

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH**

**IA(IBC)/236/KOB/2023**

**IN**

**CP(IB)/34/KOB/2022**

*(Under Section 66 of the IBC, 2016 read with Rule 11  
& Rule 32 of the NCLT Rules, 2016)*

***In the matter of:***

M/s. Simtel Trading Corporation Private Limited.

***Memo of Parties:***

Mr. Vikky Dang, Resolution Professional of Simtel Trading Corporation Limited B-11, Near Mangal Bazar Gurudwara, Vishnu Garden, New Delhi- 110 018.

**... Applicant.**

**-Versus-**

1.Mr. Rajesh Kumar, 3F, Golden Apple, Mana Lane, Aluva, Thottakkattukara P.O., Ernakulam, Kerala- 683 108.

2.Mr. Shine Kumar TC 9/2398, A81, Sreerangam Lane, Sathamangalam P.O., Thiruvananthapuram, Kerala- 695 010.

3.Mr. Kuriakose Shelly Thomas, Ozhukayil, Pushpagiri, Thaliparambu P.O., Kannur- 670 141.

4. Mr. Bobby Abraham, House 22, Mangara House, Divine Village, Near Civil Station, Kakkanad, Ernakulam- 682 030.

**... Respondents.**

**Order delivered on: 25.04.2024**

***Coram:***

**Hon'ble Member (Technical)**

**Shyam Babu Gautam**

**Hon'ble Member ( Judicial)**

**TMT. Justice (Retd.) T. Krishna Valli**

***Appearances:***

For the Applicant

: Mr. Akhil Suresh, Adv.,

For the Respondent Nos. 1

: set *ex- parte* vide order dated

to 3

12.02.2024.

For the Respondent No. 4

:Mr. Sreekanth K.M., Adv.

**ORDER**

**Per: Coram**

1. The present application is filed by the Applicant, the Resolution Professional of the Corporate Debtor M/s. Simtel Trading Private Limited under Section 66 of the IBC, 2016 for the following reliefs: -
  - i. To declare that the Respondents have carried out the business of the Corporate Debtor with an intention to defraud its Creditors
  - ii. Direct the Respondents to pay a sum of Rs 5,40,00,000/- to the bank account of the Corporate Debtor being the profits created

- by way of purchase and sale of assets of the Corporate Debtor without any actual appreciation in the Value of the property that occurred in the past 3 years.
- iii. In the alternative, direct the Respondents to pay a sum of Rs 1,59,31,000/- to the bank account of the Corporate Debtor being the profits created by way of purchase and sale of assets of the Corporate Debtor without any actual appreciation in the value of the property that occurred in the past 3 years.
- iv. Direct the Respondent Nos. 1 to 3 to pay a sum of Rs 2,70,00,050/- to the bank account of the Corporate Debtor being the profits created by way of sale of land at Kannur belonging to the Corporate Debtor and not reflecting the same in the bank accounts of the Corporate Debtor.
- v. Direct the Respondent Nos. 1 to 3 to pay a sum of Rs 1,67,32,396/- to the bank account of the Corporate Debtor being the amount written off from the Fixed assets of the Corporate Debtor without any proper explanation which includes a loss on the sale of Vehicles (cars).
- vi. Direct the Respondent Nos. 1 to 3 to pay a sum of Rs 3,94,48,140/- to the bank account of the corporate debtor being the profits created by way of fraudulent transfer of funds to the accounts of the directors of the Corporate Debtor before paying the Financial Creditors.

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vii. Direct the Respondent Nos. 1 to 3 to pay a sum of Rs 47,93,883/- to the bank account of the Corporate Debtor being the profits created by way of write-offs without any reasoning or explanation.

2. The Brief facts of the case are as follows: -
3. The Applicant stated that an application for Corporate Insolvency Resolution Process filed by Tata Capital Financial Services Pvt Ltd, being Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016 was admitted by this Tribunal vide order CP(IB)/34/KOB/2022 and vide order dated 01.12.2022 wherein the Applicant was appointed as the Interim Resolution Professional.
4. The Applicant has admitted the claims of the Creditors provisionally as they are based on the claims made by the Financial Creditors and based on proof of documents submitted with the claim. However, since the Suspended Management of the Corporate Debtor has not furnished the complete books of accounts of the Corporate Debtor, therefore, the claims of the claimants are being provisionally admitted. This list would be updated based on complete information furnished by the Suspended Management, once available, and based on clarification(s) received and/or other claims received over a while as prescribed in

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IBC, 2016. It is further stated that the suspended management has been non-cooperative in furnishing relevant information and documents to the Applicant which in turn has hindered and prejudiced the CIRP. Apart from the various emails sent. However, having no avail, the Applicant was constrained to file an application under Section 19(2) of the I&B code for necessary directions from the suspended management to extend cooperation vide IA(IBC)/80/KOB/2023 in CP(IB)/34/KOB/2022.

5. The Applicant stated that with the limited information/documents, the Applicant analyzed the state of affairs of the corporate debtor and noted certain anomalies in the books of accounts of the company. When the same was pointed out to the Committee of Creditors of the Corporate Debtor, it was decided that a forensic audit of the corporate debtor was necessary in the interest of justice. It is stated that accordingly in the 2nd CoC meeting held on 25.01.2023, the CoC had passed a resolution to appoint a financial auditor for assessing and quantifying the transactions and identify any transaction relating to Sections 43, 55 60 & 66 of the IBC Code, 2016.
6. It is stated that according to the resolution passed in the 2<sup>nd</sup> CoC meeting Mr. Kalpesh Chaudhary was appointed as the Transactional Auditor to assess and quantify the transactions of the Corporate Debtor. The main objective of the appointment of a transactional auditor is to identify the avoidance transactions for the period covered under the IBC. The audits were conducted concerning Sections 43, 45,

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50 & 66 of IBC,2016. It is stated that the Corporate Debtor is not operating since 01.04.2019, there are no transactions that are covered under Sections 43, 45 and 50 of the I&B Code within the lookback period being 30.11.2021 (1 year before the commencement date) and being 30.11.2020 (2 years before commencement date).

7. It is stated that the Applicant is constrained to file the present application under Section 66 of the I&B Code in the light of various fraudulent transactions carried out by the directors of the corporate debtor, along with other Sister Concerns of the Corporate Debtor. Serious irregularities have been discovered by the Applicant/Resolution Professional and by the Forensic Auditor in the Forensic Report, warranting the present application.
8. The Applicant stated that as per the Transaction Audit Report, the Corporate Debtor purchased land from M/s. Essco Automobiles and the same land sold to M/s. Central Associates. It is further the Applicant observed that the property was purchased by the corporate debtor at a total price of Rs. 5,40,00,000/- (Rupees Five Crore & Forty Lakhs Only). Since the property was purchased by the Corporate Debtor at the prevailing market value of the property and the above property was held by the corporate debtor in its name for a period of over 3 years. The transaction in question i.e. the sale of the said property by the Corporate Debtor to the related party M/s Central Associates (Proprietary concern of former director Mr. Bobby Abraham also being a major shareholder in the corporate debtor

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having 60% shareholding) at the same price and without any appreciation in its value has been carried out to give illegal benefit, gain and profit to the said M/s Central Associates (indirectly to Mr. Bobby Abraham) and thereby causing loss to the stakeholders of the Corporate Debtor. Although, the then market rate of the said Property cannot be ascertained, however, taking into consideration the property appreciation rate in Trivandrum to be 9% per year (on a conservative side), still the value of the said Property in the year 2016 at the time of sale by the Corporate Debtor should have been Rs. 6,99,31,566/-. Accordingly, a total loss of Rs. 1,59,31,566/- [actual value of the property at the time of sale (minus) amount at which the said property was sold] has been caused by the aforesaid fraudulent transaction to the stakeholders of the Corporate Debtor. Therefore, the Applicant has determined that the price at which the said Property at Trivandrum was not sold at the then prevailing market /actual rate and the Respondents have caused a total loss of Rs. 1,59,31,566/- to the stakeholders of the Corporate Debtor. The same is an illegal transaction and is also clearly intended to have been carried out by the Respondents with the intent to defraud the creditors of the corporate debtor. The transaction is covered under the provisions of Section 66 of the I & B Code, 2016 and is liable for appropriate relief by the adjudicating authority.

9. It is further stated that after examining the financial documents of the Corporate Debtor including the books of accounts of the corporate

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debtor, the bank account statements, etc. have determined that fraud has been committed by the Respondents by which not only the assets of the corporate debtor have been alienated through a sham financial transaction but at the same time even the sale amount mentioned in the ledger has not been received by the corporate debtor. The Respondents have taken a route of sham transaction through the purported sale of the said property. The same is further fortified by the Audit Report. The total amount of the avoidable/fraudulent transactions as assessed by the Applicant/Resolution Professional is to the tune of Rs. 2,70,00,050/-.

10. It is stated that perusal of the limited information provided by the Respondents, the Applicant after examining the financial documents of the Corporate Debtor including the books of accounts of the Corporate Debtor, has determined that fraud has been committed by the Respondents by writing off the fixed assets of the Corporate Debtor. The conduct of the Respondents raises concern qua such fraudulent transaction in which the assets/funds of the Corporate Debtor have been written off through a fallacious route to defraud the creditors and the same has been established in the Audit report. The total amount of the avoidable/fraudulent transactions as assessed by the Applicant/Resolution Professional is to the tune of Rs. 1,67,32,396/-.

11. It is stated that the 2<sup>nd</sup> Respondent has provided a total of Rs 2,23,73,689/- as an unsecured loan to the company. During September, October and November 2018, the Corporate Debtor repaid

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a total of Rs. 2,35,36,500/-. It is further stated that the Applicant stated that an amount of Rs. 11,38,922/- was received directly into the personal account of the 2<sup>nd</sup> Respondent against the sale made by the Corporate Debtor. A net amount of Rs. 23,01,733/- has been overpaid to the 2<sup>nd</sup> Respondent's loan account. Since payments are made to the directors of the Corporate Debtor before repayment of loans from financial institutions raises serious concerns regarding the company's financial practice. Therefore, the total amount of Rs. 3,94,48,140/- is observed to fall within the meaning of Section 66 of the I&B Code.

12. It is stated in the audit report that as per the financial statement for the year 2018-2019, the opening balance of inventories is Rs. 6,78,21,751/- and the closing balance is NIL. The observations were that the inventories worth Rs 47,93,883/- were written off and such writing off without any reasoning or explanation amounts to misappropriation of assets of the company and falls under the purview of Section 66 of the I&B Code.

13. On 23.01.2024, the 4<sup>th</sup> Respondent filed his reply statement and stated that the 4<sup>th</sup> Respondent resigned and was relieved from the directorship of M/s. Simtel Trading Corporation Ltd and recorded in the Registrar of Companies on 10.09.2018. The remaining directors whoever are among, the other Respondents, are solely liable for any fraudulent actions or trading that has been done. This Respondent does not have any involvement or any connection after the resignation.

The other directors who were the Respondents have defrauded this Respondent.

14. It is stated that this application is seeking relief against the 4<sup>th</sup> Respondent who is a third party in proceedings as he was no more a director in M/s. Simtel Trading Corporation Ltd. It is further stated that the Hon'ble Supreme Court reaffirmed that Section 66 of IBC, 2016 cannot be invoked against third parties and that civil remedies available under the law must be pursued for recovery of dues from such parties.

**FINDINGS: -**

15. We have heard the learned counsel for both parties and perused the entire case records/documents. We have also gone through the shreds of evidence on record.

16. The Applicant admitted that IA(IBC)/80/KOB/2023 filed under Section 19 (2) of the Insolvency and Bankruptcy Code, 2016 is dismissed by this Tribunal vide order dated 30.06.2023 and in this application, the Applicant clearly states that with the limited information/documents, the Applicant analysed the state of affairs of the Corporate Debtor.

17. We also found that the Transaction Auditor was appointed by the CoC on 25.01.2023 and the Transaction Auditor submitted his report on 11.04.2023. It is seen from the records that he submitted his report in

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the middle of a lack of books of accounts which was admitted by the Auditor the relevant portion as quoted hereunder: -

*“This transaction audit report has been prepared in compliance with the provisions of the Insolvency and Bankruptcy Code (IBC) 2016, and solely for the purpose of providing an independent assessment of the transactions analyzed. The audit procedures performed were based on the information made available to us and we have relied on the accuracy and completeness of such information.*

***However, we would like to highlight that the signed copy of the financial statement for the relevant period was not made available to us. In addition, the annual report with the audit report and directors report for the financial years 2018-19 and 2019-20 were also not made available to us. Furthermore, we have identified that the Tally data provided was not complete, and therefore we have relied on the available data to the best of our ability.***

*Our analysis and conclusions are based on our professional judgment and the application of the appropriate audit techniques, which are inherently limited by the quality of the data and information provided. We assume no responsibility for any loss or damage arising from the use of or reliance upon, this report or the information contained herein. The report is proprietary and*

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*confidential and may not be disclosed or distributed in whole or in part without our prior written consent.”*

18. To get further clarity in this matter we have also gone through the decision of Hon’ble NCLAT in its order in ***Regen Powertech Private Limited vs Wind Construction Private Limited*** (Company Appeal (AT)(CH)(Ins) No.349/2022) wherein the Adjudicating Authority 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 'bonafide 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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19. In the instant application there is no evidence available against the Respondents and the auditor only mentioned his observation and conclusion in his audit report without any material evidence available from the books of accounts of Corporate Debtor. Therefore, we believe that the mere assumption will not amount to fraud. The standard of proof required is high. The allegations are made without narrating the acts of fraud the contention of the applicant that the Respondents indulged in fraudulent transactions is not sustainable.
20. The applicant filed this application under section 66 of IBC 2016, without detailing any act of fraud. Levelling allegation of fraud is serious, the same cannot be alleged without an iota of proof, fraud cannot be alleged based on presumption, or assumption, and there must be prima facie material to allege fraud but, in this application, the applicant without collecting sufficient materials has filed this application under section 66 of IBC 2016, and acts of fraud not proved. In these circumstances it is answered to the point that the Applicant failed to prove that the Respondents indulged in fraudulent transactions, in consequence, the Respondents are not liable to pay the amount claimed by the applicant in this application.
21. With the aforesaid observation, **IA(IBC)/236/KOB/2023 is dismissed.**

IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH

IA(IBC) /236/KOB/2023

IN

CP(IB)/34/KOB/2022

*In re: M/s. Simtel Trading Corporation Private Limited.*

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22. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
23. An urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.
24. File be consigned to records.

**SHYAM BABU GAUTAM**  
**(MEMBER TECHNICAL)**

**T KRISHNA VALLI**  
**(MEMBER JUDICIAL)**

Signed on this the 25<sup>th</sup> day of April, 2024.

Rajasree R. Nair/LRA