

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 679 of 2018

[Arising out of Order dated 3rd October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Application No. 295/2018 in Company Petition (IB)-525(ND)/2017)

IN THE MATTER OF:

**Anup Kumar, Resolution Professional of
M/s Shivkala Developers Pvt. Ltd.**

IP Registration No. IBBI/IPA-002/IP-N00333/2017-
2018/10911

Address-734 Lawyers Chamber Block Western Wing
Tiz Hazari Court, Delhi – 110054

Email:-Sachanlawanalyt@gmail.com

Mob No.9811622913

....Appellant

Vs

1. BDR Builder & Developers Pvt. Ltd.,

(formerly known as M/s Renu Builders and Promoters Pvt.
Ltd. & M/s Rishi Promoters Pvt. Ltd.)

21, Ring Road, Lajpat Nagar -IV, New Delhi.

2. Shobha Naresh Wadhvani,

Ex Director of M/s Shivkala Developers Pvt. Ltd.

12 Ashiana, 31st Road Bandra (west),

Mumbai – 400050, MH, IN

3. Gaurav Bhargava,

Ex Director of M/s Shivkala Developers Pvt. Ltd.

203, Turav Nagar, Ghaziabad – 201001, U.P.

....Respondents

Present:

For Appellant: Mr. Naveen Sharma, Advocate with Mr. Anup Kumar, Resolution Professional.

For Respondents: Mr. Sanjay Goswami and Mr. K. Bhimram Achary, Advocates.

With

Company Appeal (AT) (Insolvency) No. 680 of 2018

[Arising out of Order dated 3rd October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Application No. 294/2018 in Company Petition (IB)-525(ND)/2017)

IN THE MATTER OF:

**Anup Kumar, Resolution Professional of
M/s Shivkala Developers Pvt. Ltd.**

IP Registration No. IBBI/IPA-002/IP-N00333/2017-
2018/10911

Address-734 Lawyers Chamber Block Western Wing
Tiz Hazari Court, Delhi – 110054

Email:-Sachanlawanalyst@gmail.com

Mob No.9811622913

....Appellant

Vs

1. M/s Chharia Holding Pvt. Ltd.

2, Gujrat Vihar, Vikas Marg,
New Delhi – 110092.

2. Shobha Naresh Wadhvani,

Ex Director of M/s Shivkala Developers Pvt. Ltd.
12 Ashiana, 31st Road Bandra (west),
Mumbai – 400050, MH, IN

3. Gaurav Bhargava,

Ex Director of M/s Shivkala Developers Pvt. Ltd.
203, Turav Nagar, Ghaziabad – 201001, U.P.

....Respondents

Present:

For Appellant: Mr. Naveen Sharma, Advocate with Mr. Anup Kumar, Resolution Professional.

For Respondents: Mr. Pawan Sharma and Ms. Arpita Yadav, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No. 681 of 2018

[Arising out of Order dated 3rd October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Company Application No. 293/2018 in Company Petition (IB)-525(ND)/2017)

IN THE MATTER OF:

**Anup Kumar, Resolution Professional of
M/s Shivkala Developers Pvt. Ltd.**

IP Registration No. IBBI/IPA-002/IP-N00333/2017-
2018/10911

Address-734 Lawyers Chamber Block Western Wing
Tiz Hazari Court, Delhi – 110054

Email:-Sachanlawanalyt@gmail.com

Mob No.9811622913

....Appellant

Vs

1. M/s Vipul Motors Pvt. Ltd.

Through its MD, Sh. Vinit Beriwala
16/2, Lord Sinha Road,
Second Floor, Flat No. 6,
Kolkata, West Bengal.

2. Shobha Naresh Wadhvani,

Ex Director of M/s Shivkala Developers Pvt. Ltd.
12 Ashiana, 31st Road Bandra (west),
Mumbai – 400050, MH, IN

3. Gaurav Bhargava,

Ex Director of M/s Shivkala Developers Pvt. Ltd.
203, Turav Nagar, Ghaziabad – 201001, U.P.

....Respondents

Present:

For Appellant: Mr. Naveen Sharma, Advocate with Mr. Anup Kumar, Resolution Professional.

For Respondents: Mr. Navneet Gupta and Mr. Bharat Monga, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Resolution Professional of 'M/s Shivkala Developers Pvt. Ltd.' (Corporate Debtor) filed three applications under Section 45, 49, 50(5) and 66 r/w Section 25(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') for setting aside the transaction entered into by the Corporate Debtor on the ground of being preferential transfer carried out with a view to defraud the creditors. The Adjudicating Authority (National Company Law Tribunal), New Delhi Bench rejected all the three applications being CA No. 293/2018, 294/2018 and 295/2018 by impugned order dated 3rd October, 2018 giving rise to the present appeals.

2. Learned counsel appearing on behalf of the Appellant – Resolution Professional submitted that the sale considerations reflected in the registered agreement are much below the circle rates of the relevant period and therefore undervalued. It was submitted that the transactions were fraudulent with the intent to defraud the creditors of the Corporate Debtor. It was further submitted that possession has been handed over to the buyers without a proper NOC or a completion certificate and is therefore in violation of terms and conditions of the lease deed executed by Noida

Authority. Further case of the Resolution Professional is that the sale agreements were executed by one of its Ex-Directors.

3. The Respondents disputed such allegation and opposed the prayer. As noticed, the Adjudicating Authority also came to a conclusion that no case is made out for alleged preferential transactions under Section 43 or undervalued transactions under Section 45 or extortionate credit transaction under Section 50 or fraudulent transactions under Section 66.

4. At this stage, it is relevant to point out that the Corporate Debtor was in the business of development of real estate and was allotted land by Noida Authority to develop a Commercial Complex. The same was sold to various purchasers including the Respondents herein.

5. The Resolution Professional filed registered agreements corroborating that the transactions were made for valuable consideration in the year 2009-10.

6. In CA No. 293/2018, it was alleged that the transactions were entered into by the Promoters and Directors of the Corporate Debtor, effecting a sale by an agreement executed on 9th April, 2010 in respect of ground floor and upper ground floor measuring a total area of 14,771 sq. ft. in the Commercial Complex, Fortune Smile, developed in Sector 63 Noida, on the

allegations of being a wrongful transaction within the meaning of Section 66 of the Code.

7. In another CA. No. 294/2018, it was alleged that similar transaction was made, as made above related to an agreement-cum-allotment dated 8th May, 2018 in respect of floor space admeasuring 7385 sq. ft. on the fifth floor of the same Commercial Complex.

8. In CA No. 295/2018, allegation related to agreements to sell dated 13th February, 2009, 6th April, 2009 and 31st October, 2009 in respect of the third, fourth and first floor comprising of 5,000 sq. ft., Shop No. 1112 on the lower ground floor and other floor space detailed therein, in the same Commercial Complex, Fortune Smile.

9. Section 43 of I&B Code deals with 'preferential transactions and relevant time' and reads 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.”

10. It is not the case of the Resolution Professional that the transfer of property or interest thereof to the Corporate Debtor for the benefit of a creditor has been made or the transfer has been effective on putting such creditor in beneficial position than it would have been in the event of distribution of assets in accordance with Section 53. No such case having pleaded, we hold that the Resolution Professional failed to make out a case under Section 43 and transfer in question having made in ordinary course of business, the Corporate Debtor being a developer of real estate on the

land allotted by Noida Authority for development of Commercial Complex, the application under Section 43 has been rightly rejected.

11. At this stage it is desirable to state that the Respondents have not been termed to be a related party and preference has been given during the period of two years preceding the insolvency commencement date. The insolvency proceeding has been initiated against the Corporate Debtor on 12th February, 2018 and all the transactions were made in between the year 2009-10.

12. Section 45 deals with 'avoidance of undervalued transactions' and reads as under:-

“45. Avoidance of undervalued transactions. —

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) of section 43 determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.”

13. As per Section 46, the ‘relevant period for avoidable transaction’ has been mentioned as either one year preceding the insolvency commencement date or transaction made with a related party within the period of two years preceding the insolvency commencement date, as quoted below:-

“46. Relevant period for avoidable transactions.— *(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—*

(i) *such transaction was made with any person within the period of one year preceding the insolvency commencement date; or*

(ii) *such transaction was made with a related party within the period of two years preceding the insolvency commencement date.*

(2) *The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section.”*

14. We have noticed that the Respondents are not a related party nor the transactions were made with any person during one year preceding the insolvency commencement date and in fact were made about 8-9 years back, the application under Section 45 r/w Section 46 preferred by Resolution Professional was uncalled for.

16. Section 50 deals with ‘extortionate credit transactions’ and reads as follows:-

“50. Extortionate credit transaction.— (1) *Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years*

preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

(2) The Board may specify the circumstances in which a transactions which shall be covered under sub-section (1).

Explanation.—For the purpose of this section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.”

17. It is not the case of the Resolution Professional that it is an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date. Therefore, the Resolution Professional cannot allege violation of Section 50.

18. Section 66 relates to ‘fraudulent trading or wrongful trading’ and reads as follows:-

“66. Fraudulent trading or wrongful trading.—

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

- (a) *before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and*

- (b) *such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.*

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”

19. In the present case, no case is made out by the Resolution Professional that any business of the Corporate Debtor has been carried out with the intent to defraud the creditors of the Corporate Debtor or for any fraudulent purpose. A so called alleged violation of Section 43 or Section 45 or Section 46 cannot be termed to be made for fraudulent purpose.

20. As we have noticed, the Adjudicating Authority has found that transactions were made in the year 2009-10 and the purchasers also taken possession and perusal of the documents reflects that agreements for sale are duly registered documents with adequate stamp duty paid.

21. For the reasons aforesaid, we are not inclined to entertain these appeals. All these appeals are accordingly dismissed. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

2nd May, 2019

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