

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

IA No. 75/JPR/2022
In CP No. (IB)- 158/9/JPR/2020

In the matter of:

**M/S BALAJI LIFESTYLE
TECHNOLOGIES PVT. LTD.**

...OPERATIONAL CREDITOR

VERSUS

**M/S EXCEL TECHNOVATION
PVT. LTD.**

...CORPORATE DEBTOR

And in the matter of IA No. 75/JPR/2022:

**M/S EXCEL TECHNOVATION
PVT. LTD.**

*Through its Resolution Professional
Shri Prashant Agrawal
Having its office at F-106, Sumer
Complex, Gautam Marg, B/h Bagadia
Bhawan, Jaipur*

...Applicant

VERSUS

MR. RAJESH SINGH

*(Suspended Director of Excel
Technovation Pvt. Ltd.)*

*R/o 802, Unique Sanghi
Apartment, Mahavir Nagar, Near
Durgapura Railway Station, A C
Jobner, Jaipur- 302018, Raj.*

...Respondent No. 1

Sdr

Sdr

MS. ANJU SINGH

(Suspended Director of Excel Technovation Pvt. Ltd.)

R/o 802, Unique Sanghi Apartment, Mahavir Nagar, Near Durgapura Railway Station, A C Jobner, Jaipur- 302018, Raj.

...Respondent No. 2

MR. DEV SHARMA

(Suspended Director of Excel Technovation Pvt. Ltd.)

R/o Ground Floor, Block No. 12, DDA Flats, Tilak Nagar, West Delhi, Delhi-110018.

...Respondent No. 3

FOR APPLICANT(S) : Prashant Agrawal, Liquidator
Jatin Chawla, Adv.
FOR RESPONDENT(S) : Rohan Agarwal, Adv.

Order Pronounced On: 03.05.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

- The present Application bearing *IA No. 75/JPR/2022* has been filed by *Mr. Prashant Agrawal ('Applicant'/ 'Resolution Professional'/ 'Liquidator')*, then Resolution Professional of *M/s Excel Technovation Pvt. Ltd.* ('Corporate Debtor') under Section 19(2) of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') seeking the following reliefs:

- *Direct the Non-Applicants to furnish all the documents/ information related to Corporate Debtor to Resolution Professional.*

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- *Direct the Non-Applicants to furnish the information/ clarification as sought by Resolution Professional more particularly stated hereinabove under Para 9 of the Application.*
- *Direct the Non-Applicants to co-operate with Resolution Professional for carrying out statutory duties casted upon Applicant and furnish relevant documents/ information/ clarification to be sought by Resolution Professional as time to time.*
- *Pass any other order which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case may be granted.*

2. This Adjudicating Authority, by order dated 30.09.2021, admitted the Application filed by *M/s Balaji Lifestyle Technologies Pvt. Ltd.* ('Operational Creditor') under Section 9 of the Code for the initiation of Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor. As a consequence, *Mr. Prashant Agrawal* was appointed as Interim Resolution Professional ('IRP'). Later on, the appointment of the IRP as the Resolution Professional ('RP') was approved by the CoC. Subsequently, an order for Liquidation was passed by this Adjudicating Authority on 31.10.2023, and the RP was appointed as the Liquidator.

3. The present application has been filed on the following set of facts:

3.1. It is submitted that the Applicant, in pursuance of initiation of CIRP of the Corporate Debtor, sent an email dated 02.10.2021 seeking cooperation from the Suspended Board of Directors. The Applicant requested the furnishing of documents/information from the Corporate Debtor, however, no response was furnished. The Applicant sent reminder emails on various dates, namely 12.10.2021, 13.10.2021, 14.10.2021, 15.10.2021, 18.10.2021, and 19.10.2021, seeking the

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requisite information from the Non-Applicants. It is further submitted that Non-Applicant No. 1 reverted to the email on 20.10.2021 with a few documents and information.

3.2. In furtherance of the process, the Applicant sought additional information/documents from the Non-Applicants *vide* an email dated 28.10.2021. Upon non-receipt of response, the Applicant sent reminder emails dated 03.11.2021, 10.11.2021, 11.11.2021, 20.11.2021, and 24.11.2021. The Non-Applicants responded *vide* email dated 24.11.2021, seeking more time to respond. Subsequently, in response to the emails, one *Mr. Purusottm Sharma*, a suspended personnel of the Corporate Debtor, sent a reply *vide* email dated 27.11.2021, however, he did not provide complete documents/information as requested by the Applicant.

3.3. The Applicant, after analyzing the response from *Mr. Purusottm Sharma*, sent another email dated 03.12.2021 to the Non-Applicants, seeking complete information as requested initially on 28.10.2021. Non-Applicant No. 1 reverted through an email dated 03.12.2021, reiterating the above reply of *Mr. Purusottm Sharma* received on 27.11.2021. Thereafter, the Applicant sent a rejoinder email dated 03.12.2021, highlighting the requirement, and the response on the same was provided by Non-Applicant No. 1. When no appropriate response was received from the Non-Applicants, the Applicant sent a reminder

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email dated 15.12.2021, which remained unreverted until the present date. Lastly, on 18.01.2022, the Applicant sent a final reminder email seeking the unfurnished information and mentioned that if the same were not furnished, then a petition would be filed against the Non-Applicants under Section 19(2) of the Code. The information sought are:

- a. *Books of accounts of the Corporate Debtor, which includes vouchers, registers, bills generated/ issued, invoices received from sundry creditors, details of deposits etc.*
- b. *Complete list of names and addresses of Sundry Debtors and Sundry Creditors of the Corporate Debtors along with the contract agreements and invoices/ bills raised or received.*
- c. *Please provide a complete list of fixed assets showing as per tally records, including purchase invoices, dates of purchase, make and value of purchases etc.*
- d. *As per the tally records, the opening balance of Rs. 2,66,896/- (Rupees Two Lakhs Sixty-Six Thousand Eight Hundred and Ninety-Six Rupees) is shown in the trail balance. Kindly provide details of the same.*
- e. *Total deposits are lying in the books of account at Rs. 45,04,030.50/- (Rupees Forty-Five Lakhs Four Thousand and Thirty Only). You are requested immediately to provide details of deposits and supporting evidence for the same so the amount can be recovered.*

3.4. Since the above email remained unanswered, the Applicant filed the present Application before this Adjudicating Authority under Section 19(2) of the Code against the non-cooperation by the Non-Applicants in the CIRP proceedings.

4. The Respondent No. 1 and 2 filed their Reply, *vide* Diary No. 3750/2022 dated 15.12.2022, stating as below:

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- 4.1. The Respondents No. 1 & 2 have categorically denied the allegations of the Applicant and stated that they extended full cooperation to the Applicant whenever sought. Further, it is submitted that the Applicant sent an email to the email address rajesh@exceltechnovation.com, however, this email address was shut down due to non-payment of the due amount for the use of the said domain. Therefore, the answering respondents did not have any knowledge of the email dated 02.10.2021. The answering Respondents received an email on 19.10.2021 at the email address rsc.excel@gmail.com, which was duly responded to by them, however, they had no knowledge of the emails sent by the Applicant to the other email addresses.
- 4.2. It is further submitted that the information regarding the login ID and password of the Company's website was duly provided by the answering Respondents to the Applicant in response to the email dated 28.10.2021. Furthermore, all the information within the knowledge of the answering Respondents has been duly furnished, and therefore, the contention of the Applicant that incomplete information was provided is not correct.
- 4.3. Moreover, it is submitted that the Applicant has already taken possession of the office of the Corporate Debtor under his custody and put his own locks on the said property, due to which the answering Respondents are unable to access the data and records. The Applicant



can himself access the full records of the Corporate Debtor. Additionally, the answering Respondent has acted with *bona fide* intentions at all times, and therefore the interference from this Adjudicating Authority is not required. It is submitted that the answering Respondents are further ready and willing to assist the Applicant in the due process. The answering Respondents duly responded to the information sought by the Applicant on 10.08.2022 *vide* an email dated 16.08.2022.

5. The Applicant *vide* Dairy No. 816/2023 dated 28.03.2023 has submitted the Rejoinder stating as below:

5.1. It is submitted that the Applicant sent the emails to the email addresses available in the Company's data. The email was duly sent to the personal *Rediff* email ID of Respondent No. 2 (anjusingh_jpr@rediffmail.com), who is the wife of Respondent No. 1. However, no information was provided in a timely manner.

5.2. It is further submitted that when the Applicant sent an email dated 19.10.2021, intimating the Non-Applicants for initiating proceedings u/s 19(2) of the Code against the Non-Applicants, Respondent No. 1 reverted *vide* email dated 19.10.2021. However, the response was incomplete. Furthermore, after the Applicant issued several emails, the response was sent by the Respondents *vide* email dated 27.11.2021 through *Mr. Purusottam Sharma*. Moreover, the reply to the email,

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annexed with the reply, was issued post filing of this Application.

Therefore, it can be seen that the Non-Applicant did not cooperate in the due process of law and provided vague information.

6. It is pertinent to mention herein that no representation has been received on behalf of Respondent No. 3. Thus, this Adjudicating Authority, *vide* order dated 05.02.2024, initiated *ex-parte* proceedings against Respondent No. 3.
7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply and Rejoinder along with the documents enclosed therein.
8. It is noted that the present Application was filed on 08.02.2022, and subsequently, the Liquidation of the Corporate Debtor was initiated *vide* order dated 31.10.2023. In the said order this Adjudicating Authority has directed as follows:

“(21.5) The personnel of the Corporate Debtor shall extend all assistance and cooperation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor and provisions of Section 19 of the Code shall apply concerning the liquidation process as they apply with CIR process with the substitution of references to the Resolution Professional for the Liquidator.”

9. The provisions of Section 19 of the Code impose an obligation on the personnel and promoters of the Corporate Debtor to provide all assistance and cooperation required by the Resolution Professional in the management of the affairs of the Corporate Debtor. Section 19(2) of the Code empowers the Resolution Professional to file an appropriate

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application before this Adjudicating Authority to seek necessary directions. Similarly, Section 35 of the Code delineates the powers and duties of the Liquidator and specifically empowers the Liquidator to take into his custody or control all the assets, property, effects, and actionable claims of the Corporate Debtor.

10. The Adjudicating Authority on receiving an application under Section 19(2), shall by an order, direct such personnel or other persons to comply with the instructions of the Liquidator and to cooperate with him in the collection of information and management of the Corporate Debtor.
11. Considering arguments advanced, submissions put forth and documents placed on the record, Application of the RP is allowed and Respondents are directed to extend their full cooperation and support to Liquidator in handing over the possession of the assets along with providing all the documents and records enumerated in the Application, particularly the information mentioned in *Para 3.3* hereinabove, within fifteen days from the date of this order.
12. The Liquidator shall be at liberty to move an appropriate application, in case of any breach of the direction given by this Adjudicating Authority. Furthermore, the non-compliance with the aforesaid direction would attract strict penalties and suspended management shall remain present in person either physically or through virtual mode to explain their non-compliances with the aforesaid directions.

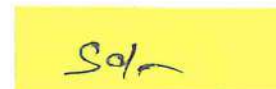
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13. Any non-conformity, shall result in the issuance of aailable warrant to secure the presence of Respondents. The Liquidator is directed to inform the Suspended Management. The Registry is directed to serve a copy of this Order to the Suspended Management. Accordingly, IA No. 75/JPR/2022 stands disposed of.



DEEP CHANDRA JOSHI
JUDICIAL MEMBER



RAJEEV MEHROTRA
TECHNICAL MEMBER

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

IA No. 81/JPR/2022
In CP No. (IB)- 158/9/JPR/2020

In the matter of:

M/S BALAJI LIFESTYLE TECHNOLOGIES PVT. LTD.

...OPERATIONAL CREDITOR

VERSUS

M/S EXCEL TECHNOVATION PVT. LTD.

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And in the matter of IA No. 81/JPR/2022:

**M/S EXCEL TECHNOVATION PVT.
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Through its Resolution Professional
Shri Prashant Agrawal

Having its office at F-106, Sumer Complex,
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...Respondent No. 1

MS. ANJU SINGH

*(Suspended Director of Excel Technovation
Pvt. Ltd.)*

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R/o 802, Unique Sanghi Apartment,
Mahavir Nagar, Near Durgapura Railway
Station, A C Jobner, Jaipur- 302018, Raj.

...Respondent No. 2

MR. DEV SHARMA

*(Suspended Director of Excel Technovation
Pvt. Ltd.)*

R/o Ground Floor, Block No. 12, DDA Flats,
Tilak Nagar, West Delhi, Delhi-110018.

...Respondent No. 3

FOR APPLICANT(S) : Prashant Agrawal, Liquidator
Jatin Chawla, Adv.
FOR RESPONDENT(S) : Rohan Agarwal, Adv.

Order Pronounced On: 03.05.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application bearing *IA No. 81/JPR/2022* has been filed by *Mr. Prashant Agrawal ('Applicant'/ 'Resolution Professional'/ 'Liquidator')*, then Resolution Professional of *M/s Excel Technovation Pvt. Ltd.* ('Corporate Debtor') under Section 66 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') seeking the following reliefs:

- i. *Direct the Non-Applicants to make contributions to the assets of the Corporate Debtor for the losses incurred by the Corporate Debtor for the wrongful transactions undertaken under section 66 of the Code, 2016 as suspended directors of Corporate Debtor did not exercise due diligence in minimizing the potential loss to the Corporate Debtor.*
- ii. *Pass any other order which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case may be granted.*

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2. This Adjudicating Authority, by order dated 30.09.2021, admitted the Application filed by *M/s Balaji Lifestyle Technologies Pvt. Ltd.* ('Operational Creditor') under Section 9 of the Code for the initiation of Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor and *Mr. Prashant Agrawal* was appointed as Interim Resolution Professional ('IRP'). Later on, the appointment of the IRP as the Resolution Professional ('RP') was approved by the CoC. Subsequently, an order for Liquidation was passed by this Adjudicating Authority on 31.10.2023, and the RP was appointed as the Liquidator.
3. The present application has been filed on the following set of facts:
 - 3.1. It is submitted that the Applicant has observed several transactions executed by the Respondents falling within the purview of Section 66 of the Code. Consequently, the Applicant conducted a Transaction Audit (IBC) of the Corporate Debtor through a Chartered Accountancy Firm. In their report, the firm noted that sufficient information was not provided, leading them to refrain from providing any remarks.
 - 3.2. The Transaction Audit (IBC) Report provides that a tender was allocated to the Corporate Debtor by the State of Rajasthan under the name "Creation of SECC- Rajasthan" at Rs. 6,86,77,200/- (Rupees Six Crores Eighty-Six Lakhs Seventy-Seven Thousand and Two Hundred Only). The Corporate Debtor has sublet the same at Rs. 7,99,40,073.00/- (Rupees Seven Crores Ninety-Nine Lakhs Forty

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Thousand and Seventy-Three Only). Thus, the Corporate Debtor has sublet the project at a loss of Rs. 1,12,62,873/- (Rupees One Crore Twelve Lakhs Sixty-Two Thousand Eight Hundred and Seventy-Three Only), and the transaction appears to be suspicious. The Applicant sent emails dated 24.11.2021, 03.12.2021, and 15.12.2021 seeking explanation from the Respondents *qua* suspicious transactions. The aforementioned emails were replied to by the Respondents *vide* emails dated 24.11.2021 and 27.11.2021, however, no appropriate response was provided.

3.3. Further, it is submitted that the Corporate Debtor has incurred following losses in near past:

Financial Year	Losses (in Rs.)
2018-2019	3,12,80,124.86/-
2019-2020	1,30,80,758.58/-
2020-2021	30,34,487.63/-
01.04.2021 to 30.09.2021	1,18,875.20/-

The Respondents were further asked to furnish a strategy to meet the aforementioned losses of the Corporate Debtor; however, no appropriate response was received. This act of the Respondents implies that they were engaged in carrying out the business of the Corporate Debtor wrongfully and fraudulently with the intent to defraud creditors.

3.4. The Respondents have failed to provide any explanation regarding the booking of bad debts and loss on fixed assets of the Corporate Debtor for the Financial Year 2020-2021. Thus, the act of the Respondents in

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booking bad debts and loss of fixed assets falls under the purview of wrongful transactions with the intention to defraud creditors of the Corporate Debtor. Additionally, the opening balance in the books of accounts for the Financial Year 2020-2021 was not carried forward properly. The books of accounts for the Financial Year 2020-2021 depicts a difference in the opening balance of Rs. 20,21,147/- (Rupees Twenty Lakhs Twenty-One Thousand One Hundred and Forty-Seven Only) on the assets side thereby defrauding the creditors to the extent of amount of unavailable assets.

4. The Respondent No. 1 and 2 filed their Reply *vide* Diary No. 3749/2022 dated 15.12.2022, stating as below:

4.1. The Respondent No. 1 & 2 have categorically denied the allegations of the Applicant and stated that they extended full cooperation to the Applicant. It is further submitted that the transaction audit of the Corporate Debtor does not specify the transactions executed by the Respondents which fall within the purview of section 66 of the Code. Additionally, the answering Respondents have no knowledge of the performance of the transaction audit by the Applicant.

4.2. In the Report, no timeframe as to the commencement of the transaction audit and the completion of the transaction audit has been specified. However, it is the duty of the Applicant and Chartered Accountancy Firm to specify the date of commencement and completion of the

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transaction audit. In the said scenario, the audit report filed by the Chartered Accountancy Firm cannot be considered as conclusive evidence towards non-corporation of the Respondents or their indulgence in any fraudulent transactions.

4.3. In respect to subletting, it is submitted that this project was allocated through tender to the Corporate Debtor at Rs. 6,86,77,200/- (Rupees Six Crores Eighty-Six Lakhs Seventy-Seven Thousand and Two Hundred Only) and it was subsequently sublet to various subcontractors by the Corporate Debtor. However, due to escalation of prices by the subcontractors, the Corporate Debtor suffered losses which were never reimbursed by the State Government. Thus, the answering Respondents were never indulged in wrongful trading in the due course of business.

4.4. Concerning the losses incurred by the Corporate Debtor, it was submitted that a pursual of books of accounts will reveal that the answering Respondents were putting efforts to improve the financial health of the Company resulting in reduction of losses. Furthermore, the Corporate Debtor is engaged in the business of government contracts and bids are granted on a competitive basis; therefore, the answering Respondents were not indulged in wrongful and fraudulent trading.

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- 4.5. It is submitted that the answering Respondents have supplied sufficient information to the Applicant with respect to booking of bad debts and loss on fixed assets. Additionally, the information sought by the Applicant was duly reverted by the answering Respondents *vide* email dated 16.08.2022. Further, the answering Respondents also undertakes to extend cooperation and support to the Applicant whenever required. Thus, Section 66 of the Code is not attracted in the present situation.
5. The Applicant *vide* Dairy No. 816/2023 dated 28.03.2023 has submitted the Rejoinder wherein it was submitted that the transaction audit was conducted according to the provisions of the Code, thus, there was no requirement of specifying the time period of the audit. Further, it is argued that the answering Respondents have not provided any justification on record explaining how subcontractors escalated their prices, and the Respondents, without any escalation from the government, increased the prices of subcontractors during the ongoing contract.
6. It is pertinent to mention herein that no representation has been received on behalf of Respondent No. 3. Thus, this Adjudicating Authority, *vide* order dated 05.02.2024, initiated *ex-parte* proceedings against the Respondent No. 3.
7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply and Rejoinder along with the documents enclosed therein.

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8. The Applicant has relied upon Transaction Audit (IBC) Report in which certain transactions have been highlighted as potentially fraudulent or wrongful under Section 66 of the Code. The allegations of the Applicant are as follows:

8.1. **Subletting of tender at loss:** The tender i.e., Creation of SECC-Rajasthan, was sublet by the Corporate Debtor at a loss of Rs. 1,12,62,873/- (Rupees One Crore Twelve Lakhs Sixty-Two Thousand Eight Hundred and Seventy-Three Only).

8.2. **Continuous losses in the business:** No explanation has been provided about continuous incurring of losses in the previous financial years. Further, the Respondent have failed to provide a plan to mitigate these losses in the future.

8.3. **Booking of Bed Debts and Loss on sale of Fixed Assets:** No justification has been given with regards to booking of bed debts and loss on fixed assets.

8.4. **Difference in opening balance on assets side of Balance Sheet:** Opening balance in the book of accounts of FY 2020-2021 was not carried forward properly.

9. Before proceeding further with the matter, it would be apposite to refer Section 66 of the IBC which reads as under:-

Section 66: Fraudulent trading or wrongful trading.

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“... (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.”

10. This Adjudicating Authority is of the view that the Section 66(1) of the Code is attracted if the business of Corporate Debtor has been carried on with the intent to defraud its creditor or for any fraudulent purpose whereas, Section 66(2) of the Code entails non exercise of due-diligence during the twilight period. Therefore, while looking into the purported/alleged transaction it has to be clearly established that the transaction was made with intention to defraud the creditors or the business was conducted in a wrongful manner during the twilight period.

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11. The Bench in the succeeding paragraphs would analyse the alleged fraudulent/ wrongful transaction and see whether the Respondents have acted in a *malafide* fraudulent/ wrongful manner in taking these business decisions. The pointwise analyses in this regard are as under:

11.1 **Subletting of tender at loss:** The findings mentioned in the Transaction Audit (IBC) Report pertaining to subletting are as follows:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

1. *As per the tender wise working provided to us, it was noticed that the company has executed one work named “Creation of SECC- Rajasthan” same was allotted to the ETPL at Rs. 6,86,77,200/- and ETPL sublet the same at a cost of Rs. 7,99,40,073/- i.e., at a loss of Rs. 1,12,62,873/-.”*

Further, the Applicant *vide* its email dated 24.11.2021 asked the Respondents to furnish the answer to the question that “*Why do company sublet contracts at operational loss?*”. The answering Respondents *vide* email dated 27.11.2021 reverted that the Company sometimes sublet contracts at operational loss due to adverse market situation. The answering Respondents in their reply further submitted that due to escalation in prices by the sub-contractors, the Corporate Debtor suffered losses which were never reimbursed by the State Government.

For adjudicating the issue at hand, it is pertinent to take note of the judgement of the Hon’ble NCLAT in *Mr. Tenny Jose & Ors. Vs. Mr.*

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Prathap Pillai Resolution Professional of M/s. Tenny Jose Limited,
[Company Appeal (AT) (CH) (INS.) No. 95 / 2023 wherein it has held that:

“40. In Law’, a Fraudulent Intent’, is to be proved’, after a careful examination of all materials / evidence, as the case may be. If a Fraudulent Intent’ or Fraudulent Purpose’, is made out, the Liability’, must follow. An action can also lie, when there is a Fraudulent Purpose’, upon the Customers’ of the Company’. The Burden of Proof’, is the same as in a Civil’ case, where Serious Allegations of Misconduct’, such as, Fraud’ are in issue’. In an isolated fraud’ case, an Individual Tort Action’ (‘Civil Wrong’), will lie.”

Further, in the case of *Regen Powertech Pvt. Ltd. Vs. Wind Construction Private Limited and Ors.* in Company Appeal (AT) (CH) (Ins) No. 349/2022, the Hon'ble NCLAT held that:-

“33. Be it noted, this ‘Tribunal’, significantly, points out that, whenever ‘Fraud’ on a ‘Creditor’ is perpetrated in the course of ‘carrying on Business’, it does not necessarily follow that the ‘Business’ is being carried on with an ‘Intent to Defraud’ the ‘Creditor’.

34. One cannot remain ‘oblivious’ of the candid fact that, if the ‘Directors’ of a ‘Company’ had acted on a ‘bona fide belief’ that the ‘Company’ would ‘recover’ from its ‘Financial Problems’ / ‘Difficulties’, then, they will not be held liable for the ‘act’ / ‘offence’ of ‘Fraudulent Trading’.

35. As a matter of fact, the ‘aspect’ of ‘Fraudulent Trading’ requires a very ‘High Degree of proof’, which is attached to the ‘Fraudulent Intent’. To put it emphatically, a more compelling ‘Material’ / ‘Evidence’ is required to satisfy the conscience of this ‘Tribunal’ on a preponderance of probability’. Apart from that, an ‘isolated’ / ‘solo fraud’ case, against the person, then, action in ‘tort’ can be resorted to, as opined by this ‘Tribunal’. No wonder, a ‘Creditor’, who was defrauded, will have ‘recourse’ to an ‘alternative remedy’, under ‘Civil Law’.”

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The Hon'ble NCLT Chennai in *The Resolution Professional for M/s. Orchid Pharma Limited Vs. M/s. Hospira Healthcare India Pvt. Ltd & Others* [MA/87/IB/2018 in CP/540/IB/2017] held that:

“8. As per Section 66 of the Code, the applicant shall prove that the corporate debtor carried the business of it either to defraud the creditors or for any other fraudulent purpose. Whenever, allegation of fraud has been made against anybody, it goes without saying, the duty is cast upon the person making such allegation to prove that the answering Respondents are parties to carrying the business either for fraudulent purpose or to defraud creditors.”

In view of the aforementioned Judgments, we are of the opinion that in order to prove allegations under Section 66 of the Code, the Applicant has to prove that the Respondents were parties to carrying out the business either for a fraudulent purpose or to defraud creditors. The Applicant has failed to provide sufficient Material/Evidence to prove the allegation, as allegations under section 66 require a ‘high degree of proof’. At the same time, the very nature of the business and the casualties present therein cannot be ignored; thus, unless otherwise proved, subletting tender in the due course of business at a loss cannot be adjudicated as fraudulent transaction. Additionally, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Therefore, it can be concluded that the Applicant failed to prove the allegations levied, and thus, the same cannot be sustained.

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11.2 Continuous Losses in the business: The findings mentioned in the Transaction Audit (IBC) Report *qua* the business losses is reproduced hereunder:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

1. *...Further company has incurred losses amounting to Rs. 3,12,80,124.86/-, Rs. 1,30,80,758.58/-, Rs. 30,34,487.63/- and Rs. 1,18,875.20/- during the FY 2018-2019, 2019-2020, 2020-2021 and 01.04.2021 to 30.09.2021 respectively.*

As per the information given by the suspended management, they are not having any clear-cut strategy to meet out the losses.”

Further, *vide* email dated 24.11.2021, the Applicant asked the company’s strategy to meet the cash losses. The answering Respondents, *vide* email dated 27.11.2021, replied that as of now they don’t have any clear-cut strategy to meet out the cash losses.

In *Mr. Tenny Jose & Ors. Vs. Mr. Prathap Pillai Resolution Professional of M/s. Tenny Jose Limited (supra), Regen Powertech Pvt. Ltd. Vs. Wind Construction Private Limited and Ors. (supra) and the Resolution Professional for M/s. Orchid Pharma Limited Vs. M/s. Hospira Healthcare India Pvt. Ltd & Others (supra)*, it has been clearly specified that the burden of proof is on the Applicant to prove the allegations levied. The Applicant herein has failed to prove, how the continuous losses of the business amount to wrongful and fraudulent business transactions. Furthermore, unless otherwise proved, continuous losses in the business do

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not *prima facie* show that the transactions carried out by the Corporate Debtor were wrongful or fraudulent with the intent to defraud creditors.

Additionally, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Furthermore, emphasis can also be placed on the table depicting losses in the previous financial years which reflects that the financial records had improved year by year. Therefore, it can be concluded that the Applicant failed to prove the allegation, and thus, this allegation cannot be sustained.

11.3 Booking of Bed Debts and Loss on sale of Fixed Assets: In order to decide the present issue, we will first refer the findings mentioned in the Transaction Audit (IBC) Report. The Chartered Accountancy Firm in its report stated as follows:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

2. As per the audited Financial Statement for the FY 2020-2021, the Company has booked bad debts and loss on fixed assets. Sufficient information, explanation and documents have not been provided to us to verify the same.

Details of Bed debts booked as books of accounts provided to us are as under:

S.No.	Date	Party Name	Amount
1	10/06/2020	Sri Annaporeshwari Enterprises	10,00,000/-
2	12/06/2020	Allience Technologie	1,98,400/-
3	25/06/2020	Max Brain Infotech	11,02,227/-
		Total	23,00,627/-

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Details of Loss on sale of Fixed Assets as per books of accounts provided to us are as:

S.No.	Date	Name of Assets	Amount
1	16/07/2020	Cameras	6,068.57/-
2	16/07/2020	Air Conditioner	58,859.00/-
3	22/07/2020	Canopies	2,65,116.00/-
		Total	3,30,043.57/-

Further, the Applicant *vide* email dated 24.11.2021, asked the Respondents that on what basis bad debts is booked. The reply received *vide* email dated 27.11.2021, states that “Repeat follow-ups Since last 5-7 years. No chance of payment hence booked as bed debts.”

The Applicant levied the allegation that the Respondents have failed to provide sufficient information regarding the booking of bad debts, which indicates that the Respondents fall within the purview of carrying out wrongful transactions with the intention to defraud creditors of the Corporate Debtor. However, the Applicant has failed to provide sufficient material on record to prove the allegation. Furthermore, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Additionally, the event of booking bad debts by the Company *prima facie* will not fall within the ambit of Section 66 of the Code, unless otherwise proved. Therefore, it can be concluded that the Applicant failed to prove the allegation, and thus, this allegation cannot be sustained.

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11.4 Difference in opening balance on assets side of Balance Sheet: The findings mentioned in the Transaction Audit (IBC) Report concerning difference in the opening balance of assets is as follows:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

3. We have observed from books of accounts for the financial year 2020-21 that the opening balance was not carry forward properly and it shows difference in opening balance of Rs. 20,21,147/- asset side. The said difference is due to wrong amount carry forwarded in reserve and surplus amount.”

In the light of *Mr. Tenny Jose & Ors. Vs. Mr. Prathap Pillai, Resolution Professional of M/s. Tenny Jose Limited (supra), Regen Powertech Pvt. Ltd. Vs. Wind Construction Private Limited and Ors. (supra), and the Resolution Professional for M/s. Orchid Pharma Limited Vs. M/s. Hospira Healthcare India Pvt. Ltd & Others (supra)*, it can be concluded that no material/evidence has been put on record indicating the *malafide* intention of the Respondents. Furthermore, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Therefore, it can be concluded that the said allegation cannot be sustained.

12. Considering the judgements referred above and the facts of the present case, we hold that the transactions in dispute cannot be called fraudulent/wrongful transactions within the meaning of section 66 of the IBC, 2016. Further, the Transaction Audit (IBC) Report dated 02.02.2022 has only

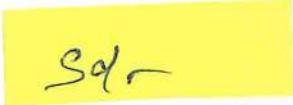
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highlighted that certain transactions may potentially be fraudulent/ wrongful transactions, however, the Report does not have any reference to transactions carried with an intent to defraud creditors in any manner. Therefore, due to dearth of material the Section 66 application cannot be entertained and application deserves to be dismissed.

13. With the above observation the I.A. 81/JPR/2022 in CP No. 158/9/JPR/2020 stands dismissed.


DEEP CHANDRA JOSHI
JUDICIAL MEMBER


RAJEEV MEHROTRA
TECHNICAL MEMBER

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER**

**SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER**

IA No. 85/JPR/2022
In CP No. (IB)- 158/9/JPR/2020

In the matter of:

**M/S BALAJI LIFESTYLE
TECHNOLOGIES PVT. LTD.**

...OPERATIONAL CREDITOR

VERSUS

**M/S EXCEL TECHNOVATION
PVT. LTD.**

...CORPORATE DEBTOR

And in the matter of IA No. 85/JPR/2022

M/S Excel Technovation Pvt. Ltd.
Through its Resolution Professional
Shri Prashant Agrawal
Having its office at F-106, Sumer
Complex, Gautam Marg, B/h Bagadia
Bhawan, Jaipur

...Applicant

VERSUS

**Office of Assistant
Commissioner of Income Tax
Department**
Circle 6, New Central Revenue
Building, Bhagwan Das Road, C-
Scheme, Jaipur-302005, Raj.

...Non-Applciant/ Respondent

Sd/-

Sd/-

FOR APPLICANT(S) : Prashant Agrawal, Liquidator
Jatin Chawla, Adv.
FOR RESPONDENT(S) : Anuroop Singhi, Adv.

Order Pronounced On: 03.05.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application bearing *IA No. 85/JPR/2022* has been filed by *Mr. Prashant Agrawal* ('Applicant'/ 'Resolution Professional'/ 'Liquidator'), then Resolution Professional of *M/s Excel Technovation Pvt. Ltd.* ('Corporate Debtor') under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') seeking the following reliefs:

- *Direct the Respondent to remove lien/debit freeze from the Bank Accounts of Corporate Debtor as more particularly stated hereinabove under Para No. 3 of Application maintained by ICICI Bank Ltd.*
- *Direct the Respondent to remove lien/ debit freeze from any other Bank Accounts of Corporate Debtor, if marked lien by Respondent.*
- *Quash the notice dated 10.02.2020 bearing DIN and Letter No. ITBA/COM/F/17/2019-20/1024932183(1) issued by Respondent under Section 226(3) of Income Tax Act, 1961 and other similar notice issued by Respondent under Section 226(3) of Income Tax Act, 1961 with regard to Corporate Debtor, if any.*
- *Pass any other order which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case may be granted.*

2. This Adjudicating Authority, *vide* order dated 30.09.2021, admitted the Application filed by *M/s Balaji Lifestyle Technologies Pvt. Ltd.* ('Operational Creditor') under Section 9 of the Code for the initiation of Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor and *Mr. Prashant Agrawal* was appointed as Interim Resolution

Professional ('IRP'). Later on, the appointment of the IRP as the Resolution Professional ('RP') was approved by the CoC. Subsequently, an order for Liquidation was passed by this Adjudicating Authority on 31.10.2023, and the RP was appointed as the Liquidator.

3. The present application has been filed on the following set of facts:

3.1. It is submitted that during the CIRP process, the bank account details of the Corporate Debtor maintained by *ICICI Bank Ltd.* came to the knowledge of the Applicant. The Respondent, *vide* notice dated 10.02.2020, bearing *DIN and Letter No. ITBA/COM/F/17/2019-20/1024932183(1)*, marked a lien on the following bank accounts of the Corporate Debtor as per Section 226(3) of the Income Tax Act, 1961:

Bank Name	Bank Account Number
ICICI Bank Ltd.	001205000398
ICICI Bank Ltd.	001205033479
ICICI Bank Ltd.	001205033988
ICICI Bank Ltd.	001251000039

3.2. *ICICI Bank* informed the Applicant about the status of the Corporate Debtor's bank accounts, stating that they had been marked with a lien/debit freeze. After receiving this information from *ICICI Bank*, the Applicant sent an email dated 26.01.2022 to the Respondent requesting the removal of the lien/debit freeze. Furthermore, it is submitted that the Respondent did not consider their request and did not remove the lien/debit freeze.

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3.3. According to section 17(1)(d) of the Code, after the commencement of CIRP, financial institutions maintaining accounts of the corporate debtor must act on the instructions of the interim resolution professional regarding such accounts. Furthermore, it is contended that proceedings before the Respondent, which resulted in freezing the bank account in the name of the Corporate Debtor, constitute proceedings before another authority as contemplated under Section 14 of the Code. Therefore, the continuation of the same during the period of moratorium is illegal in view of the prohibitions under Section 14(1)(a), and as such, it becomes untenable in law. Thus, the lien marked by the Respondent in the bank accounts of the Corporate Debtor needs to be vacated.

3.4. Further, the Applicant supported the contentions with following judgements of the various benches, for the sake of brevity, some of them form part of this order:

3.4.1. *Ram Ratan Modi (Resolution Professional of Duncans Industries Limited) vs. ICICI Bank (IA No. 1477/KB/2020 vide order dated 19.05.2021.*

3.4.2. *Kitply Industries Ltd. through the Mr. Bijay Murmuria, Resolution Professional vs. Assistant Commissioner of Income Tax (TDS) 2018 SCC OnLine NCLT 4164.*

3.4.3. *Shri Ramchandra Dallaram Choudhary, Interim Resolution Professional of Nessa Leisure Ltd. vs. Commissioner of Income Tax, Central Circle-2(2), Ahmedabad. IA No. 562 of 2019 vide order dated 18.06.2020.*

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4. The Respondent filed its Reply, *vide* Diary No. 82/2023 dated 08.01.2024, stating as below:

4.1. The Respondent submitted that the Department of Income Tax has various demands pending against the Assessee Company, i.e., the Corporate Debtor, under various provisions of the Income Tax Act, 1961. The following details depict the demands pending:

S.No.	Demand Outstanding	Section	A.Y.
1	20,93,590/-	271AAC(1)	2017-18
2	40,000/-	272A(1)(d)	2017-18
3	2,95,15,423/-	143(3)	2017-18
4	59,960/-	143(3)	2017-18

4.2. The Respondent further annexed the following copies of various notices and orders in support:

4.2.1. Copy of notice dated 10.02.2020, issued under Section 226(3) of the Income Tax Act, 1961, to the Branch Manager of *ICICI Bank Ltd.* for marking a lien on the bank accounts of the Company, marked as Annexure R/1.

4.2.2. Copy of assessment order dated 12.12.2019, passed under Section 143(3) of the Income Tax Act, 1961, for the Assessment Year 2017-18, marked as Annexure R/2.

4.2.3. Copy of the order dated 13.03.2020, pertaining to the rejection of the application for stay of demand amounting to Rs. 2,97,55,383, marked as Annexure R/3.

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4.2.4. Copy of notice dated 12.12.2019, of Demand under Section 156 of the Income Tax Act, 1961, marked as Annexure R/4.

4.2.5. Copy of the Demand analysis of PAN, marked as Annexure R/5.

5. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply, along with the documents enclosed therein.
6. The case, simpliciter, is that the accounts of the Corporate Debtor were marked frozen, admittedly by the Respondent Bank namely *ICICI Bank Ltd.* pursuant to the notice of Income Tax Department dated 10.02.2020 bearing *DIN & Letter No. ITBA/COM/F/17/2019-20/1024932183(1)*. Subsequently, this Adjudicating Authority passed the Liquidation order *vide* order dated 31.10.2023, appointing *Mr. Prashant Agarwal* as Liquidator. The Applicant is duty-bound to proceed with the liquidation, and thus, filed the present Application.
7. The Code imposes various duties and powers on the Liquidator, with respect to the management of the affairs of the corporate debtor. It is clear from the duties outlined in the Code that the Liquidator are authorized to take custody and control of the assets of the corporate debtor and proceed further according to the provisions of the Code. Furthermore, it is important to highlight that the assets also include the bank accounts of the corporate debtor. For the sake of brevity, relevant provisions of the Code are mentioned below:

17. Management of affairs of corporate debtor by interim resolution professional.

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(1) From the date of appointment of the interim resolution professional,—

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

25. Duties of resolution professional.

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

35. Powers and duties of liquidator.

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

8. Additionally, Section 238 of the Code makes it clear that the provision of the Code will override other laws. Moreover, upon enactment of the Code, several statutes were amended to that effect, Income Tax Act, 1962, being one of them, was also amended *vide* third schedule of the Code. Section 238 of the Code is reproduced below:

“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

9. As far as the issue of removal of lien from the bank accounts is concerned, it is pertinent to refer to the order passed by the Hon’ble NCLT, Principal

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Bench New Delhi in *Om Prakash Agarwal Vs. Tax Recovery Officer & Anr.*

2020 SCC OnLine NCLT 1423 wherein in like circumstance it was held that:

“the monies of the CD lying in the bank account shall be construed to be an asset of the CD even if an attachment order is passed against the same. It noted that section 178 of the Income-tax Act, 1961 has been amended to allow the Code to have overriding effect and accordingly directed the Bank to defreeze the account.”

10. We, therefore, in the light of prayers made, issue the following directions with an immediate effect:

10.1. Respondent to remove lien/debit freeze from the Bank Accounts of Corporate Debtor maintained with the *ICICI Bank Ltd.* and/or any other Bank Accounts of the Corporate Debtor, if marked lien by the Respondent.

10.2. The Notice of the Income Tax Department dated 10.02.2020 bearing *DIN & Letter No. ITBA/COM/F/17/2019-20/1024932183(1)* and any other similar notice issued by Respondent under Section 226(3) of Income Tax Act, 1961 shall stand vacated as it is inconsistent with the provision of the Code.

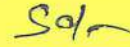
11. In addition, the statutory authorities are restrained from levying any further attachment or lien on the account of the Corporate Debtor company. Further, the bankers of the Corporate Debtor company are hereby restrained from giving effect to any attachment order issued by any authority without leave of this Adjudicating Authority, for the duration of the liquidation of the Corporate Debtor company.

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12. The Registry is directed to serve a copy of this Order to the Respondent.

Accordingly, *IA No. 85/JPR/2022* stands disposed of.



DEEP CHANDRA JOSHI
JUDICIAL MEMBER



RAJEEV MEHROTRA
TECHNICAL MEMBER