

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Ins.) No. 1081 of 2022  
& I.A. No. 3178 of 2022**

**IN THE MATTER OF:**

**Md Sadique Islam & Ors.**

**...Appellants**

**Versus**

**Niraj Kumar Agarwal & Ors.**

**...Respondents**

**Present:**

**For Appellants: Mr. Nishant Kishore and Mr. Sandeep Choudhary,  
Advocates.**

**For Respondents: Mr. Videh Vaish, Mr. Lalit Mohan and Ms.  
Aakansha, Advocates with Mr. Lovkesh Batra, PCS  
for SRA.**

**O R D E R**  
**(Hybrid Mode)**

**06.03.2024:** Heard learned counsel for the Appellant as well as learned counsel appearing for the Resolution Professional. This Appeal has been filed against order dated 06.07.2022 passed by the Adjudicating Authority in I.A. No.314/KB/2022. The Appellant before us were Respondent No.3 to 7 to the I.A. No. 314/KB/2021. The Resolution Professional had filed the application under Sections 43, 45, 49 and 66 of the IBC Code seeking relief.

2. Learned counsel for the Appellant fairly submits that the Appellant could not file Reply to the I.A. Learned counsel for the Appellant challenging the order contends that the Adjudicating Authority in the impugned order has only noticed the opinion of the Resolution Professional and has not adjudicated about the ingredients of Section 43, 45, 49 and 66, specifically.

It is submitted that in view of the judgment of Hon'ble Supreme Court in **"Anuj Jain vs. Axis Bank Limited and Ors."** there has to be consideration for the relevant ingredients which are different for preferential transactions, undervalued transactions as well as fraudulent transactions. Learned counsel for the Appellant submits that the Adjudicating Authority relying on the opinion of the Resolution Professional proceeded to allow the application without returning any finding that ingredients are proved.

3. Learned counsel for the Resolution Professional refuting the submissions of learned counsel for the Appellant submits that the Resolution Professional has filed an application relying on the Transaction Audit Report and the Resolution Professional has given all details separately in the application which have been accepted by the Adjudicating Authority.

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. The Adjudicating Authority in Para 26 of the order has noticed the law laid down by Hon'ble Supreme Court in the matter of **"Anuj Jain vs. Axis Bank Limited and Ors."** and quoted Para 29.1 of the judgment of Hon'ble Supreme Court, which is as follows:

*"26. Now seen in the context of law laid down by the Hon'ble Supreme Court in **Anuj Jain vs. Axis Bank Limited and Ors., MANU/SC/022812020**, observed in paragraph 29.1 as follows:*

*“29.1. However, we are implied to make one comment as regards the application made by IRP. It is noticed that in the present case, the JRP moved one composite application purportedly Under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor Under Section 47 of the Code. The consequences of undervaluation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to Sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful /fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.””*

6. When we look into the judgment of Adjudicating Authority from Para 1 to 25, the Adjudicating Authority has only noted the facts of the case and respective contentions of both the parties. Findings of the Adjudicating Authority are only contained in Paras 27 and 28, which are as follows:

*“27. Let us now consider whether these transactions have taken place within the look back period with respect to undervalued and preferential transactions i.e. one year preceding the insolvency commencement date. From the table given in paragraph 8 above, it is pertinent to note that only the transactions that have been entered into with Respondent Nos. 3, 4, 5, 6, 7, 8, 11 fall within the look back period.*

*28. The Resolution Professional has clearly determined the undervalued transactions as well as preferential and fraudulent transactions. There transactions entered into with Respondent Nos. 3, 4, 5, 6, 7, 8, 11 by Respondents No.1 and 2 were clearly done with the intention to defraud the other creditors, hence, the Respondent Nos. 1 and 2 have entered into fraudulent transactions.”*

7. When we look into the aforesaid paras, it is clear that the Adjudicating Authority has recorded only its conclusions and that too without considering the preferential, undervalued and fraudulent, each transaction separately and there is general observation that the transactions are undervalued transactions as well as preferential and fraudulent transactions. The ingredients of preferential, undervalued and fraudulent transaction are entirely different and there has to be application of mind to the ingredients of

each transaction to come to conclusion that ingredients are satisfied and the transaction falls in the said category advertent to the given pleadings in the application. The Adjudicating Authority ought to have adverted to the said pleadings and returned the finding regarding the fulfilment of ingredients of each provision. The Adjudicating Authority has only in two paras i.e. 27 and 28 has recorded his conclusion without giving any reason and without advertent to any pleadings or materials on record.

8. We, thus, are of the view that the order passed by the Adjudicating Authority cannot be sustained. Order impugned is set aside. The Application I.A. No.314/KB/2021 is revived before the Adjudicating Authority to be heard afresh and decided in accordance with law.

9. Learned counsel for the Appellant submits that the Appellant could not file reply, hence, they may be given opportunity to file reply before the Adjudicating Authority. They may file Reply within two weeks from today. The Appeal is disposed of accordingly.

**[Justice Ashok Bhushan]**  
**Chairperson**

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

*Archana/nn*