

Anish Niranjana Nanavaty @APPELLANT @Independent TV Limited & Others

Court: National Company Law Tribunal, Mumbai Bench

Date of Decision: Jan. 21, 2025

Acts Referred: Insolvency and Bankruptcy Code 2016 "Section 43, 44, 53

Hon'ble Judges: Prabhat Kumar, Member (T); V.G. Bisht, Member (J)

Bench: Division Bench

Advocate: Ansh Kumar, Shankari Mishra, Hafeezur Rahman

Final Decision: Dismissed

Judgement

1. This Application IA 1272/2020 was filed by the Mr. Anish Niranjana Nanavaty, the Resolution Professional (Applicant) against Independent

TV Limited (Formerly known as Reliance Big TV Limited) & Reliance Webstore Limited in the matter of M/s Reliance Communications Limited

(Corporate Debtor) under Section 43 & 44 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs:

a) Order and declare that the arrangement entered into between the Corporate Debtor and the Respondents through the Impugned

Letter dated 30th June, 2017 and acts undertaken in furtherance of the Impugned Letter, constitute a preferential transaction under

Section 43 of the Code;

b) Order and declare the arrangement entered into between Corporate Debtor and the Respondents by way of the Impugned Letter

dated 30th June, 2017 and acts undertaken in furtherance of the Impugned Letter, as being null and void and set aside the same;

c) Any other relief, including under Section 44 of the Code, that this Tribunal may deem fit.

2. Prior to the commencement of the corporate insolvency resolution process ("CIRP"), the Corporate Debtor adjusted the amount which was initially

receivable by it from Respondent No.1/RBTL to settle the dues of Respondent No.2/ RWL to the extent of Rs.112 crores ("Receivables") by way of

the Impugned Letter dated 30th June, 2017 ("Impugned Letter"), which constitutes a preferential transaction under the Code. The present application

seeks to set aside such adjustment made by way of the Impugned Letter between the Corporate Debtor and the Respondents.

2.1. By an order dated 15th May, 2018 ("Admission Order"), this Tribunal had admitted a company petition filed by an operational creditor and

had commenced the CIRP of the corporate debtor. By an Order dated May, 2018, inter alia, the Hon'ble NCLAT stayed the Admission

Order and the said stay was vacated vide Order dated 30th April, 2019.

2.2. Subsequently, by an order dated 21 June, 2019 of this Tribunal, the Applicant has been confirmed as the resolution professional for the

Corporate Debtor.

2.3. Pursuant to the aforesaid, the Applicant has taken over the management and business affairs of the Corporate Debtor, including its other

functions as a resolution professional under the Code. The Applicant had appointed auditors, Grant Thornton India LLP ("Auditors"), in order

to ascertain if the Corporate Debtor had entered into transactions which could be classified as, inter alia, preferential, undervalued,

extortionate and fraudulent for the period 15th May, 2016 to 15th May, 2018 ("Review Period"). The Auditors by way of their report dated

19th December, 2019 which forms a part of the final set of report dated 10th January, 2020 ("Auditor's Report"), have identified that the

adjustment of the amount which was initially receivable by the Corporate Debtor from Respondent No.1/RBTL to settle the dues of

Respondent No.2 RWL to the extent of Rs. 112 crores under the Impugned Letter would constitute a preferential transaction under the Code.

2.4. The brief background in relation to the above is summarised as below:

2.4.1. On 30th June, 2017, the Corporate Debtor, the Respondent No.1/ RBTL and Respondent No.2 / RWL entered into an

arrangement by way of the Impugned Letter, whereby the amount which was initially receivable by the Corporate Debtor from

Respondent No.1/RBTL was adjusted to settle the dues of Respondent No.2 /RWL to the extent of Rs. 112 crores. Further, in the

books of accounts of the Corporate Debtor, the Receivables were adjusted against the existing payable balance of Respondent No.2 /

RWL to the extent of Rs.112 crores.

2.4.2. By virtue of the Impugned Letter, the Corporate Debtor has, in effect, made payments to Respondent No.2/RWL of Rs. 112

crores by adjusting the amount which was initially receivable by it from Respondent No.1/RBTL to settle the dues of Respondent

No.2 / RWL to the extent of Rs. 112 crores.

2.5. The adjustment of the Receivables in the aforesaid manner amounts to a preferential treatment by the Corporate Debtor as the said

adjustment has the effect of putting Respondent No.2/RWL, in a beneficial position vis-à-vis the other creditors of the Corporate Debtor by

adjusting the amount receivable by it from Respondent No.1/ RBTL to settle the dues of Respondent No.2/RWL.

2.6. Thus, it puts Respondent No.2/RWL in a beneficial position than it would have been in the event of a distribution of assets being made

under liquidation of the Corporate Debtor in accordance with Section 53 of the Code, as set out below:-

2.6.1. The adjustment of the Receivables amounting to Rs. 112 crores falls during a period of 2 years preceding the insolvency

commencement date (in the present case 15th May, 2018) as required under Section 43(4) of the Code. As stated above, the

Receivables were adjusted on 28th May, 2017.

2.6.2. The Corporate Debtor was in financial distress at the time when the Receivables were adjusted to settle the dues of

Respondent No.2/RWL to the extent of Rs. 112 crores and the Corporate Debtor had defaulted in payment of other various financial

creditors.

2.7. Thus, the adjustment of the Receivables in the aforesaid manner by the Corporate Debtor through the Impugned Letter is a preferential

transaction.

2.8. Receivables not adjusted in the ordinary course of business

2.8.1. The adjustment of the Receivables was not in the ordinary course of business of the Corporate Debtor considering (i) that the

Corporate Debtor was entitled to receive Rs. 112 crores from Respondent No.1/RBTL and (ii) non-payment to other financial

creditors as such, the same ought to be declared as a preferential transaction, and the Impugned Letter facilitating the transaction

ought to be set aside. Further, it is pertinent to highlight that the adjustment of the receivables has led to Respondent No.2 / RWL

being in a beneficial position compared to the other secured creditors / lenders, if the distribution was made in liquidation of the

Corporate Debtor.

2.8.2. Moreover, the Auditors have also reviewed the Minutes of Meetings of the Audit Committee Meetings and the Board Meetings

for the review period, i.e. 15 May, 2016 to 14th May, 2018, however, no discussions/approvals on (1) the Impugned Letter and the

adjustment of the Receivables which were initially receivable by it from party to settle the dues of Respondent No.2/RWL, the amount payable by

Respondent No.2/R so attempted, but failed to do so to Respondent No. 1, as on the date of adjustment, i.e. 28th May, 2017.

2.8.3. The Resolution Professional/Applicant has analysed the adjustment of the Receivables and has determined that the same would

tantamount to a preferential transaction under Section 43 of the Code. Further, the adjustment of the Receivables has been analysed /

reviewed by the Auditors and they have concluded that the said adjustment is a preferential transaction under Section 43 of the Code.

More specifically, the Auditor's Report observes that the Receivables adjusted, which were initially receivable by the Corporate

Debtor were transferred to Respondent No.2/RWL and subsequently in the books of accounts of the Corporate Debtor, the

Receivables were adjusted against the existing payable balance of Respondent No.2/RWL to the extent of Rs. 112 crores.

2.9. Without prejudice, it is submitted that the absence of a mention in the minutes of meetings of the Audit Committee and Board Meetings,

of any discussion / approval of the adjustment of the Receivables, as done in the present case under the Impugned Letter, suggests that the

adjustment was not done in the ordinary course of business.

2.10. The Auditors had also sought response of the Corporate Debtor's management and had received the below mentioned response

pertaining to the adjustment of the Receivables.

In order to present a true and fair view of Receivable / payable position of ITL and RWSL in the financial statement, it was

necessary to transfer/assign the ICD receivable of ITL to RWSL with the mutual consent of all the parties concerned. Balance

of ICD in the books of ITV and RWSL is Nil as at March 31, 2018. It may be noted that both are subsidiaries of RCOM and

transactions between RCOM and its wholly owned subsidiaries are in ordinary course of business. RCOM and its subsidiaries are to be viewed as a single economic unit.

This represents balance transfer of the same party in various codes and In order to present a net Receivable / payable position, it is necessary to pass regrouping entry Between vendor account and ICD account which resulted in nil balance in

ICD account.

2.11. The aforementioned explanation/response given by the management of the Corporate Debtor did not appear to be satisfactory, hence,

the applicant has filed this application stating that the transaction constitutes a preferential transaction and the arrangement entered into

between the Corporate Debtor and the Respondents by way of the Impugned Letter ought to be set aside.

3. The Respondent No.2 filed affidavit in reply dated 17.12.2021 stating that the impugned transaction is not a preferential transaction as the same

was done during the normal course of business operation of the Company and the same can never be termed as preferential and has taken following

grounds –

a. Applicant has failed to submit any document establishing that the impugned transaction was a preferential transaction, except the extract of

the audit report.

b. In or about March 2017, it was apparent that ITVL/RBTL was going to be unable to pay its debt to the Corporate Debtor and in fact had

agreed to sell its DTH business to Pantel Ltd. for Re. 1 on 30th October 2017. The Corporate Debtor therefore viewed the said asset as a

bad debt and when Reliance Web-Store Ltd ("RWSL"), a solvent company expressed willingness to take over the bad debt, the Corporate

Debtor did so thereby reducing its exposure to RWSL and getting rid of a bad debt and/or a potential bad debt. In fact ITVL/RBTL is

presently in CIRP.

c. There is no "transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor" nor is

there any question 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". All that has happened is that a solvent company has taken over the liability-of-an insolvent company. Accordingly, the

transfer does not put the creditor, RWSL in a more beneficial position than it would be in a distribution, and the debtor is in CIRP and the

assignee/creditor RWSL will be paid in the distribution and the assignment is beneficial to the creditors of the Corporate Debtor.

d. The Respondent No. 2 has carried out this transaction in accordance with the provisions of the Companies Act, 2013.

e. The present Application is not maintainable for want of concealing the relevant information as complete report of the Transactions Auditor

has not been annexed to the Application.

f. Independent TV Limited ("ITVL" erstwhile Reliance Big TV Limited) and RWSL were subsidiaries of the Corporate transactions and both

the Companies be treated as a single economic unit. The impugned transaction is reflecting accurate and fair position of the net

receivable/payable position of the subsidiaries in the books of the Corporate Debtor.

4. Respondent No. 1 has filed the Reply stating that –

a. Respondent No.1 is under liquidation – "No recovery can be initiated;

b. The Applicant has only attached selective portions of the Auditor's Report in its Application, which fail to provide a clear explanation of

how the alleged transaction or the amount claimed against Independent TV Ltd. was determined by the Applicant's auditor;

c. The Applicant has failed to include any member of Suspended Board of the Corporate Debtor as necessary and proper parties to the

present Application. Consequently, the Application is liable to be dismissed for non-joinder of necessary and proper parties;

d. the alleged transactions is done under ordinary course of business;

e. the Applicant has failed to demonstrate or plead in the Application how the alleged transactions have placed any party in a more favourable

position than it would have been in the event of asset distribution during the liquidation of the Corporate Debtor, as per Section 53 of the Code.

f. The pleadings do not demonstrate how the ingredients of Section 43 are met.

5. We have heard the Counsel and perused the material available on record. 5.1. Section 43 of the Code deals with preferential transactions and

relevant time. Section 43 of the Code is as follows:

Section 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 subsection (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 transfers

(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.

5.2. the Hon'ble Supreme Court in case of Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd., (2020) 8 SCC 401,

enumerated some of the essential ingredients of the preferential transaction under the Code. Hon'ble Supreme Court held that the following

question must be considered to rule that the transaction falls under Section 43 of the Code:

1. Is the transfer for the benefit of a creditor, surety, or guarantor?

2. Is the transfer related to an antecedent financial debt, operational debt, or other liabilities owed by the corporate debtor?

3. Does the transfer place the creditor, surety, or guarantor in a more beneficial position than they would be if the assets were

distributed according to Section 53?

4. If the transfer benefits a related party (excluding employees), was it made within two years before the insolvency commencement

date? If the transfer benefits an unrelated party, was it made within one year before the insolvency commencement date?

5. Is the transfer excluded under subsection (3) of Section 43?

5.3. The receivables are Property, accordingly transfer of such receivables, even if by way of book entry without any direct cash out-flow

would constitute transfer of a property. The transfer of receivable, in the present case, has taken place to discharge the debt due from the

Corporate Debtor. However, Section 43 further contemplates that such transfer of property in discharge of debt should result in placing such

creditor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53. It is

pertinent to note that RBTL, Respondent No. 1, is stated to be in distress position, which ultimately led to initiation of Corporate Insolvency

resolution Process in its case on 23.8.2019 which culminated into commencement of CIRP in its case on 26.2.2020 and thereafter admission

of Respondent No. 1 in Liquidation process on 17.3.2023. In other words, the probability of realisation of amounts due from Respondent No. 1

was negligible. The impugned transaction resulted into set off of amount due to Respondent No. 2 against such unrealisable amount. Further,

Respondent No. 1 and Respondent No. 2 are subsidiaries of the Corporate Debtor, accordingly the erstwhile Management was placed in a

position to estimate the realisability of such receivables from Respondent No. 1. Accordingly, we are of considered view that if the impugned

transaction is set aside, it would result into re-statement of a receivable from Respondent No. 1, which is already in liquidation and there is no

chance of recovery. On the other hand, the debt owed to the Respondent No. 2 shall also stood re-stated thus putting them in a beneficial

position than what they are presently in even though the Resolution Plan in case of Corporate Debtor does not contemplate any payment to

the related parties, but the fate of said Resolution Plan is still uncertain and in case of Liquidation of Corporate Debtor, the claim of

Respondent No. 2 shall be competing with other unsecured creditors in Liquidation Process if such situation arises. The Applicant has made a

bald statement that transfer of receivables from Respondent No. 1 to Respondent No. 2 has put Respondent No. 2 in a beneficial position

without analysing these facts. Nonetheless, the Respondent No. 1 & 2 are wholly owned subsidiaries, and any benefit accruing to the wholly

owned subsidiary results into the enhancement of value of investments, the Corporate Debtor had on the date of such transfer. Undisputedly,

such investments form part of liquidation estate and proceeds thereof are available for distribution to its creditors. Accordingly, it can not be

said that such transfer had resulted into benefit having been passed to Respondent No. 2 to the disadvantage of other creditors of the

Corporate Debtor.

5.4. In view of above discussion, we are of considered view that the impugned transaction does not fall within the scope of Section 43 of the

Code.

6. In view of foregoing, IA 1272 of 2020 is dismissed and disposed of accordingly.

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