

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 328 of 2018

IN THE MATTER OF:

V. Nagarajan (Liquidator) for M/s Cethar Ltd. ...Appellant

Vs

Asset Reconstruction Company India Ltd. & Anr.Respondents

Present:

**For Appellant: Mr. Arnav Dash, Ms. Mehak Huria, Advocates.
Mr. V. Nagarajan, Liquidator.**

**For Respondents: Mr. Sitesh Mukherjee and Mr. Divyanshu Bhatt,
Advocates for R-1.**

**Mr. S. Santanam Swaminadhan and Ms. Nishtha
Khurana, Advocates for R-2.**

ORDER

30.08.2018: The Appellant – Resolution Professional/ Liquidator has preferred this appeal against order dated 26th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal) Single Bench Chennai, whereby and whereunder the application preferred by the Appellant under Section 43 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') has been rejected.

2. Learned counsel for the Appellant submitted that the Corporate Debtor made preferential transaction of in favour of the 2nd Respondent by executing a Sale Deed on 30.05.2016 of which final payment was subsequently made between 30.06.2016 and 14.10.2016.

3. However, the learned counsel appearing on behalf of the 2nd Respondent disputed the aforesaid fact and submitted that the consideration amount for executing of Sale Deed dated 30.05.2016 was paid to the Corporate Debtor much prior to the execution of Sale Deed by way of Demand Draft as referred in the Sale Deed. The Demand Draft were issued as per the instruction of the Corporate

Debtor in favour of the 1st Respondent – ‘ARCIL’, who on receipt of the same credited it in favour of the Corporate Debtor on 30.06.2016 and 14.10.2016.

4. As it is not in dispute that the Demand Draft was prepared prior to 30.05.2016, which were also shown as consideration amount and recorded in the Sale Deed dated 30.05.2016, we hold that the sale was complete on 30.05.2016. As to on which date amount was deposited in the account of the Corporate Debtor cannot be a ground to shift forward the date of Sale Deed to 14.10.2016.

5. Section 43 relates to ‘Preferential transactions and relevant time’, which is as follows:

“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.”*

6. Admittedly, the 2nd Respondent is not a related party to the Corporate Debtor and therefore, for preferring an application under Section 43 in respect to transaction made with 2nd Respondent one has to refer to clause (b) of Sub-

section (4) of Section 43. In the said provision the period of one year preceding the insolvency commencement date is prescribed to find out whether any preferential transaction was made in favour of any person other than the related party.

7. Admittedly, the insolvency commencement date (date of admission) in the present case is 16.06.2017, the execution of Sale Deed reached finality on 30.05.2016 that is much prior to one year preceding the insolvency commencement dated.

8. In that view of the aforesaid finding we hold that the application under Section 43 of I&B Code in respect of 2nd Respondent was not maintainable and the Adjudicating Authority has rightly rejected the petition. In absence of any merit the appeal is dismissed. No cost.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansilal Bhat]
Member (Judicial)

am/gc