

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

ORDER SHEET OF THE HEARING ON 2nd July, 2024, 10:30 A.M.

**IA (IBC)/11/GB/2022
IA (IBC)/17/GB/2022
In CP (IB)/3/GB/2020**

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

In the Matter of	Kamal Agarwal, RP Vs Gautam Saha, 2. Abhijit Dutta 3. Potential Coaching Institute Pvt. Ltd.
Under Section	U/s 9 of IBC, 2016

For Petitioner (s) : Mr. K. Agarwal, RP in person

For Respondent (s) : Mr. B. Sharma, Adv.

ORDER

Order pronounced in the open court *vide* separate sheets.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
H.V. Subba Rao
Member (Judicial)

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IA (IBC)/17/GB/2022

In CP (IB)/3/GB/2020

In the matter of:

An Application under Section 66 of the Insolvency and Bankruptcy Code, 2016;

-And-

In the matter of:

An Application under Rule 11 of the NCLT Rules, 2016;

-And-

In the matter of:

Kamal Agarwal, Resolution Professional for M/s Concept Eduventures Private Limited (Corporate Debtor) having address at 487/27 School Road, Near Peergarhi Metro Station, New Delhi-110087; **...Applicant**

-Versus-

Gautam Saha, Suspended Director of the Corporate Debtor having address 1002, Shubham Heights Kahilipara, Guwahati, Assam- 781019; **...Respondent No. 1**

-And-

Abhijit Dutta, Suspended Director of the Corporate Debtor having address Flat No/ A2, Block B3, City Heart Apartment Borasevice, GS Road, Guwahati- 781007;

...Respondent No. 2

-And-

Potential Coaching Institute Private Limited, Partner of the Corporate Debtor having address House No. 160, 4th Floor, Rajgarh Road, Lachit Nagar, Guwahati, Assam- 781007;

...Respondent No. 3

-And-

Jayati Saha, w/o Respondent No. 1 having address 2/E, Krishna Apartment, Adabari Tinali, Jalukbari, Kamrup, Guwahati, Assam-781012; **...Respondent No. 4**

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-And-

Meghna Kalita, having address at Flat No/ A2, Block B3, City Heart Apartment, Ulubari, Guwahati, Assam -781007; **...Respondent No. 5**

-And-

Jinti Deka, having address at House No. 30, A1 Girija Enclave, B/L-5, Mother Teresa Road, Guwahati, Assam -781021; **...Respondent No. 6**

-And-

Vikash Sisodia, having address at House No. 30, A1 Girija Enclave, B/L-5, Mother Teresa Road, Guwahati, Assam -781021; **...Respondent No. 7**

-And-

Seema Devi Bihani, having address at Bihani Residency, GMCH Road, Christian Basti, Kamrup Metro, Guwahati-781005; **...Respondent No. 8**

-And-

Basant Kumar Bihani, having address at Bihani Residency, GMCH Road, Christian Basti, Kamrup Metro, Guwahati-781005; **...Respondent No. 9**

-And-

Bijoy OM & Associates, Transaction Auditor having address at House No. 26, Professor para, 2nd Floor, H.S. Road, Chatribari, Guwahati-781008. **...Respondent No. 10**

Coram:

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing):

For Petitioner : Mr. K. Agarwal, RP

For Respondent : Mr. B. Sharma, Mr. M. Jain (Advs.)

Order pronounced on: 02.07.2024

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ORDER

1. The instant Interlocutory Application i.e. **IA (IBC)/17/GB/2022** has been filed under Section 66 of the Insolvency and Bankruptcy Code, 2016, praying for the following reliefs:
 - a) *Pass an order requiring the Respondents no 1 & 2 to contribute to the assets of the corporate, as there is a fraudulent trading to the tune of 22.50 crore for the period from 01.04.2014 debtor to 14.01.2019 as is detailed in para 13, as this Tribunal may deem fit under section 66(1) of the Code;*
 - b) *Pass an order requiring the respondents no 3 to 9 to contribute to the assets of the corporate debtor, on account of having the knowledge of fraudulent trading and further assisting the respondents no 1 & 2 with the intent to defraud the creditors of the corporate debtor, as this Tribunal may deem fit under section 66(1) of the Code;*
 - c) *Pass an order requiring the respondents no 1 & 2 to contribute to the assets of the corporate debtor, on account of wrongful trading done on the brink of insolvency with the intent to defraud the creditors of the corporate debtor and not exercising due diligence in minimising the potential loss to the creditors of the corporate debtor for the period from 15.01.2019 till the insolvency commencement date, as this Tribunal may deem fit under section 66(2) of the Code;*
 - d) *Pass an order referring the matter to the Central Government for investigation of the affairs of the corporate debtor by an inspector(s) under section 213 of the Companies Act, 2013;*
 - e) *Pass any further order(s) as this Tribunal deem fit and proper.*
2. The relevant submissions of the Applicant made *vide* their Petition, Rejoinder and Written Notes are extracted hereunder:
 - 2.1 There is a fraudulent transaction undertaken on 01.02.2019 by the Respondent no 1 and 2 (Suspended Directors) in collusion with the Respondent no 3 (Potential Coaching Institute Pvt Ltd) with a malafide intent and ulterior motive of defrauding the creditors of the corporate debtor.

- 2.2 The nature of the fraudulent transaction undertaken on 01.02.2019 is that the corporate debtor was made to enter into partnership with Respondent no 3 to form a partnership firm "Potential and Concept Educations" with equal profit sharing ratio and thereafter barely a week later, *vide* deed of agreement dated 08.02.2019, there was a transfer of all the assets of the Corporate Debtor including the right to use of the most valuable asset, *i.e.*, the Trade Mark "CONCEPT Educations" along with all furniture, fixture and electronics for a mere Rs 10 Lakh only to the partnership firm. The implication of the transaction is that the corporate debtor is now having no asset with itself.
- 2.3 Thereafter *vide* Deed of Reconstitution of partnership dated 19.09.2019, the Corporate Debtor is made to retire from the partnership and the spouse of the Respondent no 1 (Ms Jayati Saha -Respondent no 4) and 2 (Meghna Kalita-Respondent no 5) are inducted as partner. Now, the Corporate Debtor is out and the suspended directors through their spouse are enjoying the assets and the profits of the Corporate Debtor. Thereafter, there were frequent changes in the partnership and partners as detailed resulting in the induction of Respondent no 6 to 9 as the beneficiaries of the assets and earnings of the corporate in individual capacities without any consideration flowing to the corporate debtor.
- 2.4 It is stated that the suspended board and others did not provide all the required information and therefore, there was an application IA 40 of 2021 filed against the suspended directors including the Respondent no 3 to provide the details of the pending information.
- 2.5 The pre-designed conspiracy and fraudulent intentions of the Respondents no 1 to 9 are also evident from the fact that the main petition was filed for a mere default of Rs 3,48,000/- and corporate debtor remained *ex-parte* in the main petition. It is also observed by this Tribunal at para 3 in the admission order dated 26.02.2020.

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- 2.6 The Transaction Auditor appointed by the erstwhile RP has identified an amount of Rs 11,60,92,902/- plus some unidentifiable transactions as fraudulent or wrongful trading.
- 2.7 The business of the Corporate Debtor has been carried on with the intent to defraud its creditors and the same is conclusively proved from the e-mail dated 01.09.2015 written by R2 to R1. The Corporate Debtor was burdened with liabilities because of acquiring properties and lavish spending by both R1 and R2. The suspended directors have themselves shared the list of liabilities to the tune of 4.69 crore before the commencement of the CIRP *vide* e-mail dated 02.03.2021.
- 2.8 In the absence of complete and reliable information, an estimated 22.50 crores stands diverted from the account of the Corporate Debtor by conspiring to first entering the Corporate Debtor into partnership on 01.02.2019 and thereafter ousting it on 19.09.2019.

1.	Estimated total revenue for the period from 01.04.2014 to 14.01.2019 (based upon the actual audited financials provided)	61.50 Cr
2.	Estimated cost for the period from 01.04.2014 to 14.01.2019 [para 12(f)]	39.00 Cr
3.	Estimated surplus/profit of the CD diverted by Respondent No. 1 and 2 from 01.04.2019 till 14.01.2019	22.50 Cr

- 2.9 The Resolution Plan of the Corporate Debtor is approved *vide* order dated 24.03.2022 in IA 61 of 2021 which also directed the RP to continue to pursue all the avoidance applications under Section 43 and 66 of the Code.
- 2.10 The suspended directors had also filed an application IA 88/GB/2023 offering 40 Lakh as full and final settlement for disposal of the present IA 11 of 2023, IA 40 of 2021 (filed under Section 19(2) of the Code and IA 17 of 2022 (filed under

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Section 66 of the Code) which stands dismissed by this Tribunal *vide* order pronounced on 08.11.2023.

- 2.11 The beneficiaries at the cost of the Corporate Debtor are R1 to R9 and therefore are jointly and severally liable to contribute to the assets of the Corporate Debtor to the extent of unsatisfied claim along with the fees and expenses incurred by the ex-RP.
 - 2.12 The defence of timelines under Regulations 35A of CIRP Regulations 2016 is directory and cannot benefit the wrong doer as held by the Hon'ble NCLAT in *CA(AT) INS No 583 of 2021* in the matter of *Aditya Kumar Tibrewal*, as well as, in the Judgement of the Hon'ble Delhi High Court in *LPA 7/2021* in the matter of *Tata Steel BSL Ltd vs Venus Recruiters Pvt Ltd*.
 - 2.13 The Respondents no 1 to 9 are knowingly parties to the carrying on of the business of the Corporate Debtor with a fraudulent intent and therefore are jointly and severally liable to contribute to the assets of the corporate under Section 66(1) of the Code. The Suspended Directors are also guilty of wrongful trading under Section 66(2) of the Code.
3. Shorn of unnecessary details, the submissions by Respondent No. 1 and 2 *vide* their reply and written submissions are produced hereinafter:
 - 3.1 The Applicant has made mere allegations of fraud without accompanying the same with substantial evidence before the Tribunal and hence, the Applicant has failed to meet the threshold required under Section 66 of IBC, 2016. The absence of sufficient transaction tracking and supporting documents renders the allegations of fraud speculative at best and undermines the integrity of the insolvency proceedings. Further, onus of proving presence of fraud before the Tribunal lies on the Applicant, which the Applicant herein as failed. The former RP has also failed to demonstrate his authority to file this application before the Tribunal.
 - 3.2 Section 66 of the IBC is applicable only to fraudulent/wrongful trading during the CIRP or during a subsequent liquidation process, if at all initiated and not

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regarding past transactions. Even if Section 66 of the IBC applied to past transactions, unlike Sections 44, 48 and 51, IBC (under which the NCLT, as Adjudicating Authority, can avoid past transactions), under Section 66, the NCLT cannot avoid past transactions, even if fraudulent, but under Section 66(2) can only direct the Director/partner of the Corporate Debtor, and not other parties to the transaction, to make contribution to assets of the Corporate Debtor. The Petitioners have placed their reliance on *Prashant Properties Limited v. SPS Steels Rolling Mills Ltd. MANU/ WB/2456/2019*, *Swiss Ribbons (P) Ltd. v. Union of India MANU/SC/0079: 2019 4 SCC 17*, *Sudipa Nath v. Union of India and Ors MANU/TR/0036* and *Glukrich Capital Pvt. Ltd. v. State of West Bengal and Ors (2023)179 SCL 44 (SC)*.

- 3.3 There is a failure on part of the Ex-RP to demonstrate any asset transfer with the intent to defraud the creditors. The agreement mentioned in the application is purely a routine business transaction and the applicant has failed to comprehend that a coaching business can face decline due to heightened competition. Since there was a merger of institutes, there was also a necessity to use each other's trademark. It was only the “right to use trademark” which was transferred and not the trademark itself. Moreover, the resolution process, the said agreement was annulled by this Tribunal and right to use was then revoked. Thus, the matter concerning the right to use trademark has already been resolved and decided.
- 3.4 It is the duty of RP to file an application under Section 66 during the CIRP or liquidation process. However, in the case at hand, the CIRP concluded on 31.11.2021 and the application was filed in the month of February 2022. There has also been non-compliance of requirements laid down in Regulation 35A of the CIRP Regulations, 2016.
4. Respondent No. 3 while opposing the present Application submits that this tribunal *vide* order dated 24.03.2022 in IA (IBC) 24/GB/2021 have already rejected erstwhile RP's plea to proceed against the Respondent No. 3 for payment of compensation. Both the

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coaching institutes, Potential Coaching Institute Private Limited and Concept Eduventures Private Limited, had decided to come together for survival and for the benefit of students. This decision was made due to increased competition in the coaching center industry, particularly with the entry of ALLEN in the Guwahati region. Consequently, there was a sudden decline in student enrollment, while operational expenses persisted. However, after a certain time, it became apparent that the policies and management systems of both coaching institutes were incompatible, leading to a mutual decision to terminate their partnership. The Deed of Agreement dated 08.02.2019 is not relinquishment Deed and no right to use of intellectual property was relinquished in favor of Respondent No.3. In fact, only the right to use Trade mark "Concept Education" was given to Respondent No.3, against which it was promised to give free education to students of concept for a period of One Year, which can be valued in different ways depending on the fee structure of the institution. Hence, the prayer made in the present application against the Respondent No. 3 are misconceived and untenable in law and the same needs to be dismissed.

5. Respondent No. 4 while denying the allegations made against him in the application submits that there is no such land in the name of Respondent No. 4. During his tenure as a partner, he maintains that no illegal transactions or business activities took place, thereby contesting the claim of wrongful trading as alleged by the erstwhile RP.
6. Respondent No 6 & 7 *vide* reply dated 04.05.2023 submit that erstwhile RP has arrayed them as Respondents for merely entering into the Limited Liability Agreement which is not existence as on date and there were also neither any transaction nor business. Respondent No. 6 & 7 had no knowledge regarding any kind of wrongful transaction of Corporate Debtor and has no involvement in alleged wrongful acts of the Corporate Debtor. There is no reason or cause given by the RP to show intention of the Respondent No 6 & 7 having acted with intention to defraud the creditors of Corporate Debtor by entering into LLP. On the contrary, the Resolution Professional has suppressed the fact that there were no business or transactions conducted under the said LLP.

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7. Respondent No 8 & 9 submit that the Petitioner, the erstwhile RP, unnecessarily made them party in the application by making wrong allegations and misleading the Tribunal. They have been arrayed as Respondents for merely entering into the Limited Liability Agreement which is not existence as on date and there were also neither any transaction nor any business. Respondent No. 8 & 9 had no knowledge regarding any kind of wrongful transaction of corporate debtor and has no involvement in alleged wrongful acts of the Corporate Debtor.
8. Respondent No. 10 was released from the present case *vide* order dated 17.03.2023 upon submitting his reply in the matter as he was only a *proforma* Respondent.
9. Heard the Ld. Counsel and perused the entire material available on record. At the outset, the two *prima facie* issues with regards to the period of limitation and locus of the Applicant to file/continue this application have already been elaborately dealt with by this Bench in the connected matter, IA(IBC)/11/GB/2022 which is also for pronouncement today. Now, that the two *prima facie* issues have effectively been addressed, we proceed to engage with the facts of the transactions identified by the Applicant, ex-RP as fraudulent under Section 66, IBC, 2016.
10. Ld. Ex-RP has identified certain transactions to be fraudulent transactions based on the Transaction Auditor's report with an estimated amount of 22.50 Crore *in toto* inclusive of all the transactions rendered unquantifiable by the Transaction Auditor. From the facts and circumstances of this application, this Bench would like to bring to light that the transactions so mentioned by the Transaction Auditors as fraudulent transactions are only to a tune of Rs. 11,60,92,902 Crore alongwith a few transactions which are also termed as fraudulent by the Transaction Auditor however, have remained unquantifiable owing to the constraint in availability of documents with the said Transaction Auditor. We would like to mention here that, we are of the view that during the course of business of CD, the Suspended Directors have carried on business in a reckless and negligent manner. From buying of a luxury car on account of CD for personal use to entering into partnership with another coaching institute and thereby transferring its assets, including the right to use their trademark, which then had to be

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cancelled effectively by this Tribunal *vide* their Order approving the Resolution Plan, the Suspended Directors *i.e.*, Respondent No. 1 and 2 did attempt to maliciously use and siphon the funds of CD for their personal benefit. Furthermore, this intent of the Suspended Directors becomes more evident from the email dated 01.09.2015, sent from Respondent No. 1 to Respondent No. 2 from and to their official email ids is taken into consideration. The aforementioned email, though not a conclusive proof, does act as corroborative evidence to the malicious intent on part of the Suspended Directors. Furthermore, although application under Section 19(2) was deemed infructuous for the reason of taking over of CD by the Successful Resolution Applicant (SRA), this Bench cannot help but notice the lack of enthusiasm/ reluctance on part of Respondent 1 and 2 to provide the documents sought for by Ld. Ex-RP, to the extent of issue of bailable warrant against Respondent No. 2, only after which the Respondents took the process of this Tribunal seriously. Moreover, looking at the Resolution Plan approved, specifically the summary of claims that were admitted, undisputed and found deficit, which were to a tune of Rs.1,87,40,080 as well as the observations earlier made by this Tribunal that any amount, if recovered from IA(IBC)/11/GB/2024 and IA(IBC)/17/GB/2024 would not go in favour of the creditors but be distributed as per the directions of this Tribunal *vide* Order dated 24.03.2022 in IA(IBC)/61/GB/2021:

“14.5. The CoC has Passed a resolution that all the claw back received in pursuance to the avoidance applications shall be distributed in accordance with the directions of this Bench; It is observed that the sole financial creditor -M/S Volkswagen Finance Private Limited, (now loan assigned to M/s Kotak Mahindra Prime Pvt. Limited) had sanctioned loans for High End Luxury Porsche Boxster Car to the Coaching institute worth of Crore of rupees. Coaching Institute was not requiring those cars but the FC knew that it was for Directors’ personal use only but payment of instalments and interest was paid from the Account of the CD only It is not understood how a NBFC/FC has sanctioned such High End Luxury Porsche Boxster Cars to the Coaching Institute and one of the main reasons for failure of the Coaching Institute to pay the salary of the Employees, Faculties, other OCs, resulted into CIRP, is due to the diversion of funds towards payment of large value loan instalments and interest of high

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end Car Loans given/availed. Now the FC is getting almost its entire dues as provided in the Resolution Plan, leave interest portion/overdue interest and their resolution not to take any amount further, if recovered from the transactions under Sec 43,45,50,66 is not viewed at all a favour to other Creditors. The FC-NBFC does not deserve more amount than the amount provided in the Resolution Plan.”,

this Bench is nothing but skeptical about the intention of the Respondent No. 1 and 2 and the manner in which the business of CD was conducted.

11. However, despite the skepticism of this Bench with respect to the intention to defraud, we find that there still has been failure on part of Ex-RP to make a firm determination enumerating the alleged fraudulent transactions. It is pertinent to mention here that enactment of Section 66 has to be read with the objects and features of the Code, implying that any proceeding under IBC, is in the nature of a summary proceeding and for any court of competent jurisdiction to declare a transaction to be fraudulent or wrongful, a higher degree of proof and verification / trial is required. Even though, the Transaction Auditor had suggested numerous transactions to be fraudulent in his report, Ex-RP has failed to showcase an independent opinion formed by him citing the transactions to this Tribunal. While submitting that there has been diversion of funds and the amount sought for contribution by the Respondents in prayer, Ex-RP has been deficient in actually quantifiably and conclusively determining the true amount such alleged diverted funds. Had the Ex-RP even identified few transactions from the list given by the Transaction Auditor, this Bench would have been inclined to look into the same. The matter at hand has left us only with the perusal of qualitative evidence and no quantitative evidence.
12. With regards to the involvement of Respondent No. 3 or the partners of Respondent No. 3, *i.e.*, Respondent No. 4 and 5 of the present Application, this Bench relying on the settled law laid down by Hon'ble Supreme Court of India in ***Glukrich Capital Pvt. Ltd. v. State of West Bengal and Ors 2023 Livelaw SC 464*** are of the considered view that remedies against third parties are not available. Further, since Respondent No. 6, 7, 8 and 9 also fall under the category of third party as the contentions of the Applicant are

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only on account of them being partners in Respondent No. 3, which in itself is a third party. It is important to note that Tribunals are courts of limited jurisdiction which cannot go into detailed questions of facts and law, which means that for any transaction to be declared as fraudulent or wrongful against a third party, independent proceedings before a civil or criminal court are the only respite available. Relevant portion of the judgment by Hon'ble Apex Court is extracted hereunder for reference:

*“8. We may also observe that the Tripura High Court has rightly relied upon the observations made by this Court in a binding precedent, in **Usha Ananthasubramanian Vs. Union of India**, which pertains to a matter under Section 339(1) of the Companies Act, 2013 which is *pari materia* with Section 66 of IBC. The High Court in the case of **Sudipa Nath (Supra)** has rightly observed that:-*

*“13..... That Section 66 (1) also directed towards making such persons personally liable for such fraudulent trading to recouping losses incurred thereby and to provide that the NCLT can pass order holding such persons liable to make such contributions to the assets of the corporate debtor as it may deem fit. No power has been conferred on NCLT to pass such orders against other organizations/legal entities (other than corporate debtors) with whom such business was carried out against any person responsible in such other organizations/legal entities for carrying on business with corporate debtor. For the said purpose, the ratio of the judgment of the Hon'ble Supreme Court in **Usha Ananthasubramanian (supra)** in the context of section 339 (1) one of the companies Act, 2013 as extracted above would clearly apply even in the context 66(1) of IBC. Accordingly, an application under Section 66(1) by the resolution professional would not bar any civil action in accordance with law, either at the instance of resolution professional or liquidator or by the corporate debtor in its new avatar on a successful CIRP for recovery of any dues payable to the corporate debtor by such organization / legal entities. Such legal action is independent of Section 66(1).”*

9. Learned counsel appearing for the respondents has pointed out to us that even the NCLT in other similar matters has taken the same view following the judgment of this Court in **Usha**

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Ananthasubramanian (Supra). Reference has been made to the order dated 09.02.2023 passed in an application in CP(IB) No.4258/(MB) 2019.

10. We are of the considered opinion that in such circumstances, it is for the Resolution Professional or the successful resolution applicant, as the case may be, to take such civil remedies against third party, for recovery of dues payable to corporate debtor, which may be available in law. The remedy against third party, however, is not available under Section 66 of IBC, and the civil remedies which may be available in law, are independent of the said Section.”.

13. There has been a failure on part of the Ex-RP in zeroing-down the transactions allegedly of fraudulent nature as a result of which the prayer is only for an amount on the basis of estimation made by him. Hence, in view of the aforementioned observations, this Bench holds that the alleged transactions sought to be annulled in the present application does not meet the legal requirements as required to be established under Section 66 of the Code by the Ex-RP and consequently, the application is liable to be rejected.
14. Accordingly, IA(IBC)/17/GB/2022 stands **dismissed**.
15. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
16. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
17. File be consigned to records.

Sd/-

Satya Ranjan Prasad
Member (Technical)

Sd/-

H. V. Subba Rao
Member (Judicial)

Signed this on 2nd day of July, 2024