

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1522 of 2025

(Arising out of judgment and order dated 01.08.2025 passed by the National Company Law Tribunal, Mumbai Bench at Mumbai in I.A. No. 4648 of 2023 filed in C.P. (IB) No 748/MB/2022)

In the matter of:

1. Dharamveer Singh Magan Singh Shekhawat

Suspended Member of Board of Directors

Resident of: - 201, Shajanand Complex,

Shahibaug, Ahmedabad,

Gujarat - 380004

...Appellant No. 1

2. Harsh Upadhyay

Suspended Member of Board of Directors

Resident of: - 2-K-29, Chpsani Housing Board,

Nandanwan, Jodhpur,

Rajasthan - 342008

...Appellant No. 2

3. Sandip Joshi

Suspended Member of Board of Directors

Resident of: - 20, Kondeshwar Colony,

Sai Nagar, Amravati,

Maharashtra - 444607

...Appellant No. 3

Vs.

1. Mr. Dharmendra Dhelariya,

Resolution Professional for

M/S. KSS LTD

Having Registered Office at: Unit 101 A,

Cont'd.... /

1st Floor, Plot No. B-17,
Maurya Landmark II Andheri (West),
Mumbai

...Respondent No.1

2. Jayashree Vilas Gangurde

Suspended Member of Board of Directors
Resident of: - 7/16, S.V. Road,
Pirmal Nagar, Goregaon West,
Mumbai, Maharashtra – 400104

...Respondent No. 2

3. Monika Meena

Suspended Member of Board of Directors
Resident OF: - 10-H-25, Parijat Yojana,
Mahaveer Nagar 3, Keshopura,
Kota, Rajasthan – 324005.

...Respondent No. 3

4. Bhargav Vishalbhai Ahir

Suspended Member of Board of Directors
Resident of: - 18, Vrundavan Bungalows-1,
Opp. Shridhar Farm, Shilaj Road, Thaltej,
Ahmedabad, Gujarat – 380059.

...Respondent No. 4

Present:

For Appellant: Mr. Mohak Sharma and Ms. Pooja Singh, Advocates.

For Respondents: Ms. Honey Satpal, Mr. Akash Agarwala, Ms. Pooja Singh, Mr. Aman, Advocates for R-1.

Mr. Akash Chatterjee, Advocate for R3.

J U D G M E N T

(11th May, 2026)

INDEVAR PANDEY, MEMBER (T)

This appeal has been filed under Section 61 (1) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'Code') by **Dharamveer Singh Magan Singh Shekhawat; Harsh Upadhyay; and Sandip Joshi**, who are the suspended members of Board of Directors of the Corporate Debtor M/s KSS Ltd. and are hereinafter referred to as **Appellants**. The Appellants are aggrieved by the order dated 01.08.2025 passed by the Ld. National Company Law Tribunal, Mumbai Bench (Adjudicating Authority), in I.A. No. 4648 of 2023 filed in C.P. (IB) No 748/MB/2022. The Adjudicating Authority vide the impugned order allowed the Application filed by **Respondent No. 1/Resolution Professional**, preferred u/s 43 of the Insolvency and Bankruptcy Code 2016 ("Code") relating to the transfer of Rs.47,92,646/- to two sister concerns of Corporate Debtor viz. M/s. K Sera Sera Miniplex Ltd. & M/s. K Sera Sera Digital Cinema Limited. The impugned order directed the Appellants as well as **Jayashree Vilas Gangurd/ Respondent No.2; Monika Meena, Respondent No.3; and Bhargav Vishalbhai Ahir, Respondent No.4**, who were also suspended members of Board of Directors of CD to repay/refund Rs.47,92,646/- to the Corporate Debtor, making them jointly and severally liable for the same.

2. The Appellants assert that The Respondent No.1/Resolution Professional failed in his duties by alleging these transactions as avoidable without placing them to the test as provided under the provisions of Section 43 of the Code and follow the steps laid down by the Hon'ble Supreme Court in the matter of '*Jaypee Infratech Ltd. Interim Resolution Professional vs. Axis Bank Ltd. & Ors.*' [(2020) 8 SCC 401] commonly referred to as Anuj Jain Judgment. That neither the Respondent Resolution Professional's application nor the Impugned Order have tested the alleged preferential transactions on the ingredients and thus the Impugned Order is bad in the eyes of law.

Brief facts of the case

3. The brief facts of the case are as given below:
- i. The Appellants herein are Suspended Board of Directors of M/s. KSS Limited (CD) which was admitted into CIRP vide order dated 24.01.2023 passed by the Ld. Adjudicating Authority in CP (IB) No. 748/MB/2022 filed by M/s. Micro Capitals Pvt. Ltd.. Mr. Dharmendra Dhelariya /Respondent No. 1, was appointed as the Resolution Professional for the Corporate Debtor.
 - ii. The Respondent No. 1, appointed M/s. Arihant A. Jain & Associates as Transaction Auditor for conducting the Transaction Audit of the Corporate Debtor, with review period being 24.01.2020 to 23.01.2023 for the purpose of identifying transactions u/s 43, 45, 49, 50 & 66 of the Code and forming of opinion by Respondent No. 1 as per Section

25(2)(j) of the Code. On 03.08.2023, the Transaction Auditor submitted its Final Transaction Audit Report of the Corporate Debtor.

iii. Based on the aforementioned Transaction Audit report, Respondent No. 1 filed I.A. No. 4648 of 2023 on 10.10.2023 in CP (IB) No. 748/MB/2022 u/s 43 of the Code against the Appellants and the Respondent Nos. 2 to 4 herein, alleging that the following amounts transferred by Corporate Debtor in January 2022 as being preferential u/s 43 of the Code –

a) M/s. K Sera Sera Miniplex Ltd. (sister concern of Corporate Debtor) - Rs. 39,00,000/-

b) M/s. K Sera Sera Digital Cinema Ltd. (sister concern of Corporate Debtor) – Rs. 8,93,646/-

this amounted to a total of Rs. 47,92,646/-.

iv. Ld. Adjudicating Authority vide the Impugned Order dated 01.08.2025 allowed the subject I.A. and directed the Appellants to repay/refund the aforementioned total amount of Rs. 47,92,646/- to the Corporate Debtor. It also made the Appellants & Respondent Nos. 2 to 4 jointly and severally liable for payment of the same.

Submissions of the Appellant

4. The submission of Ld. Counsel for the appellant are as follows:

- i. That the Impugned Order is passed without appreciating proper facts and the same is arbitrary and is liable to be set aside. It is submitted that the Application was bad in law due to non-joinder of parties. It is submitted that two sister concern companies of the Corporate Debtor were not even made parties/Respondents in the subject I.A. despite the same being necessary parties for the adjudication of the subject I.A., which in itself renders the subject I.A. as being bad in law for non-joinder of necessary parties.
- ii. Ld. Counsel submits that Section 44 of the Code, 2016 stipulates the orders, which can be passed by the Adjudicating Authority in case of preferential transactions. Therefore, any order in terms of Section 44 of the Code, 2016 in an Application under Section 43 of the Code, 2016 could have been passed, only if the sister concerns were made parties to the Application under Section 43 of the Code, 2016.
- iii. Ld. Counsel submitted that the Hon'ble Supreme Court of India in '*Aliji Momonji & Co. v. Lalji Mavji & Ors.*' [(1996) 5 SCC 379] has laid down the test that whether a party is necessary or not which is two-fold i.e. (1) Where presence of a party is necessary for complete and effectual adjudication of the disputes (2) If in the absence of the said party no effective and complete adjudication of the dispute could be made and no relief could be granted then the said party is a necessary party.
- iv. It is submitted that any order by the Adjudicating Authority under Section 44 of the Code, 2016 could not have been passed in the

absence of the sister concerns of the Corporate Debtor with whom the alleged preferential transactions were carried out.

- v. Ld. Counsel further submits that the Application filed before the Ld. Adjudicating Authority as well as the Transaction Audit Report have not stated/pleaded the following anywhere despite the same being specific conditions required to be fulfilled for any transactions to be declared as preferential u/s 43 of the Code-
- a) That the aforementioned two companies were creditors of the Corporate Debtor.
 - b) That the aforementioned amounts were transferred to the aforementioned two companies on account of antecedent debt or liabilities which was owed by the Corporate Debtor to them. It is pertinent to mention that w.r.t transaction made towards M/s. K Sera Sera Digital Cinema Ltd., the Respondent No. 1 as well as the Transaction Auditor have both categorically stated that the said amount is not transferred to it against any outstanding debt owed by the Corporate Debtor to it.
 - c) With regard to the transaction with K Sera Sera Digital Cinema Limited, it is Resolution Professional's own case that he could not find any outstanding debt against which a payment of Rs. 8,92,646/- were made.
 - d) That the transfer of aforementioned amounts to the aforementioned two companies have put them in a beneficial position as creditors of the Corporate Debtor than it would have

been in the event of distribution of assets of Corporate Debtor u/s 53 of the Code.

- vi. Ld. Counsel submits that the Impugned Order dated 01.08.2025 was passed by the Ld. Adjudicating Authority without proper application of mind, without proper appreciation of facts of the case, without appreciation of position of law laid down by Hon'ble Supreme Court of India w.r.t preferential transactions in Jaypee Infratech Ltd. (supra) referred to as "Anuj Jain case", thereby erroneously allowing the Application and directing the Appellants and Respondents No. 2 to 4 to repay/refund the aforementioned total amount of Rs. 47,92,646/- to the Corporate Debtor, while making the Appellants and Respondent No. 2 to 4 jointly and several liable for the same.
- vii. Ld. Counsel further submits that the Hon'ble Supreme Court of India whilst analysing Section 43 of the Code has laid down 5 questions which have to be answered in order to arrive at the conclusion whether the transaction musters the test of Section 43 of the Code or not. That it is submitted that 5 questions need to be answered in the facts of the present case in order to rule the aforementioned transfer of amounts as being preferential in nature u/s 43 of the Code which are reproduced hereinunder:
 - a) *whether such transfer is for the benefit of a creditor or a surety or a guarantor* – It is nowhere stated or pleaded in the subject I.A. or in the Transaction Audit Report annexed therein that the aforementioned two companies were creditors or surety of

guarantor of the Corporate Debtor. Therefore, in the facts of the present case, this question is answered in the negative.

- b) *whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor* – It is nowhere stated or pleaded in the subject I.A. or in the Transaction Audit Report annexed therein that the aforementioned amounts were transferred to the aforementioned two companies on account of an antecedent debt owed by the Corporate Debtor to them. To the contrary, it is categorically submitted/pleaded in the subject I.A. as well as in the Transaction Audit Report that the amount transferred to one of the aforementioned companies, i.e. M/s. K Sera Sera Digital Cinema Ltd., was NOT transferred to it on account of any outstanding debt. Therefore, in the facts of the present case, this question is also answered in the negative.
- c) *whether such transfer has the effect of putting such creditor 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* – Considering the fact that the aforementioned two companies have not been stated to be creditors of the Corporate Debtor, the question of putting them in any beneficial position in terms of Section 53 of the Code does not arise.
- d) *if such transfer had been for the benefit of a related party (other than an employee), 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 – Admittedly, the aforementioned two companies are sister concerns of the Corporate Debtor and are therefore, related parties to the Corporate Debtor. The alleged transactions have taken place in January 2022 and accordingly, the same is within 2 years. Therefore, this question that is being answered in positive.

- e) *whether such transfer is not an excluded transaction in terms of sub-section (3) of section 43* – It is submitted that in terms of Section 43(3) as has been interpreted by the Hon'ble Supreme Court in Anuj Jain (supra) case, a transaction is excluded from being ruled as preferential if the same is being carried out in the ordinary course of business of the Corporate Debtor as well as that of the transferee companies. It is submitted that on a perusal of the Transaction Audit Report annexed with the subject I.A., it is evident that the said transactions are actually made in the ordinary course of business of the Corporate Debtor as well as of the aforementioned two transferee companies.

viii. Ld. Counsel cited certain details from the Transaction Audit Report which are reproduced below:

- a) In regard to alleged transactions totaling to Rs. 39,00,000/- made towards M/s. K Sera Sera Miniplex Ltd., the Suspended Management, had stated that the same was paid for its working capital requirements. Ld. Counsel referred to query by the

transaction Auditor regarding the transfer of Rs. 3.74 crores of Long-Term Unsecured Loan-good transferred to M/s. K Sera SeraMiniplex Ltd. during F.Y. 2021-22 and the Suspended Management had provided the ledgers w.r.t same stating that the said amount was assigned to M/s. K Sera SeraMiniplex Ltd. and is to be recovered from it subsequently. The same was accepted by the Auditor who had thereafter reiterated the list of sundry debtors therein. This establishes that such transactions were carried out in the ordinary course of business of the Corporate Debtor and of M/s. K Sera SeraMiniplex Ltd.

- b) In regard to alleged transaction of Rs. 8,92,646/- qua M/s. K Sera Sera Digital Cinema Ltd. Ld. Counsel cited that the Transaction Auditor has listed in a tabular form, the debit as well as credit transactions ranging between 03.01.2022 to 31.03.2022, thereby resulting in a debit amount which is alleged in the Subject I.A., i.e. Rs. 8,92,646. The said table illustrated demonstrates that it was done in ordinary course of business of the Corporate Debtor as well as that of M/s. K Sera Sera Digital Cinema Ltd. He also made a reference to a transaction wherein, Rs. 6.01 crores of Tirupati Infra Projects Pvt. Ltd. was transferred to M/s. K Sera Sera Digital Cinema Ltd. during F.Y. 2021-22 and the reply provided by the Suspended Management w.r.t the same was accepted as correct by the Respondent No. 1. Therefore, it is evident that such transactions were carried out in the ordinary course of business of the Corporate Debtor and of M/s. K Sera Sera Digital Cinema Ltd.

c) He further made a reference to query by the Transaction Auditor regarding transfer of outstanding balance in Loans & Advances granted to M/s. Paradise Tradewings Pvt. Ltd. amounting to a total of Rs. 1,32,20,000/-, was transferred to M/s. K Sera Sera Box Office Pvt. Ltd. (Rs. 1 Crore) and M/s. Birla gold & Precious Metals Ltd. (Rs. 32.20 lakhs). The Suspended Management had stated in its reply that the aforementioned amount was recovered by said two companies which are the Corporate Debtor's subsidiary companies, and the Transaction Auditor has further stated that Rs. 1 crore of the said amount received by M/s. K Sera Sera Box Office Pvt. Ltd. was further transferred and adjusted against payable of M/s. K Sera Sera Digital Cinema Ltd. in the books of Corporate Debtor and that Rs. 32.20 Lakhs received by M/s. Birla Gold & Precious Metals Ltd. was still outstanding. This very chain of events between the corporate debtor and its subsidiary companies further corroborates the fact that such transactions, included the transactions alleged in the subject I.A., were carried out in the ordinary course of business of the Corporate Debtor as well as its subsidiary companies, including the aforementioned two companies concerned in the subject I.A.

ix. Ld. Counsel states that in the light of abovementioned facts which are evident from the perusal of the Transaction Audit Report, it is established that the alleged transactions are excluded in terms of Section 43(3) of the Code as being transactions carried out in the

course of ordinary business of the Corporate Debtor and of the abovementioned two transferee companies.

- x. It is the submission of Ld. Counsel that this Hon'ble Appellate Tribunal in its decision in 'Md Sadique Islam & Ors. v. Niraj Kumar Agarwal & Ors.', [*Company Appeal (AT) (Ins.) No. 1081 of 2022*] whilst allowing the Appeal and reviving the Application before the Adjudicating Authority, held that there has to be application of mind to the ingredients of each transaction to come to conclusion that ingredients are satisfied and transaction falls in the said category.
- xi. Ld. Counsel submits that in terms of Section 43(3) as has been interpreted by the Hon'ble Supreme Cour in Anuj Jain case, a transaction is excluded from being ruled as preferential if the same is being carried out in the ordinary course of business of the Corporate Debtor as well as that of the transferee companies. It is submitted that on a perusal of the Transaction Audit Report annexed with the subject I.A., it is evident that the said transactions are actually made in the ordinary course of business of the Corporate Debtor as well as of the aforementioned two transferee companies as similar transaction have been carried out by the Corporate Debtor against which the explanation of the ex-management has been accepted and the said transaction have been found to be in ordinary course.
- xii. It is submitted by the counsel that according to the Black's Law Dictionary meaning of ordinary course of business is the normal

routine in managing a trade or business. It is further relevant to refer to the Guidance Note of related party transaction issued by Institute of Company Secretaries, which is also referred to by this Hon'ble Appellate Tribunal in the Judgment of '*Sahyog Infrastructure Private Limited and Ors. v. Anju Agarwal*' wherein, this Hon'ble Appellate Tribunal has held that guidance note has persuasive value though it cannot be read in place of statutory provisions. However, the guidance note is being referred in order for better adjudication of the present Appeal which is reproduced hereinunder:

"Guidance Note of related party transaction issued by Institute of Company Secretaries

In common parlance, 'ordinary course of business' would include transactions which are entered into in the normal course of business

pursuant to or for promoting or in furtherance of the company's business objectives, as per the charter documents of the company. For example, in case of a manufacturing company, purchase and sale of goods, taking premises on lease/rent, construction of factory, employing workers, etc. will be considered as ordinary course of business. To carry on a business, several activities are carried on by the company; all such activities will be considered to be in the ordinary course of business. However, if a manufacturing company, for the purpose of diversification, decides to acquire another company which is engaged in a completely unrelated business, this activity will not be considered to be in the ordinary course of business. To decide

whether an activity which is carried on by the business is in the ordinary course of business, the following factors may be considered:

- a. Whether the activity is covered in the objects clause of the Memorandum of Association*
- b. Whether the activity is in furtherance of the business*
- c. Whether the activity is normal or otherwise routine for the particular business (i.e. activities like advertising, staff training etc).*
- d. Whether the activity is repetitive/frequent*
- e. Whether the income, if any, earned from such activity/transaction is treated as business income in the company's books of account*
- f. Whether the transactions are common in the particular industry*
- g. Whether there is any historical practice to conduct such activities*
- h. The financial scale of the activity with regard to the operations of the business*
- i. Revenue generated by the activity*
- j. Resources committed to the activity*

The above list is not exhaustive. Individually, none of the above parameters can amounts to the transactions being in the ordinary course of business. In other words, any activity which is routine and in accordance with the usual customs and practices of a particular business can be described to be 'in the ordinary course of business'. For a company, the interpretation needs to be

contextual, taking into account the nature of the activity and its relevance in the overall context of the company's business”.

xiii It is submitted by the Appellant that the Corporate Debtor and its sister concerns are in the same business which took a hit after covid19 pandemic had hit the nation and therefore, transfer of money was for the purposes of business capital requirements. Furthermore, the fact that there was a categorical pleading in the Application that the amounts have not been transferred towards any outstanding debt. In addition, thereto, there is no cogent evidence which is placed on record either with the Transaction Audit Report or the Application to show that the amounts have been transferred towards any outstanding debt i.e. any antecedent debt. Therefore, the said transactions are squarely covered under the ordinary course of business in terms of Section 43(3) of the Code and hence, the Impugned Order deserves to be set aside.

xiv Ld. Counsel further submits that the Ld. NCLT, Mumbai Bench – I in the matter of *‘Ericsson India Private Limited v. Reliance Communication Limited, I.A. No. 1269 of 2020 in C.P. (IB) No. 1387 of 2017’* have held that payment towards antecedent debt was in ordinary course of business. However, in the instant case there is no existence of Antecedent Debt which is a pre-requisite for a transaction to be termed as preferential in nature. It is further relevant to refer to the decision of NCLT, Mumbai Bench – I in the matter of *‘Union Bank of India v. Rolta India Limited’*, I.A. No. 3648 of

2023, C.P. (IB) No. 530/MB/2020 wherein, the transaction by CD with the subsidiary company has been held not to be a preference as per Section 43 of the Code, 2016.

xv In view of the submissions above he prays for setting aside the impugned order or pass any such order or further orders that this appellate tribunal may deem fit in the facts and circumstances of the present case.

Submission of Respondent No. 1/RP:

5. Submissions of Respondent no. 1 are as follows:

- i. Ld. Counsel for the Respondent No. 1/RP submits that the present Appeal fails to disclose any cogent ground in support of the relief sought by the Appellants and is thus, liable to be dismissed at the threshold by this Hon'ble Tribunal.
- ii. Ld. Counsel submits that the Corporate Insolvency Resolution Process of the Corporate Debtor was initiated on 24.01.2023. The Respondent No. 1 had appointed Transaction Auditor on 10.03.2023 to conduct transaction audit, who submitted the Final Report of Transaction Audit on 03.08.2023 in view of which, the Respondent No. 1 had filed the Interlocutory Application No. 4648/2023 for the identified transactions.
- iii. Ld. Counsel further submits that the following two transactions have been identified to be preferential transactions (subject transactions):

- a) Transfer of a sum of Rs. 39,00,000/- (Rs. Thirty-Nine Lakhs Only/-) by the Corporate Debtor to its wholly owned subsidiary viz 'M/s K Sera Sera Miniplex Limited' within a review period of two years during the period of financial stress.
 - b) Transfer of a sum of Rs. 8,92,646/- (Rs. Eight Lakh Ninety-Two Thousand Six Hundred Forty-Six only/-) to M/s K Sera Sera Digital Cinema Limited i.e. a sister concern for the outstanding debt within the review period as defined under Section 43 (4) of the Code.
- iv. It is submitted that the Ld. Adjudicating Authority has correctly held these transactions as preferential while holding the Appellants and Respondents No. 2 to 4 jointly and severally liable to repay/refund the amount of Rs. 47,92,646/- to the account of the Corporate Debtor.
- v. Ld. Counsel for Respondent No.1 denied that the subject transaction are not preferential transactions. The transaction claimed to be avoidable for being preferential to the creditors of the Corporate Debtor meets the criteria as defined under the Code and the judicial precedents and more specifically explained in the below mentioned paragraphs:

Transfer to M/s K Sera Sera Miniplex Ltd:

- a) That for seeking necessary orders under Section 44 of the Code, the ingredients of Section 43 are required to be met and it is

submitted that the same have been fulfilled for the present transaction.

- b) That it is submitted that M/s K Sera Sera Miniplex Limited is an wholly owned subsidiary of Corporate Debtor and thus a related party. That the review period for the transactions with the related parties as provided under Section 43 (4) is two years preceding the insolvency commencement date.
- c) The CIRP of the Corporate debtor was initiated on 24.01.2023. The Corporate Debtor had transferred a sum of Rs. 39,00,000/- in January 2022 i.e. within a period two years preceding the commencement of the CIRP.
- d) It is submitted that the initiation of the CIRP was imminent due the financial distress of the Corporate Debtor. However, during the period of financial distress the Corporate Debtor transferred a sum of Rs. 39,00,000/- to the K Sera Sra Miniplex Limited. The only explanation provided by the Appellants for making this transfer was for working capital requirement of the wholly owned subsidiary.
- e) He submits that the Appellants gave preference to K Sera Sera Miniplex against the creditors of the Corporate Debtor by transferring a sum of Rs. 39,00,000/- to its wholly owned subsidiary and by this act, it kept the money out of the reach of the creditors of the Corporate Debtor.

Transfer of Money to M/s K Sera Sera Digital Cinema limited:

- a) That it is submitted that M/s K Sera Sera Digital Cinema is a sister concern of the Corporate Debtor and has been classified as a related party of the Corporate Debtor.
- b) K Sera Sera Digital Cinema is also an unsecured creditor of the Corporate Debtor and had filed a claim of Rs. 3,08,58,210.63/- which was admitted by the Answering Respondent.
- c) That the Corporate Debtor transferred a sum of Rs. 8,92,645/- during a period of two years preceding the commencement of the CIRP.
- d) Ld. Counsel submitted that the Corporate Debtor transferred a property to K Sera Sera Digital Cinema Limited during the period of two years preceding the commencement of CIRP against its antecedent debt for which a claim was filed and admitted. Thus, it was given preferential treatment over other creditors of the Corporate Debtor.
- e) That it is also an admitted position of fact that the transfer was made against the outstanding debt. Therefore, the said amount was not transferred during the ordinary course of business.
- vi. Ld. Counsel submits that with regard to the ground of the Appellants that the Respondent No. 1 did not discuss the Transaction Audit report with the CoC and has filed the Application without discussion

with the CoC is without any substance and cannot be a ground of challenge. It is submitted that in terms of the provisions of the Code, the Resolution Professional is required to form an opinion, before filing the Application. It is clear from these sections that it is purely in the domain of Interim Resolution Professional/ Resolution Professional to appoint the Transaction Auditor and frame an opinion. Nowhere, in the Code or Regulation, it has been stipulated that the approval of the CoC is required. The Application was filed by the Answering Respondent after framing of opinion on the expert report of the Transaction Auditor.

- vii. Ld. Counsel further submits that the Respondent No. 1 did not make any independent opinion. it is further submitted that Respondent No. 1 as Resolution Professional was already having preliminary information about transactions based on whatever documents were available in the public domain; as available with the CoC and with the Corporate Debtor. This preliminary information coupled with professional inputs of the Transaction Auditor, which having been prepared by an expert agency was an aiding mean for the Answering Respondent in determining the facts surrounding each transaction and in making out whether the ingredients of Sections 43 were applicable to such transactions before filing an application before the Adjudicating Authority. It is further submitted that the Respondent No. 1 had filed an application after reviewing the report of the expert agency therefore, the ground to challenge is frivolous.

viii. Ld. Counsel further submits that in view of the above, the present appeal is frivolous and wholly devoid of merit, serving no purpose other than to unnecessarily consume judicial time. From a legal standpoint, the appeal is completely non-maintainable and deserves to be dismissed at the threshold.

Analysis and findings

6. We have heard both the parties in detail, gone through the voluminous records of the case and also seen the written submission of Appellant. The Respondent No.1 did not file any note of submissions. Respondents No. 2,3 & 4 did not file any reply and are treated as perfunctory respondents.

7. The contention of appellants in brief is that there was no transparency in appointment of Transaction Auditor and the same was done without the approval of Committee of Creditors. The RP has failed to implead the sister concerns of the Corporate Debtor, which were necessary parties to the adjudication. The appellants are not the creditors or surety or guarantors of the CD and in such a situation the responsibility for payment of the alleged preferential transaction could not be placed on them. It is stated that even otherwise the alleged transactions were made in the ordinary course of business, which is covered by the exception under Section 43 (3) (a) of the Code. It has also been stated that the alleged transaction does not fall within the five criteria's which have been laid down by the Hon'ble Supreme Court in Anuj Jain's (supra).

8. Per contra the Respondent No.1/ RP has stated that the appellants have not denied the transfer of funds and their main defence is that such transfer is done in the ordinary course of business. It is also submitted that no supporting documents have been provided to show that the aforesaid transactions are in ordinary course of business. It is an admitted fact that the two companies to whom the transfer has been done are sister concerns of the Corporate Debtor. In the case of related parties, the look back period provided in the Code is two years. The Code also provides that any transfer to related parties during the look back period would be deemed to be preferential. The RP has powers under the Code to appoint Transaction Auditors to identify preferential and undervalued transactions and for this the approval of Committee of Creditors is not required. It is his submission that the appeal is devoid of any merit and should be dismissed forthwith.

9. We now examine the issues raised by the appellant. The first contention of the appellant is that the Transaction Auditor has been appointed by the Resolution Professional in a non-transparent manner and without the approval of CoC and further the application under Section 43 has been filed without the approval of CoC.

10. The duties of Resolution Professional are mentioned in Section 25 (1) & (2) of the Code. The relevant portion of the said Section is extracted below:

“25. Duties of resolution professional

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(d) appoint accountants, legal or other professionals in the manner as specified by Board;”

11. The relevant regulation in this regard is the Regulation 27 (2) of IBBI (Insolvency Resolution Process for corporate persons) Regulations, 2016.

The same is extracted below:

“27. Appointment of Professionals

(1) The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.

(2) The interim resolution professional or the resolution professional, as the case may be, may appoint any professional, in addition to registered valuers under sub-regulation (1), to assist him in discharge of his duties in conduct of the corporate insolvency resolution process, if he is of the opinion that the services of such professional are

required and such services are not available with the corporate debtor.”

12. Section 25 (2) (d) of the Code provides the power to IRP/RP to appoint Accountants, Legal or other professionals in the manner as specified by the board. Further Regulation 27 (2) of CIRP regulations 2016, provides that the RP may appoint any professional to assist him in discharge of his duties in conduct of the CIRP, if he is of the opinion that the services of such professionals are required and such services are not available with the Corporate Debtor. Nowhere does the Code provide for consultation by RP with CoC to appoint professionals. RP is empowered under the Code to appoint Transaction Auditors and accordingly, we do not find any merit in this contention of the appellant.

13. Regarding the contention of Respondent that application under section 43 has been filed by the RP without the approval of CoC, we note that the Code does not have any such provision in this regard. On the contrary, under Section 25(2)(j), the RP is duty-bound to file application for avoidance of transactions under Chapter-III of the Code and it is one of the statutory responsibilities of the RP. Such contention of Respondent again is without any merit.

14. The appellant has also invited our attention to non-joinder of the two subsidiary companies of the corporate debtor who are the parties in the aforesaid preferential transactions. It is the submission of the appellant that their presence was necessary for complete and effectual

adjudication of the disputes and in absence of their participation in proceedings, the effective and complete adjudication is not possible. The appellants have cited the judgment of Hon'ble Supreme Court in Aliji Momonji (supra) in this regard.

15. The Insolvency and Bankruptcy Code, 2016 is a complete Code for adjudication of disputes relating to such matters. The code provides for summary proceedings and the procedure for the same are designed accordingly. Keeping these in mind, the RP has been given a timeline of 90 days from the initiation of CIRP till filling of application under section 43 for declaring a transaction as preferential. The RP, therefore, in this period gets a transaction or forensic audit of CD to identify such transactions and file the application before the Adjudicating Authority within 90 days. It is not possible to look into the balance sheets of the other parties in such transactions. The identification of such transactions is based on the financial statements of the Corporate Debtor only. There is no necessity to look into financial statements of counter-parties to such transactions. Therefore, there is no need of joinder of such parties. We further note that this plea was not taken during the proceedings at the stage of Adjudicating Authority.

16. The appellants have admitted to the transaction but they have stated that these transactions are covered by exception to preferential transactions provided under section 43 (3) (a) of the Code. The subject of preferential transaction is covered under Section 43 of the Code, which is extracted below:

“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 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 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.

(Emphasis supplied)

17. Section 43 of the Code deals with the preferential transaction and relevant time. The nature of such transactions has been dealt with by the Section 43 (2) & (3) and the look back period is prescribed in Section 43 (4). We note that for the related party the time period of two years has been prescribed as look back period from the date of commencement of

insolvency. The RP has accordingly ordered the transaction audit of the CD for the corresponding period.

18. Section 43 (2) provides that if any transfer of property or interest thereof of the Corporate Debtor has been done for the benefit of a creditor or a surety or a guarantor for an existing financial debt or operational debt or other liabilities of the Corporate Debtor and such transfer has an effect of putting such creditor or a surety or a guarantor in a beneficial position than in case of distribution under Section 53 of the Code, such transactions would be deemed to be preferential.

19. Appellants herein rely on exceptions to the provision under section 43(2) to claim that the aforesaid transactions were made in ordinary course of business between the Corporate Debtor and the subsidiary companies (transferee herein), and are covered under the exception provided in Section 43(3)(a).

20. It is an admitted fact that transfers were made to the two subsidiaries companies of the Corporate Debtor. We have a look at the relevant portion of Transaction Audit Report at pages 31 & 32 of the same, which are extracted below:

Kenneth A. Boudry

Transaction Audit Report | Confidential | Restricted Use

a) Observation

a) Chloroform

- * During FY 2021-22, KSI have transferred Rs. 39 Lakhs to M/s. K Sara Sara Miniplex Limited, which seems to be preferential transaction. Following are the transactions:

Received/Paid through bank	Date	Receipt/Payment	Debit	Credit
SVC Co-Operative Bank Ltd	30/01/2022	Payment	₹ 2,500,000	-
SVC Co-Operative Bank Ltd	05/01/2022	Payment	₹ 2,000,000	-
SVC Co-Operative Bank Ltd	05/01/2022	Payment	₹ 800,000	-
		TOTAL	₹ 5,300,000	-

Results from Management:

- * The amount was paid for working capital requirement of wholly own subsidiary company.

Further Comment:

- As per our point of view, KSS Limited should have utilized funds in paying off its own creditors instead of transferring it to subsidiary company as KSS Limited itself was incurring loss in that period. Therefore, it might be said that Company has given preference to its subsidiary.

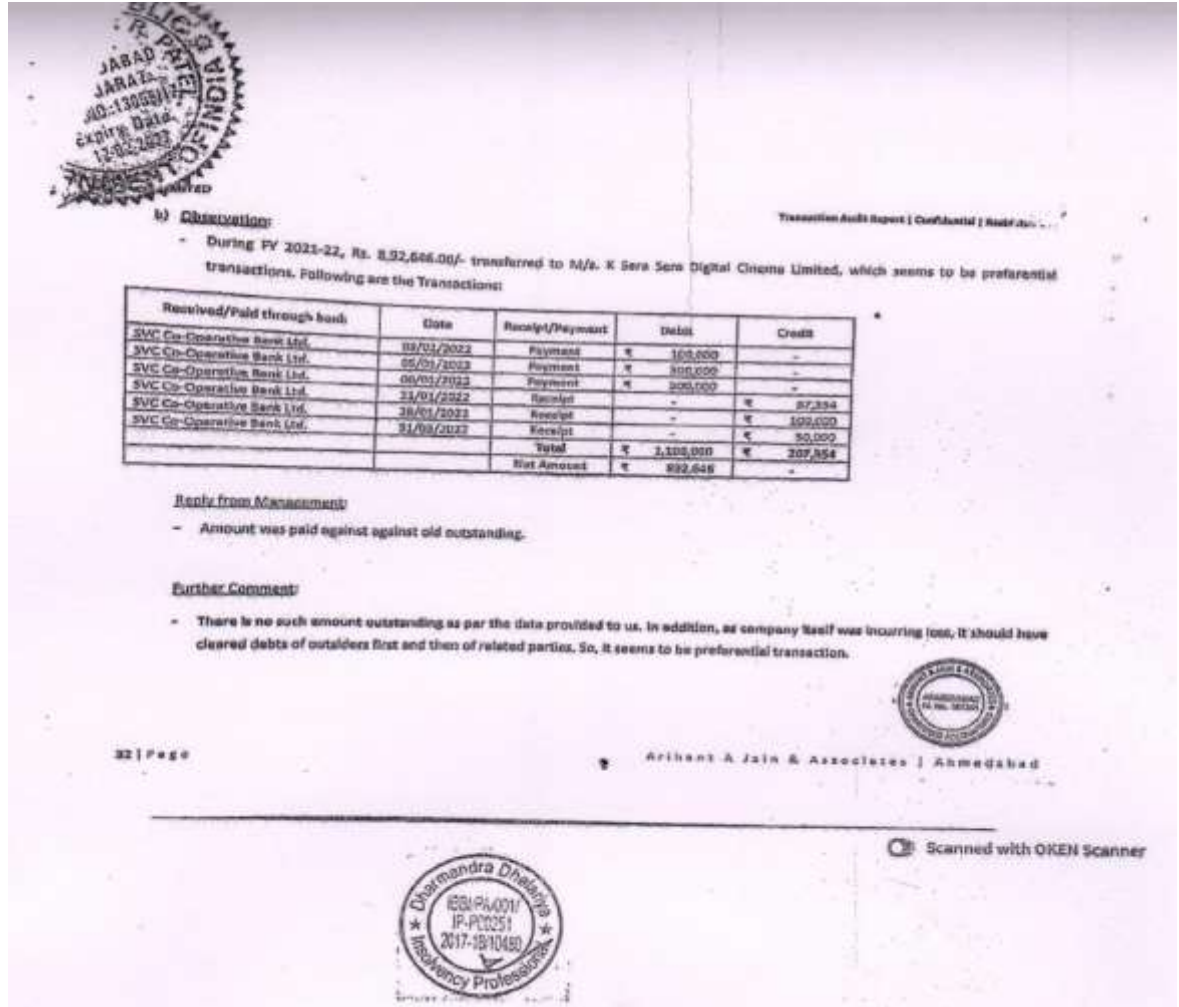


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21. Page 31 of Audit Report above, relates to the first transfer of Rs. 39 lakhs to M/s K Sera Sera Miniplex Ltd. in the Financial Year 2021-22, the Transaction Auditor has identified the same to be likely preferential transaction. A reply was sought from the management, wherein it was stated that amount was paid for the working capital requirement of wholly owned subsidiary company. The Auditors in their comment have noted that KSS Ltd. (CD) should have utilized the funds in paying of its own creditors instead of transferring it to the subsidiary company as KSS Ltd. itself was incurring losses in that period. The auditor therefore reached the conclusion that the company has given preference to its subsidiary.

22. Page 32 of the Transaction Audit Report relates to the second transfer of Rs. 8,92,646/- in FY 2021-22 to M/s K Sera Sera Digital Cinema Ltd. The Transaction Auditor again identified the transaction to be likely preferential. The reply from the management in this case was that the amount was paid against old outstanding. Based on the same the audit reached the conclusion that there is no such amount outstanding as per data provided to them, the company has been incurring losses, it should have cleared the debts of outsiders first and then of the related parties so it seems to be a preferential transaction.

23. It should be noted here that the transaction auditor has sought the comments of the erstwhile management but they could not rebut the findings of the audit. In the hearings before the Adjudicating Authority, when these transactions were referred to the respondents, they could not effectively rebut the opinion formed by RP except for claiming that these transactions were made in ordinary course of business.

24. The appellant in his reply to IA No. 4648 of 2023 has, in para 12, averred the following:

“12. With respect to contention about alleged preferential transactions, it is submitted that the said transactions were carried out in normal course of business out of business prudence and customs & usage in the industry. It is stated that parties with whom alleged preferential Transactions are made, were having debit as well as credit balance either for themselves or for parties that they represent. Therefore, as per the prevailing customs in the

business of trading of lamination, those debit and credit entries were squared off. There is no evidence that these parties are "preferred" over other creditors when it comes to distribution under Section 53 of the Code. In fact, it is stated that amount paid to subsidiary company cannot be classified as preferential transaction. Also, preferential transactions under Section 43 of the Code, are barred so as to ensure just and equitable distribution amongst creditors under Section 53. Therefore, unless it is shown that transactions referred in the application are with a view to prefer those parties over other creditors, the transactions with those parties cannot be termed as preferential transactions under Section 43 of the Code."

25. It is the submission of the appellant that the said transactions were carried out in normal course of business out of business prudence and custom and uses in the industry. The transactions involved squaring off existing debit and credit balances. Nowhere in their pleadings have the appellants produced any documents relating to provision of any product or service by the transferees to the CD. Their contention is actually a vague assertion of such transactions being undertaken under the ordinary course of business, but the same has been made without any document supporting such underlying transactions.

26. We note that in the CIRP proceedings of the Corporate Debtor, M/s K.Sera Sera Digital Cinema has filed a claim of Rs. 3,08,58,210.63 which was admitted by the Resolution Professional/ Respondent No.1 here. This is an admitted position on record. K. Sera Sera Digital Cinema is therefore

a creditor of the CD and is squarely covered by Section 43 (2) (a) of the Code. Accordingly, the transfer of Rs.8 Lakhs made by the CD to its sister concern K. Sera Sera Digital Cinema has to be treated as preferential transaction as under Section 43 (2)(b) of the code, it would have the effect of putting K.Sera Sera Digital Cinema in a beneficial position than it would have been in case of distribution of assets made under Section 53. Such transaction cannot be said to have been made in ordinary course of business under the exception provided in Section 43 (3) (1) of the Code.

27. Based on the documents on record, we note the following:

- i. The transferee companies namely, K. Sera Sera Miniplex Ltd. and K. Sera Sera Digital Cinema Ltd. are subsidiary companies of the CD, and are related parties.
- ii. There is a transfer of Rs. 39 Lakhs to M/s K. Sera Sera Miniplex Ltd. and Rs. 8,92,646/- to K. Sera Sera Digital Cinema Ltd. In the CIRP of CD M/s K.Sera Sera Digital Cinema Ltd. had filed a claim of Rs.3.08 Crores. So, it is also a creditor of CD.
- iii. The aforesaid transactions took place in January 2022, which is within 2 years of lookback period provided for related parties under section 43(4) of the Code.
- iv. There are no documents to show transactions relating to provision of goods or services by the subsidiary companies for which payment has been made by the CD. The aforesaid transactions therefore are

not covered under the exception provided in section 43(3)(a) of the code.

- v. Under section 43(4)(a), in case of a related party, preference shall be deemed to have been given regarding such transactions within a period of 2 years preceding the insolvency commencement date.

28. It is clear from the factual matrix that the K. Sera Sera Digital Cinema Ltd. is a financial creditor of the corporate debtor and a payment of Rs. 8,92,646/- has been made to it by the CD within the lookback period and such payment has been made in spite of CD itself passing through financially difficult times. It also cannot be said to have been made in ordinary course of business as we noted earlier. This transaction has the effect of reducing the amount payable to other unrelated creditors of the CD under section 53 of the Code. Therefore, the aforesaid transaction qua K. Sera Sera Digital Cinema Ltd. is a preferential transaction under Section 43 of the Code. This transaction squarely meets the requirements of a preferential transaction as per the norm laid down by Anuj Jain (supra).

29. In regard to transfer of Rs. 39 Lakhs with M/s K. Sera Sera Miniplex Ltd. towards Working Capital Loan, we note that the aforesaid Company though a related party, is not 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 therefore, it is not an entity covered by the Section 43(2)(a) which is an essential condition for

declaring a transaction as preferential. Accordingly, we hold that this transaction is not a preferential transaction.

30. In view of the findings above, only the transfer of Rs. 8,92,646/- made by the CD to K. Sera Sera Digital Cinema Ltd. is held as preferential transaction under Section 43 of the Code.

31. The appeal is accordingly disposed of in the following manner: The respondents in IA No. 4648 of 2023 who are appellants 1 to 3 and respondents 2 to 4 in this appeal are jointly and severally directed to repay/ refund the amount of Rs. 8,92,646/- to the Account of the Corporate Debtor within a period of 30 days from the pronouncement of this order together with interest in the same manner as directed by Ld. Adjudicating Authority.

Pending IA's, if any, are closed. No order as to costs.

[Justice N Seshasayee]
Member (Judicial)

[Mr. Arun Baroka]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

Place: New Delhi

Harleen