contradictory, in as much as clause 5, which permitted repayment of entire amount in 5th year was contrary to clauses 3.2 and 4 of the Loan Agreement.

13. It is also submitted by the Respondent that the Appellant has mischievously suppressed the email dated 06.05.2020, by which the RP declined to categorize the Appellant as a Financial Creditor. It is submitted that the email dated 06.05.2020 makes a clear reference to the decision of the Hon'ble Supreme Court in Anuj jain, IRP Vs. Axis Bank Ltd, (2020) 8 SCC 401. The said judgment, besides clarifying the position of law on what constitutes financial debt under Section 5(8) of the Code also lays down the criteria for what constitutes by interpreting section 43 of the Act. The Hon'ble Supreme Court held as under:

> *"20.5 - At this juncture, we may usefully refer to paragraph 177 of UNCITRAL Legislative Guide on Insolvency Law, as referred to and relied upon by learned counsel for the respondent as also paragraphs 178 and 179 thereof, to indicate the basic theory and principles governing the provisions under consideration. In the said Guide, while dealing with the topic of treatment of assets on commencement of insolvency proceedings, it is stated broadly on the theory of avoidance of preferential transactions as follows:*
>
> *"(c) Preferential transactions*
>
> *(i) Criteria*

177. Preferential transactions may be subject to avoidance where:

(a) the transaction took place within the specified suspect period;

(b) the transaction involved a transfer to a creditor on account of a pre-existing debt; and (c) as a result of the transaction, the creditor received a larger percentage of its claim from the debtor's assets than other creditors of the same rank or class (in other words, a preference). Many insolvency laws also require that the debtor was insolvent or close to insolvent when the transaction took place and some further require that the debtor have an intention to create a preference. The rationale for including these types of transaction within the scope of avoidance provisions is that, when they occur very close to the commencement of proceedings, a state of insolvency is likely to exist and they breach the key objective of equitable treatment of similarly situated creditors by giving one member of a class more than they would otherwise legally be entitled to receive.

14. It is also stated by the Ld Counsel for the Respondent that the letter dated 06.05.2020 made a clear reference to the purported loan transaction being vitiated for giving a preference to the Appellant, in terms of the judgment of the Hon'ble Supreme Court in Ajun jain (supra). Accordingly, the Appellant could not be treated as 'Financial Creditor'. The contention of the Appellant that the Adjudicating Authority could not suo motu hold the transaction to be preferential because this was not one of the reasons given by the RP/Respondent No.1 is clearly erroneous and devoid of merit. It is to be noted show cause notice was issued by the Department of Revenue Intelligence under Section 124 of the Custom Act, 1962 dated 21.11.2019 (ref no. F. No.DRI/MZU/D/INT95/2019/7687) to the CD and several other persons. Subsequently, based on the said DRI show cause notice, an order dated 04.02.2021 was also issued by the Joint Commissioner, Customs, Ahmedabad in File No. FNo.VII/10-94/RRPL/O&A/2019-20, by way of which orders of confiscation of seized articles and penalty have been imposed inter alia on the CD. The CD was a 'front company' run by one Mr. Manoj Kumar Babulal Punamiya to obtain duty free gold/silver under the Advance Authorization Scheme, pursuant to authorizations granted in favour of the CD. The suspended directors of the CD were recruited by Mr. Punamiya and

were working on the directions of Mr. Punamiya to import duty-free gold bars and unlawfully divert the same to domestic market. On May 2019 the office premises of the CD were subjected to raids by the DRI. Search and seizure was conducted by the DRI at 14 locations related to the CD and no stock of Gold Bullion Bars or Silver bars were found in the locations. It is also stated by the Respondent that several irregularities in the financial statements of the CD over three financial years since 2016, including drastic increase in creditors and receivables, while sales level was mostly stagnant for the CD. The CD has also found that a significant volume of the CD's stock in gold bars had been sold off to a few number of entities immediately prior to the raid conducted by the DRI (i.e. 01.05.2019 to 20.05.2019). The CD has had a history of indulging in 'bogus donations' in previous years, as had been confessed by an erstwhile director of the CD during the course of proceedings before the Assistant Commissioner of Income Tax, Circle – 5(3)(2), Mumbai, vide order dated 23.12.2016.

15. We have carefully gone through the submissions made by the Ld counsel for the parties and the documents available on records and laid down provisions of the I & B Code, 2016 and we are having the following observations: -

a. It is undisputed fact that money has been received by the 'Corporate Debtor' in different tranches. The object of all these payments are to meet the requirement of 'Memorandum of Understanding' *(appearing at page 67 of the appeal paper book)* to consider it as advance payment towards future supply of gold coin/Jewelry against the estimated quantity as indicated by the buyer to take place after January, 2019.

b. It is also very much clear that at this time the advance payment was not attracting any interest.

c. It is also not in dispute that at the time of 'origination of transactions' from April 2018 to February, 2019, it was in the nature of purely of operational debt and meeting all the criteria of operational debt as enunciated in Section 5(21) of the Act. For brevity and clarity, the same is depicted below:

> *"Section 5 (21) – "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the 5 [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"*

d. The 'Resolution Professional has also not disputed the receipt of the amount received from the Appellant. What is the grey area that converting the operational debt into financial debt resulting from inability of the Corporate Debtor/Respondent to supply the gold as requested by the Appellant on 04th February, 2019 and in the month of March, 2019 the Corporate debtor has requested for getting the operational debt/advance payment converted into loan, it was accepted by the appellant in March, 2019 and the CIRP initiated on 13th November, 2019. The CIRP process was started on the Petition of Raksha Bullion, Mumbai against the CD by the Adjudicating Authority on the ground that CD committed a default of Rs. 4.90 Crore under Section 9 of the Code and that CD was having regular business for buying and selling gold bar. The case of the present appellant is that they have paid the advance against the MOU entered into in March, 2017 and advanced payment commenced from 01.04.2018 and ended on 15.02.2019.

e. During the submission of the Ld counsels for both the parties that none of them stated that the Appellant and the CD are related party. If they are not related party, then lookout period is a period of one year. If that be the case that in November, 2019 CIRP commenced, so the payment released from 01.04.2018 to

30.06.2018, in any way will not get covered under Section 43 of the Code and hence as per details furnished at page 121 of the Appeal paper book out of 39.95 crore two payments will only get covered even remotely is the payment of 13.02.2019 i.e. Rs. 2.5 Crore and 15.02.2019 i.e. 2.04 crore only can be treated as preferential payment and not the balance payment out of 39.95 crore. For brevity and clarity, the provisions of Section 43 & 44 of the Code are reproduced below:

> ***"Section 43: Preferential transactions and relevant time***
>
> *43. (1) Where the liquidator or the resolution professional, as the case may be, is of the opinion 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), he shall apply to the Adjudicating Authority for avoidance of preferential transactions 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, 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.

(3) For the purposes of sub-section (2), a preference shall not include the following transfer —

(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 that—

(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.—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, 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."

Section 44: Orders in case of preferential transactions.

"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 not—

(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.—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,—

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

(ii) (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.—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."

It is abundantly clear from the above provision of the Code that transfer made in the ordinary course of business or financial affairs of the Corporate Debtor shall not be covered under preferential transaction. Hence, this issue goes in favour of the Appellant.

f. While hearing the Ld counsels for both the parties that they have cited the catena of the Judgments to supplement their stands and in some of the judgments, both have cited the same judgment. However, for brevity and clarity some of the judgments are analyzed below:

- Swiss Ribbons (p) Ltd Vs. Union of India (2019) 4 SCC 17

  It is true that that para 37 to 51 of the above judgment held that Financial creditors are from the very beginning involved

with the assessment of viability of CD and engaged in restructuring of loan as well as reorganization of CD business when there is a financial stress. While Operational creditors do not and cannot do.

- Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India (2019 8 SCC 416.

  This is not applicable to the present appeal as it relates to Real Estate developers where the stand of home buyers/allottes are on a different footing.

- Phoenix A.R.C Vs. Spade Financial Services, (2021) 3 SCC 475

  This is also not applicable to the present case as it relates to Financial creditors that are the related party.

- Manish Trivedi Vs. State of Rajasthan, (2014) 14 SCC 420

  This case relates to Prevention of Corruption Act, 1988, the facts of these two cases are totally different. Hence, it can not also be applied to the present case.

- Voltas Ltd Vs. Union of India (1995) Supp (2) SCC 498

  This case is also related to MRTP Act and the facts of two cases are totally different

- Grindlays Bank Ltd Vs. Central Govt. Industrial Tribunal, 1980 Supp SCC 420.

  This case is related to labour laws and does not seem to have relationship with the facts of the present case. Hence, it cannot be considered.

g. Similarly, the Appellant has also cited the judgement (appearing at page 27 of the appeal paper book) is given below:

- Pragyag Polytech Pvt. Ltd. Vs. Shivalik Enterprises Pvt. Ltd., IB 312/(ND)/2019, NCLT, New Delhi Bench.

This case is also not applicable in the present appeal.

h. Now let us consider the case – Anuj Jain, IRP Vs. Axis Bank Ltd., (2020) 8 SCC 401;

This judgment has been cited by both the parties and the Adjudicating Authority. So, it is prudent to deal with this case.

> ***"Para 28.6.1****- Thus, the enquiry now boils down to the question as to whether the impugned transfers were made in the ordinary course of business or financial affairs of the corporate debtor JIL. It remains trite that an activity could be regarded as 'business' if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive. As regards the meaning*

and essence of the expression 'ordinary course of business', reference made by the appellants to the decision of the High Court of Australia in Downs Distributing Co (supra), could be usefully recounted as under:-

"As was pointed out in Burns v. McFarlane the issues in sub-s. 2(b) of s. 95 of the Bankruptcy Act 1924-1933 are "(1) good faith; (2) valuable consideration; and (3) ordinary course of business." This last expression it was said "does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor." It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions

in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation." (emphasis supplied) 25.6.2. Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of 'the undistinguished common flow of business done'; and is not arising out of 'any special or particular situation'"

28.6.2 *- Taking up the transactions in question, we are clearly of the view that even when furnishing a security may be one of normal business practices, it would become a part of 'ordinary course of business' of a particular corporate entity only if it falls in place as part of 'the undistinguished common flow of business done'; and is not arising out of 'any special or particular situation', as rightly expressed in Downs Distributing Co (supra).*

Though we may assume 43 vide State of Andhra Pradesh v. H. Abdul Bakshi and Bros.: 1964 STC 644 (at p. 647). that the transactions in question were entered in the ordinary course of business of bankers and financial institutions like the present respondents but on the given set of facts, we have not an iota of doubt that the impugned transactions do not fall within the ordinary course of business of the corporate debtor JIL. As noticed, the corporate debtor has been promoted as a special purpose vehicle by JAL for construction and operation of Yamuna Expressway and for development of the parcels of land along with the expressway for residential, commercial and other use. It is difficult to even surmise that the business of JIL, of ensuring execution of the works assigned to its holding company and for execution of housing/building projects, in its ordinary course, had inflated itself to the extent of routinely mortgaging its assets and/or inventories to secure the debts of its holding company. It had also not been the ordinary course of financial affairs of JIL that it would create encumbrances over its properties to secure the debts of its holding company. In other words,

we are clearly of the view that the ordinary course of business or financial affairs of the corporate debtor JIL cannot be taken to be that of providing mortgages to secure the loans and facilities obtained by its holding company; and that too at the cost of its own financial health. As noticed, JIL was already reeling under debts with its accounts with some of the lenders having been declared NPA; and it was also under heavy pressure to honour its commitment to the home buyers. In the given circumstances, we have no hesitation in concluding that the transfers in questions were not made in ordinary course of business or financial affairs of the corporate debtor JIL."

The above para clearly reflects that it must be identified first whether it is ordinary course of business or otherwise.

i. Now in the present case, it is very much clear that the MOU which was entered into long back in the year 2017 was meant for supply of goods in the form of gold coins/gold ornaments and order of initiation of CIRP in Raksha Bullion, Mumbai reflects that the CD was in regular business of buying and selling gold bar. So, the MOU apparently does

not look under the grey area when it is also not proved that they are the related party. If they are not related party, then naturally the transactions falling within a period of one year can only be covered under even in the best scenario as preferential transactions. So, the entire amount cannot be put under preferential transaction.

j. The Adjudicating Authority in its impugned order has exceeded its jurisdiction while recording the finding to the effect that the Appellant herein is a related party which is beyond scope of the petition filed in the Tribunal. The Resolution Professional has not filed any application for the preferential transaction as required under Section 43(1) of the Code. Hence, apparently while going through the petition and hearing of Ld. Counsels for both the parties, it is very much clear that the Adjudicating Authority on its own has recorded it a related party which is beyond the provisions contend in the Code either explicitly or implicitly.

k. Reference may be invited to the Hon'ble Apex Court Judgment in a Central Excise matter of Godrej Industries Limited and Anr. Vs. Commissioner of Central Excise Mumbai and Anr. (2008) 17 SCC 471 held at para3 & 5

"Para 3- The Tribunal in its impugned order has exceeded its jurisdiction by recorded finding to the effect that Godrej

Soap Ltd is a related person vis a vis Procter & Gamble Godrej Ltd which is beyond the scope of the show-cause notice. We ourselves have gone through the show cause notice and we are satisfied that the finding recorded by the Tribunal insofar as it relates to a related person is beyond the scope of show cause notice and therefore, the same cannot be sustained and is accordingly set aside.

Para 5-In view of the same, the order of the Tribunal on other issues are also set aside and the Tribunal is directed to decide afresh on three issues, in accordance with law, namely, (a) advertisement charges incurred by PGG; (b) amounts paid under the non-competition agreement; and (c) amounts paid by PGG to Godrej & Boyce for the trademarks can be loaded on to the assessable value."

l. In the case of Reserve Bank of India Vs. Jindal Steel and Power Limited 2021 SCC Online DEL 1356 the Hon'ble Delhi High Court has referred the Learned Single Judge order in case of Mahender Singh Gill Vs. Chief Election Commissioner; (1978) 1 SCC 405 that:

"8. When a statutory functionary makes an order based on certain grounds, its validity must be judged

by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out…"

It reflects that the Resolution Professional, a statutory functionary, has not filed an application for initiation of proceedings under Section 43 of the Code in respect of preferential transactions and the Adjudicating Authority has passed the order, then it is supplementing it by fresh reason in through affidavit or otherwise. This is also not acceptable in the case of the Code.

m. In these facts and circumstances of the case as observed above let the 'Adjudicating Authority' again go back into the details of these transactions which can be done even in the liquidation proceedings which has commenced from April 2021 and yet to be completed to ascertain and finally determine the voracity whether it is still a preferential transaction or not.

n. With these observations, it is prudent to set aside the impugned order dated 07.01.2021 in I.A No. 991 of 2020 in CP(IB) No. 2556/MB/2019 and remand back the matter to the 'Adjudicating Authority' for

reconsidering the case as a fresh case without getting influenced by any comments made in this Judgment and deciding the matter on the merits in accordance with law.

Pending application, if any, stands disposed of.

Interim order, if any, passed by this Tribunal stands disposed of.

No order as to costs.

[**Justice M.Venugopal]**
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

***09th May*, 2022**
New Delhi

Raushan.K