

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 600 of 2018

IN THE MATTER OF:

Tirumala Balaji Alloys Private Limited **...Appellant**

Versus

Sumit Binani **...Respondent**

Present:

For Appellant : **Mr. Abhijeet Sinha, Mr. Arjun Asthana, Ms. Sreenita Ghosh, Mr. Saikat Sarkar, Advocates.**

For Respondent: **Mr. Nakul Mohta, Mr. Johnson Subba, Advocates for R-1.**

Company Appeal (AT) (Insolvency) No. 601 of 2018

IN THE MATTER OF:

M/s. Excello Fin Lea Limited **...Appellant**

Versus

Sumit Binani & Anr. **...Respondents**

Present:

For Appellant : **Mr. U.K Chaudhary, Senior Advocate with Ms. Pooja Saigal, Mr. Akshay Gupta, Mr. Dhruv Gupta, Advocates.**

For Respondents: **Mr. Nakul Mohta, Mr. Johnson Subba, Advocates for R-1.**

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In both the appeals as common impugned order dated 6th August, 2018 is under challenge and common question of law being involved, they were heard together and disposed of by this common judgment.

2. In the 'Corporate Insolvency Resolution Process' against 'Monnet Ispat & Energy Limited' ('Corporate Debtor'), the 'Resolution Professional' filed Miscellaneous Application under Sections 43 and 44 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) against Appellants- 'Excello Fin Lea Limited' and 'Tirumala Balaji Alloys Pvt. Ltd.' for refund of Rs.23,48,40,274/- from 'Excello Fin Lea Limited' and for refund of Rs.5,68,38,355/- from 'Tirumala Balaji Alloys Pvt. Ltd.' along with interest @18% per annum on the ground that the payments were made by the 'Corporate Debtor' to the Appellants falls within the ambit of 'preferential transactions' as referred under Section 43 of the 'I&B Code'.

3. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai by impugned order dated 6th August, 2018, after notice and hearing the parties, including the Appellants, allowed the Miscellaneous Application and directed the 'Excello Fin Lea Limited' to restore entire transferred amount and 'Tirumala Balaji Alloys Pvt. Ltd.' was directed to restore transfers made on 28th October, 2016 and 31st March, 2017 aggregating to Rs.2,84,00,274/- along with 12% interest till the date of

realisation to the 'Corporate Debtor' within 30 days from the date order is made available to the parties.

4. Learned counsel appearing on behalf of the Appellants submitted that the Appellants were engaged in the business of extending loans in the forms of ICD to various companies. The 'Corporate Debtor' is one such company, to which loans were extended by 'Tirumala Balaji Alloys Pvt. Ltd.' on 8th October, 2015 and 9th October, 2015. Despite the transaction between Appellants and the 'Corporate Debtor' being in the usual course of business, the Adjudicating Authority has held that it was a preferential transaction and directed to refund the amount.

5. It was submitted that the 'Corporate Debtor' was facing financial stress for some years, the lenders implemented the SDR in the 'Corporate Debtor' in August, 2015 and converted Rs.350 Crore of their dues into equity to hold 51% equity (controlling stake) in the 'Corporate Debtor'. Owing to the heavy financial stress, the 'Corporate Debtor' was unable to source funds from its existing lenders, as the lenders did not provide any additional line of credit, for the purpose of meeting its financial obligations including working capital requirements.

6. According to the learned counsel for the Appellants, the transactions, in question, were made during the usual course of business and do not fall within the meaning of 'preferential transactions'. Reliance has been placed on the decision of this Appellate Tribunal in ***"Anup Kumar, Resolution Professional of M/s. Shivkala Developers Pvt. Ltd. v. BDR Builder &***

Developers Pvt. Ltd. & Ors.- Company Appeal (AT) (Insolvency) No. 679 of 2018”.

7. On the other hand, according to counsel for the ‘Resolution Professional’, the transactions, in question, are ‘preferential transactions’ and made in favour of the ‘related party’ by the Promoter of the ‘Corporate Debtor’.

8. Learned counsel for the Appellant- ‘Tirumala Balaji Alloys Pvt. Ltd.’ submitted that part payment of Rs.30,94,272/- (after deducting TDS) was made out of interest accrued @15% per annum. Thereafter, a sum of Rs.2,50,00,000/- towards part payment of principal was also paid to the Appellant on 13th July, 2016 which is more than one year before the commencement date of initiation of the ‘Corporate Insolvency Resolution Process’.

9. It was submitted that the ‘Corporate Debtor’ paid a sum of Rs.2,50,00,000/- towards part payment of principal amount to the Appellant on 29th October, 2016 which is more than one year before the commencement date of initiation of the ‘Corporate Insolvency Resolution Process’, therefore, it cannot be termed to be ‘preferential transactions’. Referring to the earlier payments, it was submitted that all the payments were in usual course of transaction.

10. The ‘Corporate Insolvency Resolution Process’ was initiated on 18th July, 2017 on admission of application under Section 7 of the ‘I&B Code’. The transactions which were made between the parties and reflected in the records of the ‘Corporate Debtor’ shows that the ‘Corporate Debtor’ availed

loan of Rs.23 Crores at an interest rate of 18% per annum from ‘Excello Fin Lea Limited’ and Rs.5 Crores at an interest rate of 15% per annum from ‘Tirumala Balaji Alloys Pvt. Ltd.’. The amounts were reflected in the Bank Accounts as under:

‘Excello Fin Lea Limited’

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Received
5.10.2016	2554002100002680	PNB RPR (Punjab National Bank, Raipur)	Current Account	7,50,00,000
5.10.2016	2554002100002680	PNB RPR (Punjab National Bank)	Current Account	7,50,00,000
5.10.2016	2554002100002680	PNB RPR (Punjab National Bank)	Current Account	5,00,00,000
6.10.2016	65254133186	SBI (erstwhile SBOP)	Current Account	3,00,00,000
	TOTAL			23,00,00,000

‘Tirumala Balaji Alloys Pvt. Ltd.’

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Received
8.10.2015	278640000025	HDFC	Current Account	4,00,00,000
9.10.2015	278640000025	HDFC	Current Account	1,00,00,000
	TOTAL			5,00,00,000

11. The Adjudicating Authority has noticed that the ‘Corporate Debtor’ has been in losses since long, but as to the loan taken from ‘Excello Fin Lea Limited’ in three transactions on 5th October, 2016, the ‘Corporate Debtor’ repaid Rs.20 Crores on 15th November, 2016 i.e. within 40 days from the date of borrowing, the interest paid on 29th November, 2016; as to remaining Rs.3,00,00,000/- shown as taken by the ‘Corporate Debtor’ from ‘Excello Fin

Lea Limited', the principal was repaid on 6th January, 2017, and interest of Rs.10,80,000/- was shown as paid on 21st March, 2017 i.e. within 80 days from the date of borrowing, details are as follows:

'Excello Fin Lea Limited'

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Received
15.11.2016	278640000025	HDFC	Current Account	20,00,00,000
29.11.2016	65254133186	SBI (erstwhile SBOP)	Current Account	37,60,274
21.03.2017	65254133186	SBI (erstwhile SBOP)	Current Account	3,00,00,000
31.03.2017	65254133186	SBI (erstwhile SBOP)	Current Account	10,80,000
	TOTAL			23,48,40,274

12. As to 'Tirumala Balaji Alloys Pvt. Ltd.' loan, the records of the 'Corporate Debtor' discloses that repayment was made to 'Tirumala Balaji Alloys Pvt. Ltd.' on 11th July, 2016, 13th July, 2016, 28th October, 2016, 31st March, 2017, as mentioned below:

'Tirumala Balaji Alloys Pvt. Ltd.'

Date	Bank Account Number of Corporate Debtor	Bank Name	Type of Account	Received
11.7.2016	65254133186	SBI (erstwhile SBOP)	Current Account	34,38,081
13.7.2016	65254133186	SBI (erstwhile SBOP)	Current Account	2,50,00,000
28.10.2016	2554002100002680	PNB RPR	Current Account	2,50,00,000
31.03.2017	65254133186	SBI (erstwhile SBOP)	Current Account	34,00,274
	TOTAL			5,68,38,355

13. According to the 'Resolution Professional', the promoters of the 'Corporate Debtor' hold 99.4% shareholding in 'Excello Fin Lea Limited', and 50% shareholding in 'Tirumala Balaji Alloys Pvt. Ltd.'. Regarding remaining

50% in 'Tirumala Balaji Alloys Pvt. Ltd.', it has been held by the close relatives of the promoters of the 'Corporate Debtor' i.e. 'Rungta Family', therefore, according to the 'Resolution Professional', both the aforesaid Companies fall within the definition of "Related Party" as defined under Section 5(24) of the 'I&B Code'.

14. Further, according to the 'Resolution Professional', since these two transactions having taken place within two years before Insolvency Commencement Date i.e. 18th July, 2017, as per Section 43(4) of the 'I&B Code', all the transactions should be treated as 'preferential transactions'.

15. Section 43 of the 'I&B Code' deals with 'preferential transactions' as under:

"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.]”

16. From the aforesaid provisions, it is clear that if 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’ is transferred, then it comes within the meaning of ‘preferential transactions’. The ‘preferential transactions’ 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. As per sub-section (3) of Section 43, transfer made in the ordinary course of the business or financial affairs of the 'Corporate Debtor' or the 'transferee' be not included within the meaning of 'preferential transactions'.

18. The question arises for consideration is whether in such case, the transactions, in question, can be claimed to be a transfer made in the ordinary course of business.

19. It is not the case of the Appellants that apart from the Appellants, all other Creditors were paid their dues during the ordinary course of business. It is only in the case of the Appellants that the amounts were released and repaid just before a period of one year from the date of Insolvency Commencement Date i.e., 18th July, 2017.

20. This apart, as it is not in dispute that the promoters of the 'Corporate Debtor' hold 99.4% shareholding in 'Excello Fin Lea Limited' and 50% shareholding in 'Tirumala Balaji Alloys Pvt. Ltd.' and rest of the 50% shareholding of the 'Tirumala Balaji Alloys Pvt. Ltd.' is with the relatives of the promoters of the 'Corporate Debtor' i.e. 'Rungta Family', we are of the view that all the transactions made during the period of two years preceding date of Insolvency Commencement Date i.e., 18th July, 2017 come within the meaning of 'preferential transactions'.

21. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 6th August, 2018 passed by the Adjudicating Authority, Mumbai Bench, Mumbai.

Both the appeals are dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

NEW DELHI

13th November, 2019

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