

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 1817 of 2024

**[Arising out of the Order dated June 05, 2024, passed by the
'Adjudicating Authority' (National Company Law Tribunal, New
Delhi) in I.A. No. 5166/2023 in CP (IB)/223/ND/2020]**

IN THE MATTER OF:

Alok Tripathi, Suspended Director

1F 903 Raheja Vedanta Sec. 108
Dwarka Express Way Gurugram – 122008
aloktripathi@hotmail.com

...Appellant

Versus

Mohit K Gupta, Liquidator

Benchmark Supply Chain Solutions Pvt. Ltd.
15 (Basement) Paschim Vihar Extension
New Delhi – 110063
Mohitgupta1112@yahoo.co.in

...Respondent

Present:

For Appellant : Mr. P. K. Sachdeva, Advocate

For Respondent : Mr. Arvind Nayar, Sr. Advocate with Mr. Rajiv Malik,
Advocate

ORDER
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

The present Appeal is filed by the Appellant, the Suspended Director, under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("IBC") against the Order dated 05.06.2024 passed by the Hon'ble National Company Law Tribunal (Adjudicating Authority), New Delhi, Bench in I.A. No. 5166/2023 in CP (IB) /223/2020 whereby the said I.A. was allowed and the Appellant was directed to deposit a sum of Rs. 3,67,900/- (Rupees Three lakhs, sixty-seven thousand and nine hundred only).

2. The Corporate Debtor was incorporated on 04.04.2013, with a paid-up capital of Rs 66 lakhs only. It is claimed that the Corporate Debtor was doing good business but it faced a financial crunch in 2019 and started looking for financial assistance from Banks and NBFCs. During this process, it is claimed that the Appellant/Director of the Corporate Debtor met with one Mr. Vijay Thapar, who assured the Director to get him a big loan and took hefty amounts of money as service charges. However, he turned out to be a con and never arranged for the assured loan for the Corporate Debtor. After paying the money to him, the finances of the Company went into doll-drum and resulted into the collapse of the Company.

3. Due to the inability of the Corporate Debtor to pay its Creditors, they approached the Hon'ble Adjudicating Authority, and the Corporate Debtor was placed under CIRP on 17.05.2022 and subsequently under liquidation on 12.10.2022.

4. The Liquidator filed I.A. No. 5166 of 2023 under Section 43 of the IBC based upon the Transaction Audit Report.

5. It is contended by the Appellant that the amount under contention in the Transaction Audit Report was withdrawn by the Appellant against the amount payable by the Corporate Debtor to him and the amount was utilised for the benefit of the Corporate Debtor to keep it running and protected from the rigors of CIRP.

6. Appellant contends that the Liquidator had failed to form his independent opinion about the existence of the preferential transaction. Appellant contends that as per the provisions of Section 43, the Application by the Resolution Professional or the Liquidator, as the case may be, is to be filed after forming his opinion in this regard. The Adjudicating Authority failed to consider the fact that the Applicant has not submitted his opinion in the Application and was supposed to submit his opinion and grounds thereof as per the provisions of Section 43 of the IBC.

7. It is claimed that the Impugned Order is liable to be set aside as the Adjudicating Authority has passed an Order, without due Application of mind and cogent reasons in respect of its conclusion/findings in the Impugned Order. It has therefore sought for the following relief(s):

- a) Allow the present Appeal;
- b) Set aside the Impugned Order dated 05.06.2024 passed by the Hon'ble Adjudicating Authority;
- c) Pass any other order/direction in the facts and circumstances of the present Appeal and in the interest of the justice.

Appraisal

8. Heard Learned Counsel for both the parties and perused documents on record.

9. There is a delay in re-filing of 50 days beyond the statutory period of 7 days in the Appeal explanation given in I.A. No. 6635 of 2024 at paragraph 4. Cause shown is found sufficient and re-filing delay is condoned.

10. In this case, the Corporate Debtor was admitted into CIRP on 17.05.2022 and, subsequently, into liquidation on 12.10.2022.

11. In order to ascertain the details of transactions conducted on the said Corporate Debtor's account in the period preceding the commencement date of Liquidation and for further scrutinizing the documents of the Corporate Debtor relating to transactions which were preferential, defrauding and undervalued during the "look-back period" of 5 years prior to commencement of the CIRP, the Liquidator appointed M/s KRA & Co., to conduct the Financial Transaction Audit on 03rd February, 2023.

12. M/s KRA & CO. submitted its Transaction Audit Report to Liquidator on 30.05.2023, wherein it pointed out that there were some financial irregularities in the Financial management of the Corporate Debtor in terms fraudulent transaction without any documentation or reasons by and on behalf of the Corporate Debtor and also some transactions (preferential transaction) which violated the provisions of the Code.

13. The Transaction Audit Report had given categorical findings with respect to preferential transactions to the tune of about Rs. 3,67,900/- (Rupees Three lakhs, sixty-seven thousand and nine hundred only) in favour of the Appellant/ Mr Alok Tripathi, reportedly against the outstanding

secured loan. As the payment has been made in preference to the other creditor of the CD, this is a preferential transaction under Section 43. This transaction was conducted within the look-back period and unjustly enriched certain creditors. On the basis of the Transaction Audit Report, the Liquidator/Respondent filed an Application under Section 43 of the IBC, 2016 before the NCLT on 19.07.2023. Therefore, it was prayed that the amount of Rs. 3,67,900/- (Rupees Three lakhs, sixty-seven thousand and nine hundred only) received by the unsecured creditor of the Corporate Debtor be vested in the Corporate Debtor for the reason of such payment being preferential in nature and in contravention of Section 43 of IBC.

14. The Adjudicating Authority also gave sufficient opportunity to the Appellant/ Mr Alok Tripathi to file a Reply against the Transaction Audit Report. However, the Reply was not filed by the Appellant/ Mr Alok Tripathi. Thereafter, the Adjudicating Authority forfeited their right to file a Reply on 02.05.2024. Further, the Appellant filed another I.A. for recalling of Order dated 02.05.24. On 05.06.2024, before the Adjudicating Authority, Appellant also argued that they may be given adjournment and asked for listing of their Application for recall of the Order dated 02.05.2024. On the same date, the Appellant/ Mr Alok Tripathi simultaneously argued that they did not have funds available to pay.

15. Based on this facts of the case and in such situation the Hon'ble NCLT decided for reversal of preferential transactions on 05.06.2024, as per the following orders:

“In view of the aforementioned, particularly with reference to the Transaction Audit Report, we allow the present application and direct Mr. Alok Tripathi to pay back Rs. 3,67,900/- to the Liquidation amount of the Corporate Debtor.

It goes without saying that while distributing the assets/funds/properties of the Corporate Debtor, the Liquidator shall take into account the claim of aforementioned amount of Mr. Alok Tripathi also and would distribute the amount due to him against the aforementioned amount, as per waterfall mechanism, viz. Section 53 of IBC, 2016”.

16. Section 43 (2) (a) of the Code clearly provides as follows:

“(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.”

17. From the records we note that the Liquidator had got a Transaction Audit Report made, which had various findings, and in one such finding it was noted that Rs. 3,67,900/- (Rupees Three lakhs, sixty-seven thousand and nine hundred only) had been paid to the Suspended Director i.e. Alok

Tripathi and was found to be a preferential transaction. The Adjudicating Authority has rightly noted that the Appellant/ Mr Alok Tripathi was put in a beneficial position when aforesaid payment was made against his unsecured loan as in terms of the provisions of Section 53 of the Code, the secured Creditors and workmen get precedence over unsecured Creditors against the payment of dues.

18. It is claimed by the Appellant that, as per Section 43 of the Code, the Liquidator should have found an opinion based on the Transaction Audit Report. He relies upon the word ‘opinion’ in Section 43, as reproduced below:

“43. Preferential transactions and relevant time. –

(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.”

19. It is to be noted that even if any amount was payable to the Appellant/ Mr Alok Tripathi qua its outstanding unsecured loan could have staked his claim before the Liquidator and could have got his share in terms of the provisions of Section 53 of the Code. It is worth noting that the Adjudicating Authority noted that the Liquidator shall look into the claim of the amount of the Appellant/ Mr Alok Tripathi while distributing the assets/funds/properties of the Corporate Debtor as per the waterfall mechanism under Section 53 of the Code.

Conclusion and Order

20. When the Liquidator has got a Transaction Audit Report done and basis that has come to a conclusion that this is a preferential transaction, after which he filed an I.A. before the Adjudicating Authority, in such conditions, we cannot agree with the submissions of the Appellant that the Liquidator has not formed an opinion. We reject the submissions of the Appellant accordingly. The Appeal is dismissed. No orders as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**New Delhi.
08.11.2024.**
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