

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH (COURT- I) CHENNAI**

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **26.04.2024** THROUGH VIDEO CONFERENCE

PRESENT: HON'BLE SHRI SANJIV JAIN, MEMBER (JUDICIAL)
HON'BLE SHRI VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

IN THE MATTER OF : Syndicate Bank
Vs
Akshaya ImaginG Systems Pvt Ltd

MAIN PETITION NUMBER : CP/431/IB/2018

(IA/MA) APPLICATION NUMBERS

IA/59(CHE)/2021; IA/1319/IB/2020; IA/1321/IB/2020
IA/1322/IB/2020; IA/1324/IB/2020; IA/1325/IB/2020
IA/1326/IB/2020; IA/1327/IB/2020

ORDER

IA/1319/IB/2020; IA/1321/IB/2020
IA/1322/IB/2020; IA/1324/IB/2020; IA/1325/IB/2020
IA/1326/IB/2020; IA/1327/IB/2020:

Present : Mr. Badrinarayanan, Ld. Counsel for Liquidator.

Vide common order pronounced in the open court, the applications are dismissed.

Files be consigned to records.

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[VENKATARAMAN SUBRAMANIAM]
MEMBER (TECHNICAL)

MS

-sd-

[SANJIV JAIN]
MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IA/1327/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,

Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
Behind Indian Bank,
Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. Mr. Sreenivasan Harikrishnan,

11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.

2. Mr. Sreenivasan Janakiraman,

15/8, BandalaVenugopal Naidu Street,
Triplicane, Chennai – 600 005.

... Respondents

Along with

IA/1319/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,

Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
Behind Indian Bank,
Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. **Mr. Sreenivasan Harikrishnan,**
11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.
2. **Mr. Sreenivasan Janakiraman,**
15/8, BandalaVenugopal Naidu Street,
Triplicane, Chennai – 600 005.
3. **Mr. Murugesan Saravanan,**
M/s. Kerala Trade Zone,
No.67/1193-A, St Benedict Street,
Ernakulam – 682 018.

... Respondents

Along with

IA/1321/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,
Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
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Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. **Mr. Sreenivasan Harikrishnan,**
11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.
2. **Mr. Sreenivasan Janakiraman,**
15/8, BandalaVenugopal Naidu Street,
Triplicane, Chennai – 600 005.

3. **Digital Plate Systems Pvt. Ltd,**
Represented by its Director,
46/248, Peters Road,
Royapettah, Chennai – 600 014.

... Respondents

Along with

IA/1322/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,
Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
Behind Indian Bank,
Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. **Mr. Sreenivasan Harikrishnan,**
11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.
2. **Mr. Sreenivasan Janakiraman,**
15/8, BandalaVenugopal Naidu Street,
Triplicane, Chennai – 600 005.
3. **Mr. Yoganandham,**
M/s. Akshaya Printers,
22/55, Devaraj Street,
Royapettah, Chennai – 600 014.

... Respondents

Along with

IA/1324/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,

Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
Behind Indian Bank,
Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. **Mr. Sreenivasan Harikrishnan,**
11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.
2. **Mr. Sreenivasan Janakiraman,**
15/8, BandalaVenugopal Naidu Street,
Triplicane, Chennai – 600 005.
3. **M/s. Annai Apirami Printers,**
Represented by its Partners,
No. 42, ERP Layout, College Road,
Tirupur – 641 602.

... Respondents

Along with

IA/1325/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,

Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
Behind Indian Bank,
Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. **Maruthi Trading Company,**
Represented by its Proprietor Mr. Murugesan Saravanan,
No. 39, A.P.Kanaiah Street,
Ramapuram, Ambattur,
Chennai 600 053.
2. **Mr. Sreenivasan Harikrishnan,**
11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.
3. **Mr. Sreenivasan Janakiraman,**
15/8, Bandala Venugopal Naidu Street,
Triplicane, Chennai – 600 005.

... Respondents

Along with

IA/1326/IB/2020 in CP/431/(IB)/CB/2018

(filed under Section 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of M/s. Akshaya Imaging Systems Private Limited

Mr. Varadachari Kumar,
Liquidator of M/s. Akshaya Imaging Systems Private Limited,
No. 7, Ramanujar Street,
Behind Indian Bank,
Chitlapakkam, Chennai – 600 064.

... Applicant

Vs

1. **Mr. Sreenivasan Harikrishnan,**
11, North Tank Square Street,
Opposite to REX School,
Triplicane, Chennai – 600 005.
2. **Mr. Sreenivasan Janakiraman,**
15/8, Bandala Venugopal Naidu Street,
Triplicane, Chennai – 600 005.

... Respondents

Order pronounced on 26th April, 2024

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SANJIV JAIN, MEMBER (JUDICIAL)

VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

For Applicant : *Mr. S.Sathiyarayanan, Advocate*

For Respondent : *Mr. P.James Victor Rajkumar, Advocate*

COMMON ORDER

(Heard through video conferencing mode)

By this common order, we will dispose of the above applications which have been filed by the Liquidator of the Corporate Debtor viz. M/s. Akshaya Imaging Systems Private Limited under Section 66 of the Insolvency and Bankruptcy Code, 2016.

2. Brief facts relevant for disposal of the above applications are that this Tribunal on an application filed under Section 7 of IBC, 2016 by the Financial Creditor M/s. Syndicate Bank vide an order dated 31.05.2018 in CP/431/2018 initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor and appointed the IRP. This Tribunal thereafter vide order dated 07.08.2018 ordered for the liquidation of the Corporate Debtor and appointed the Applicant viz. Mr. Varadachari Kumar as the Liquidator. The Liquidator collected

the accounting data of the Corporate Debtor for the period commencing from 01.04.2017 from the suspended directors in a tally format on 03.11.2018. On perusal, the Liquidator noticed several irregularities in the books of accounts of the Corporate Debtor. On the basis of the above, he filed these applications.

3. IA/1327/IB/2020:

3.1. IA/1327/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking reliefs as follows;

a) Declare that the alleged transactions constitute fraudulent transaction under Section 66 of the Code;

b) Direct the Respondents No. 1 & 2 to make contribution to the assets of the Corporate Debtor; and

c) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

3.2. It is stated that in the fund flow statement from 01.07.2017 (disconnection of electricity supply for non payment of EB Bill) till CIRP commencement date, there are glaring irregularities:

a. The promoter shareholders have withdrawn Rs.1,40,29,613.75/- during the period from 01.07.2017 to 31.05.2018.

b. The current assets of the Corporate Debtor decreased by Rs.1,21,92,320.43 and the current liabilities have increased

by Rs.5,83,765.94 and the resultant Net Working Capital reduced by Rs.1,16,08,554.49. However, there is no decrease in the secured debts.

c. Unprecedented expenses have been incurred prior to the CIRP commencement.

d. Fixed assets outstanding in the books of accounts were unavailable to include the same in the liquidation estate for realisation.

3.3. It is stated that due to non-payment of electricity charges, the power supply to the Corporate Debtor was suspended by TNEB on 17.06.2017. A huge amount unmatched with the production level was spent towards DG Diesel and maintenance of machinery. Clarifications were sought from the Respondent vide letter dated 16.01.2020, however, the explanation given by them vide letter dated 23.01.2020 was not satisfactory. The applicant sought further clarification vide mail dated 13.03.2020 asking for corresponding bills/invoices however no reply was received. The details are tabulated below.

Sl. No.	MONTH	AMOUNT IN Rs.
1	July 2017	Nil
2	August 2017	36000.00
3	September 2017	17000.00
4	October 2017	99049.00
5	November 2017	178499.00
6	December 2017	159496.00
7	January 2018	161999.00
8	February 2018	198000.00

9	March 2018	236500.00
10	April 2018	216000.00
11	May 2018	234000.00

3.4. It is stated that last entry for import of raw materials was made in July 2017 which strongly raises question over any manufacturing activity post September 2017. It is alleged that incurring expenditure on DG diesel for a period during which no manufacturing activity was taken gives rise to suspicion over the alleged transactions. The alleged expenditure was paid in cash. Even it is assumed that the DG set was used for running the plant for maintenance purpose, the same does not justify the expenditure. It is stated that the monthly average expenses of Rs.18,000/- was essential to upkeep the plant and machinery, but the amount spent was exorbitant and unwarranted. It is alleged that the said expenditure has been done for fraudulent purposes without any diligence against the interest of the creditors and other stakeholders.

3.5. It is stated that as per the books of accounts, prior to commencement of CIRP, the Corporate Debtor had incurred cash expenses to the tune of Rs.6,02,000/- and the same were recorded in the journals by way of entries with narration towards ETP cleaning expenses and paid in cash. The Respondent in reply to the queries vide letter dated 23.01.2020 stated that the above expenses were incurred for 20 days from 26.02.2018 to 17.03.2018, out of 20 vouchers, 4 vouchers were

paid in Feb 2018 and because of funds constraint, remaining payments were sought on 31.03.2018. Further clarifications were made but Respondents did not respond.

- 3.6. It is stated that during the period from 01.04.2018 to 31.05.2018, an amount of Rs.25,98,095/- towards factory expenses and Rs.5,45,554/- towards office and admin expenses were spent by cash, although there were no activities in the Corporate Debtor. On clarification the Respondents vide their letter dated 23.01.2020 stated that the alleged expenses pertain to repair and maintenance and plant which explanation is not justifiable. It is stated that during the year 2016-2017 when production activities were carried, the reported expenses were Rs.26,87,258.65 but the above expenditure were incurred during a span of 2 months when there were no business activities. It is stated that the expenses incurred are not justifiable.
- 3.7. It is stated that prior to commencement of CIRP, the Corporate Debtor incurred cash expenses of Rs.1,56,000/- by way of 24 entries during the period from 30.09.2017 to 31.03.2018 towards sanitary maintenance and sanitary GH. However on clarification no response was provided by the Respondents.
- 3.8. It is stated that the applicant after taking control of the Corporate Debtor found certain assets missing i.e., 30 Kva Genset; Toyoto Fortuner and TVS XL & Yamaha and the books of accounts do not show any receipt of consideration against

these items. It is stated that an explanation was given by the first Respondent in the letter dated 23.01.2020 that the genset was damaged during flood and sent for repair twice and that it continued giving trouble and the repair charges were higher than the value of the genset, so no further action was taken. It is stated that the Respondents did not respond on further clarification. It is alleged that the alleged transfer / disposal was not done in the ordinary course of business. It is stated that the asset value of the car as on 31.05.2018 was shown as Rs.9,02,914.34 however the said car was missing. On explanation, the Respondents vide letter dated 23.01.2020 explained that the Corporate Debtor had paid only the advance amount for the car and started using without registration. Since the Corporate Debtor failed to pay the instalments, the seller seized the car. On further enquiry the Respondent did not respond. It is alleged that the car was used till 18.03.2018 as the Corporate Debtor had been filling fuel for the car till 18.03.2018.

3.9. It is stated that the genset was outstanding in the books with the asset value as Rs.13,000/- as on 31.05.2018. The Respondent failed to give any explanation. The record shows that the Corporate Debtor resorted to hiring of the genset.

3.10. It is stated that there were two motor cycles outstanding in the books of accounts as on 31.05.2018 for a value of Rs.66,626.36/-. The explanation given by the first Respondent in the letter dated

23.01.2020 that the vehicles were used for factory work and during floods these were damaged beyond repair and sold as scrap is not plausible as no details are provided by the Corporate Debtor further these vehicles were used till 31.03.2018. It is stated that no evidence exists for the losses of the above assets.

3.11. It is stated that an amount of Rs.4,07,200/- was written off as forfeiture charges towards non-performance of an import order which is not on record. The explanation given that advance was paid to Shanghai UPG International Ltd., Shanghai towards import of plates but they have not executed the order as committed to them due to various constraints so they refused to return the advance amount and they treated that amount as forfeiture damages is not plausible. It is stated that the Respondents on the mail dated 13.03.2020, by which FEMA compliances and contract were sought, did not respond. Correspondence was made to UPG International who in their reply dated 01.04.2020 stated the following:

“our account with Akshaya Imaging Systems Pvt. Ltd (AISPL) has been squared at the end of 2017 and all email or bank receipts can be checked with the owner of AISPL. As to your request, we are sorry to say we don't have any obligation to supply this to you, if you do need related files, please ask the owner of AISPL to supply or contact us, otherwise we can't supply related document”.

3.12. It is stated that further correspondence with UPG International was made but it did not respond. The details were sought from

the bank on 29.04.2020 as per FEMA guidelines but no reply was received from the bank. It is stated that since there exists no supporting documents proving the genuineness of written off transaction, these transactions are taken as fraudulent transactions.

3.13. It is alleged that the Respondents being the suspended directors did not act with due diligence and their actions were not judicious. They had not maintained proper records substantiating the transactions and their actions increased the loss to the creditors. It is stated that the said transactions in the opinion of the applicant / liquidator are the fraudulent transactions as provided under Section 66 of IBC, 2016.

3.14. In reply to the above application, the Respondent Nos. 1 and 2 submitted that the applicant / liquidator is not empowered to file an application under Section 66(2) of IBC, 2016 since he is not a Resolution Professional nor he can seek directions to the Respondents to make contribution to the assets of the Corporate Debtor. Section 66(1) of IBC, 2016 allows only the RP to file such an application. It is stated that a bad commercial decision cannot be considered to be fraudulent or wrongful trading under the provisions of Section 66 of IBC, 2016. It is stated that this Tribunal has jurisdiction to inquire into allegations of any fraudulent trading carried on by the Corporate Debtor during the Insolvency resolution. It is stated that so-called alleged

violation of Section 43 or Section 45 or Section 66 cannot be termed to be made for fraudulent purpose. It is stated that the allegations are not based on proper and correct assessment of transactions involved and no circumstance the transactions referred to in the petition, contains or reflects even an iota an intention to defraud the creditors.

3.15. It is stated that the transactions for an amount of Rs.10,04,648/- made towards diesel for the generator, fall prior to CIRP. TNEB connection was terminated since the cost was more than the diesel genset. A commercial decision was taken to save the money which does not constitute fraud. Electricity charges are payable every month even there is no consumption. The bill of April 2017 was attached showing the fixed charges as Rs.2,18,925/-. It is stated that they have saved Rs.8,71,632/- during the said period and consequently increased the current assets of the company. It is stated that genset hire charges paid is reasonable based on the business prudence as can be seen from the table.

MONTH	AMOUNT SPENT ON GENSET HIRE (IN RS.)	AVERAGE NO OF DAYS FOR WHICH HIRED ON AN AVERAGE RENT OF Rs.9,000 PER DAY
Jul-17	-	
Aug-17	36,000.00	4
Sep-17	17,000.00	2
Oct-17	99,049.00	11
Nov-17	1,78,499.00	20
Dec-17	1,59,496.00	18
Jan-18	1,61,999.00	18

Feb-18	1,98,000.00	22
Mar-18	2,36,500.00	26
Apr-18	2,16,000.00	24
May-18	2,34,000.00	26

3.16. As to the transaction for Rs.6,02,000/- towards ETP clearing expenses were paid prior to CIRP. It is stated that nothing were transacted during CIRP or the liquidation process. Cash payments are not prohibited by any law. It is stated that cash payments were necessitated since made to the illiterate labourers and other suppliers. The expenditure incurred is reasonable for preserving the assets of the entity. The breakup was already provided to the liquidator as follows:

ETP cleaning and sand filling work done for 20 days from
26.02.2018 to 17.03.2018

JCP Hire Charges	(Rs.300/- Per Hr x 8 Hrs x 15 days)	36,000.00	2,400.00
Sand	20 Trips x 10000	2,00,000.00	10,000.00
Water	(20 Trips x Rs.4000/- per trip)	80,000.00	4,000.00
Labours	Rs.700 per Labour x 8 Labours x 20 days	1,12,000.00	5,600.00
Food expenses – Labours	(Rs.100 per day per Labour – 8 Labours x Rs.100 x 20 days)	16,000.00	800.00
Chemicals purchased		35,000.00	7,000.00
Transport – wastage	(per trip Rs.2000: 18 trips)	36,000.00	2,000.00
Diesel & Hire Charges for 30 KVA Genset	(Rs.3000 per day for 20 days)	60,000.00	3,000.00
Total expenses		5,75,000.00	34,800.00

- 3.17. As to the expenses of Rs. 64,56,518.81/- towards factory expenses, office and admin expenses, repairs and maintenance prior to CIRP, it were based on the commercial decision of the Corporate Debtor and would not constitute fraud. It is stated that the increase in the expenditure happened due to Genset hire charges, additional periodic cleaning expenses, repair expenses, maintenance expenses to attract and impress upon prospective buyers. It is stated that the expenses were incurred with good intentions.
- 3.18. As to the transactions for Rs.1,56,000/- it is stated that these expenses were incurred for sanitary maintenance. There are 8 toilets for which Rs.5000/- per month were paid to the cleaner and Rs.8000/- per month towards the cleaning materials. The arrears of salary were paid on 30.09.2017. The average expenditure works out of Rs.1625/- per month per toilet which is reasonable by any standards.
- 3.19. As to the allegation of Rs.1,90,000/- the value of DG set, it is stated that genset was affected by flood and it was sent for repair three times. Cost of repair was more than the actual value and it was left as unusable condition with the mechanic who is not traceable. It was not written off in the books of account as they had not documented the discarding of the assets. Their company was a closely held private limited company and they were concerned about the revival of the unit so they had not

given proper weightage to the procedural aspects. As regards the Toyota Fortuner car, due explanation was given to the applicant. It was a commercial decision taken by the Corporate Debtor towards the old genset. It is stated that cost of repair was more than the actual value so it was decided to leave it unusable condition with the mechanic. As to the old motor cycles, they were damaged in flood and sold as scrap value to the employees before CIRP on the basis of commercial decision taken by the Corporate Debtor.

3.20. As to the allegations of written off entry for forfeited charges it is stated that the term forfeiture is a misnomer. The transaction represents only the difference between the bargain price and final price agreed by the seller. It should have been added to the purchase cost in the normal course of accounting. It was a commercial decision taken by the Corporate Debtor.

3.21. It is stated that the Respondents had been making efforts for restarting the normal operations or to sell the unit as a going concern and avoid the commencement of CIRP. So they decided to reduce the cost of power consumption. It is stated that at that time the Respondents were literally in a delirious state of mind caused by an all-out effort to either revive the company or to sell it as a going concern for a fair and reasonable price. It is stated that the Respondents had carried out the commercial activities without any malafide intention during the normal course of

business and the above transactions do not reflect any iota of intention to defraud the creditors. It is stated that for a fraudulent transactions, intention to deceive is a *sine qua non* which is missing in the present case. Reference is made of Section 447 of the Companies Act, 2013, Section 17 of the Indian Contract Act, 1872. Hence it is stated that the application has no merits and deserves to be dismissed.

3.22. Rejoinder is filed by the Applicant stating that Section 66 of IBC, 2016 provides that during the CIRP or a liquidation process if it is found that any business of Corporate Debtor has been carried on with intent to defraud the creditors of the Corporate Debtor or for any fraudulent purpose, the Adjudicating Authority may pass an order against any person who is knowingly the party to such transaction to make such contribution to the assets of the Corporate Debtor. It is stated that by virtue of this provision, the Liquidator can also file an application for fraudulent trading after the commencement of the liquidation of the Corporate Debtor. Reference is made of the Insolvency Committee Report dated Feb 2020 and Section 35 of the Code. It is stated that there is no look back period for the fraudulent transactions based upon the legal maxim of once a fraud, always a fraud. It is stated that the alleged transactions are not the bad commercial business transactions as alleged by the Respondents but had been carried out by the Respondents intentionally to defraud the stakeholders. The Respondents did not hand over the records

voluntarily. They handed over the record only after the intervention of this Tribunal. The applicant reiterated what has been stated in the application and stated that all the transactions as referred above are the fraudulent transactions which were made to deceive the creditors.

3.23. The Respondents also filed the written legal submissions in support of their contentions that the applicant / liquidator is not empowered to file the application under Section 66 of IBC, 2016 referring the judgements in the case of Pritipal Singh v Union of India (AIR 1982 SC 1413), CIT v Sundaradevi (1957) (32 ITR 615) (SC), R.S.Nayak v A.R.Antulay, AIR 1984 SC 684, Grasim Industries Ltd v Collector of Customs, Bombay, (2002) 4 SCC 297.

4. IA/1319/IB/2020

4.1. IA/1319/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking relief as follows;

a) Declare that the alleged transactions constitute fraudulent transaction under Section 66 of the Code;

b) Direct the Respondents including (Respondents No. 1 & 2) to make contribution to the assets of the Corporate Debtor;

c) Direct the Respondents to pay costs, and

d) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

4.2. It is stated that on 13.05.2019, while identifying the Trade debtors of the Corporate Debtor, he demanded for repayment of Rs.13,40,806/- towards the total goods value of Rs.35,73,013/- from Kerala Trade Zone (KTZ) one of the debtor, supplied by the Corporate Debtor on 06.03.2018 and 21.03.2018. However, the letters returned with the endorsement "not known". He sent the mails and reminders as detailed in para 5. It is stated that as per the records available at GST site, M/s. Kerala Trade Zone is a proprietary concern in the name of Mr.Murugesan Saravanan (mobile No. 9444600054). One Mr. Ramesh attended the call and stated that GST registration was done on the request of the Respondent and he is not aware of the alleged business transactions with the Corporate Debtor and e-mail address is of his friend's e-mail ID. Thereafter, Mr. Ramesh did not respond. He sought explanation on 16.01.2019 with regard to the alleged transactions from R1 who responded vide letter dated 23.01.2020 as under;

"The buyer claims that most of the plates supplied by us was defective. The customer who bought our plates from him refuse to pay the outstanding amount since they have lost a lot of money on paper, ink and bad quality printing. So the buyer faced bad debts problem. In turn the buyer refused to pay the outstanding amount to us since his loss is more than the outstanding amount to us". Further they have also stated that "entries (sales

return) were missed out while filing GST returns and the same was shown in April / May 2018."

- 4.3. Thereafter he raised the queries in his mail dated 13.03.2020, to which R1 did not reply.
- 4.4. It is alleged that there was no receipt of the goods on 02.06.2018 and 05.06.2018 and an amount of Rs.32,23,013/- (Rs.13,40,806/- + sales return of Rs.18,82,207/-) are the entries created for fraudulent purpose with an intent to defraud the Creditors.
- 4.5. In reply/counter, it is stated that the annexure at page 67 represents a ledger of the trade debtor, the 3rd Respondent. The Corporate Debtor had supplied goods to the trade debtor as per two invoices recorded in the ledger before the initiation of CIRP. It is stated that in the normal course of business, whenever the goods were found defective and unusable, a credit note is raised in favour of the trade debtor to the tune of the actual loss incurred though the normal business terms and mentioned that the goods once sold are not returnable.
- 4.6. In rejoinder, it is stated that the tally data was given by the erstwhile directors on 13.12.2018 with postings in the tally upto 30.06.2018. Further, the ledgers given by the erstwhile directors reveal an outstanding of Rs.13,40,806/- which includes two entries dated 02.06.2018 and 05.06.2018 for Rs.7,41,800/- and Rs.11,40,407/- respectively totalling Rs.18,82,207/- as sales return.

The said transaction is not reflected in the GST returns. Nor do they reflect in the inventory records. In the absence of the alleged sales return being reflected in the GST returns together with the fact that there is no proof for return of goods, it is evident that purported return amounting to Rs.18,82,207/- is a fraudulent posting (accounting entry).

5. IA/1321/IB/2020

5.1. IA/1321/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking reliefs as follows;

a) Declare that the alleged transactions constitute fraudulent transaction under Section 66 of the Code;

b) Direct the Respondents No. 1 & 2 to make contribution to the assets of the Corporate Debtor, and

c) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

5.2. It is stated that on the basis of books of accounts of the Corporate Debtor, the Applicant identified the trade debtors of the CD and demanded repayment of pending dues of Rs.58,665.06/- from M/s. Digital Plate Systems Private Limited, one of the trade debtor, on 14.09.2018 towards the goods supplied. However, he did not get any response. He sent the mail dated 26.11.2018 and the trade debtor vide reply dated 28.11.2018 stated that as per the ledger, total goods of Rs.4,558/- were purchased and the

prior payment was made. He then sought clarification from the Respondent vide letter dated 23.01.2020 who had replied stating as under :

"The partners of Digital Plate Systems are Partners in Digital Prints also. Hence there may be a miscommunication. If you refer the tally entries you can find out we have raised nearly 9 invoices and there was a outstanding amount of Rs.58,665.06. These invoices were up-loaded in GST website and definitely the customer would have taken input credit for the same."

- 5.3. It is stated that there was no prior transaction with M/s. Digital Prints by the Corporate Debtor and in his opinion the above transaction is a fraudulent transaction.
- 5.4. In reply, the Respondent referred to the annexure at page 67 i.e., a ledger of a trade debtor. It is stated that the Corporate Debtor was supplying the goods to the trade debtor and received the payments. The trade debtor sensing that the Corporate Debtor has decided to discontinue the operations, stopped the final payments. It is stated that the query raised by the applicant relates to a few sale entries during the Financial year 2017-18, whereas the reply from the Trade Debtor relates to transactions for the FY 2016-17. This misfit could have been easily identified by the applicant; he had read the ledger extract provided by the Trade Debtor annexed at Page No.72 of the petition. It may further be noted that the Ledger extract contains sale entries by the trade debtor whereas the query raised by the applicant relates to purchase by the said Trade Debtor. The reply letter

also contains an ambiguity. It refers to purchases by them from the Corporate Debtor whereas the Leger extract contains sales entries.

- 5.5. In rejoinder, it is stated that the alleged transactions are not bad commercial business transactions rather these transactions were carried out to defraud the stakeholders. No record of follow up for payment / recovery, is there especially when the facilities were recalled on 01.08.2017. It is stated that the debtor has denied any purchases other than Rs.4,568/- and there is no acknowledgment of receipt of goods purportedly sold. There is no ledger accounts for trade with 'Digital Prints' there are four entries in the GST / VAT relating to the debtor. Corporate Debtor had not maintained any book entry in the name of Digital Prints.

6. IA/1322/IB/2020

- 6.1. IA/1322/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking reliefs as follows;

a) Declare that the alleged transactions constitute fraudulent transaction under Section 66 of the Code; or

b) Direct the Respondents No. 1 & 2 to make contribution to the assets of the Corporate Debtor; or

Direct the Respondent No.3 to pay the said amount to the Corporate Debtor;

c) Direct the Respondent to pay costs; and

d) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

6.2. It is stated that a sum of Rs.67,539/- was due from the 3rd Respondent. The Applicant issued a demand notice dated 14.05.2019 to the 3rd Respondent demanding repayment but it was returned with the endorsement "Left". He then wrote a letter to R1 and R2 on 16.01.2020 to clarify, who made the following response dated 23.01.2020:

"We had given our office printing works (i.e.,) invoice, DC Printing to him and did not pay the charges hence he adjusted the same with our outstanding amount"

- It is pertinent to note that as per the ledger statement of the Corporate Debtor, the 3rd Respondent's account with the Corporate Debtor always had a credit balance. The opening balance as on 30.03.2017 was credit balance of Rs. 35,951/- and as on 30/03/2017 was Rs.35,951.92 i.e., the amount payable by CD to the third Respondent. However, on 31.03.2018, the last day of the year, the 3rd Respondent account was debited for Rs.1,03,035/-on account of GST sales of PS offset plates 700 mm by 945 mm and as a result the net payable by the 3rd Respondent stood as Rs.67,539.08. It is submitted that the Applicant vide his letter dated 16.01.2020 requested the Respondents, being the suspended directors of the Corporate Debtor, to provide explanation and relevant documents pertaining to the alleged transaction. The 1st Respondent in his reply letter dated 23.01.2020 gave the following explanation with respect to the alleged transaction: "We had given our office printing works (i.e.,) invoice, DC Printing to him and did not pay the charges hence he adjusted the same with our outstanding amount"

- In response to the 1st Respondent's explanation, the Applicant vide email dated 13.03.2020 requested the Respondents to provide clarification with views In fact in the ledger there has always been a credit balance (on 30/03/2018 being Rs.35,495.92 credit) and the debit of Rs.1,03,035/- on 31/03/2018 being on account of GST sales has resulted in the net payable amount of Rs.67,539/- by Mr. Yoganandhan (Akshaya Printers) for which the Respondents have not replied.”

- 6.3. He sought for further clarification but did not get any response. He contacted the debtor on his own who replied that he has paid all the amounts in December, 2017 and he never purchased plates of the size 700 x 945 as he has a smaller machine. It is stated that the Corporate Debtor did not give any document to show the delivery and as such a sum of Rs.67,539/- is a debt recoverable from R3. It is stated that transaction is non-existence and fraudulent.
- 6.4. In reply, it is stated that the 3rd Respondent was the ex-employee of the Corporate Debtor. He left the job and started doing small scale printing job work. The Corporate Debtor also provided the job work. He later started by small quantity of offset plates for his industrial usage. The accumulated supply of goods was billed as per GST invoice No. 439 dated 31.03.2018. The 3rd Respondent made the payments for the goods supplied as evident from the ledger. He was the small scale service provider and did not have any GST.

6.5. In rejoinder, it is alleged that if he has to accept the contention of the suspended Directors that the amount was paid as advance for job work, then the accounting (as per the accounting practice) would have been as advance paid reflected in Sundry Creditors and it would not have got adjusted with sales. The suspended management failed to adhere with the standard of accounting expected of a corporate entity. Further, no acknowledgement for receipt of goods is available for the purported supply with the Corporate Debtor.

7. IA/1324/IB/2020

7.1. IA/1324/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking reliefs as follows;

a) Declare that the alleged transactions constitute Fraudulent transaction under Section 66 of the Code:

b) Direct the Respondents No. 1 & 2 to make contribution to the assets of the Corporate Debtor,

c) Direct the Respondents to pay the costs; and

d) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

7.2. It is stated that on 14.05.2019, the Applicant after identifying the trade debtors, demanded repayment of Rs.2,29,495/- from the trade debtor M/s. Annai Apirami Printers towards the goods supplied by the Corporate Debtor, but he did not get any

response. Later the trade debtor vide reply dated 17.06.2019 stated that they have cleared all the payments and attached a ledger copy. The Applicant then pointed out that the supply made by the Corporate Debtor vide invoice No.431 dated 27.03.2018 for Rs.2,29,477/- was not included in the list and it remains unpaid but he did not get any response. In response, the 1st Respondent replied as under;

"The normal payment procedure in the printing industry is the supply to the customer should be continuous otherwise the customer will stop the payment & purchase from other company who will supply continuously. We have tried our level best to collect the amount but vain."

- 7.3. It is stated that the explanation is not acceptable as there exists no records to substantiate the delivery.
- 7.4. In reply, it is stated that the query raised by the Applicant relates to a few sale entries from 01.04.2017 to 30.06.2018, whereas the reply from the Trade Debtor relates to transactions for the period from 01.04.2017 to 31.03.2018. This misfit could have been easily identified by the applicant; he had read the Ledger extract provided by the Trade Debtor annexed at Page No.71 of the petition and the last invoice is dated 27.03.2018 vide GST Invoice No.431. The 3rd Respondent would have made an entry in their books of account after 31.03.2018.'
- 7.5. In rejoinder, it is stated that the alleged operational debt of Rs.2,29,477/- entry was created for fraudulent purposes to

diversify the funds. There exists no records to substantiate physical delivery / acceptance of goods allegedly sold on 27.03.2018.

8. IA/1325/IB/2020

8.1. IA/1325/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking reliefs as follows;

a) Declare that the alleged transactions constitute wrongful trading transaction under Section 66 of the Code;

b) Direct the Respondents including Respondents No. 2 & 3 to jointly and severally make contribution of Rs.2,73,371.83 to the assets of the Corporate Debtor;

c) Direct the Respondents to pay costs; and

d) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

8.2. It is stated that from the books of accounts of the Corporate Debtor, he has identified the debts remained unpaid to the Corporate Debtor. Accordingly, on 14.07.2022 he demanded Maruthi Trading Company, one of the debtor of the Corporate Debtor for repayment of Rs.2,73,371.83 being the balance towards the advance payments made for the goods to be purchased by the Corporate Debtor by 22.07.2020. The notice to 3rd Respondent received back unserved with the report "No Such Person". He tried to contact him on his own but the

number was found to be not existing. He sent the mails to the R2 and R3 but did not get any response. It is stated that the purchase ledger of Corporate Debtor shows that R1 had to pay Rs.2,73,371.83.

8.3. In reply, it is stated that there was no change in the policy of Corporate Debtor. The credit balance became a debit balance mainly because of an assignment of a trade debtor in the name of M/s. Metrostar Print Solution Private Limited amounting to Rs.8,72,256/- on 10.11.2017. The 1st Respondent was an importer of printed plates and was an established entity. It was a purely a commercial transaction.

8.4. In Rejoinder, it is stated that the Respondents have given a new story of some assignment of receivables, which are not substantiated with any documentary evidence. There was no confirmation letter of Maruthi Trading Company to the Corporate Debtor confirming the receipt of Rs.8,72,256/- erroneously. Had it been so, the Maruthi Trading Company would have been a creditor to the Corporate Debtor for Rs.5,98,884.17 however in the present case it did not lodge any claim before the Liquidator.

9. **IA/1326/IB/2020**

9.1. IA/1326/IB/2020 is an Application filed by the Liquidator of the Corporate Debtor under Section 66 of IBC, 2016 seeking relief as follows;

a) Declare that the alleged transactions constitute fraudulent transaction under Section 66 of the Code;

b) Direct the Respondents (including Respondents No. 1 & 2) to make contribution to the assets of the Corporate Debtor,

c) Direct the Respondents to pay cost; and

d) To pass such other orders as the Hon'ble Tribunal may deem fit and expedient under the circumstances of the case and thus render Justice.

9.2. It is stated that from the books of accounts of the Corporate Debtor, the Liquidator has identified that some of the trade transactions by the Corporate Debtor with Kompac Trading Company were not justifiable. It is stated that there have been receipts by the Corporate Debtor on four occasions of Rs.5 lakhs each (total Rs.20 Lakhs), two on 26.07.2017 and one each on 06.09.2017 and 26.09.2018 as a credit in the ledger "Security Deposit – Kompac Trading Co" with narration "amount received from Kompac Trading Company – transferred to Ameya Engineering". It is stated that after receipt of funds, the Corporate Debtor has paid a sum of Rs.20,00,000/- to Ameya Engineering. It is stated that the Applicant had raised a query to the suspended directors vide communication dated 16.01.2020 and to this effect 1st Respondent has replied vide letter dated 23.01.2020 as under:

"Actually Mr.Shivakumar shown his interest to become a director in our company and started to pay the amount but due to various reasons he setback in decision and stopped paying the amount. During this time we made a high sea sales with M/s. Ameya Engineering and Kompac Trading

Company. In this transaction Kompac Trading Company has to pay Rs.10 lacs to Ameya Engineering and Mr.Shivakumar requested us to pay that amount to Ameya Engineering and deduct the same from his outstanding amount. Since the Ameya Engineering was keep on pressurising us for the payment, we made the payment to them."

9.3. It is stated that there was no prior transaction with M/s. Kompac Trading Co in case of existence of the said high sea sales. The Applicant has sent e-mail dated 13.03.2020 to the Respondents to provide proof of advice received from Kompac Trading Co requesting such payment and also the receipt issued by Ameya Engineering acknowledging payment from the Corporate Debtor on account of Kompac Trading Co and the details of high sea sale transaction, however, there was no response from the Respondents. It is stated that after verifying the records that there was no Trade Debtor and this transaction has been done with an intent to defraud the creditors of the Corporate Debtor.

9.4. In reply, it is stated by the Respondent Nos. 1 and 2 that the applicant / liquidator is not empowered to file an application under Section 66(2) of IBC, 2016 since he is not a Resolution Professional nor he can seek directions to the Respondents to make contribution to the assets of the Corporate Debtor. It is stated that Section 66(1) of IBC, 2016 allows only the Resolution Professional to file such an application. It is stated that a bad commercial decision cannot be considered to be fraudulent or wrongful trading under the provisions of Section 66 of IBC, 2016.

It is stated that this Tribunal has jurisdiction to inquire into allegations of any fraudulent trading's carried on by the Corporate Debtor during the Insolvency Resolution. It is stated that a so-called alleged violation cannot be termed to be made for fraudulent purpose. It is stated that the allegations are not based on proper and correct assessment of transactions involved and no circumstance the transactions referred to in the petition, contain or reflect even an iota an intention to defraud the creditors.

9.5. It is stated that the Respondents had carried out the commercial activities without any malafide intention during the normal course of business. It is stated that for a fraudulent transactions, intention to deceive is a *sine qua non* of a fraud which has been missing in the present case. Reference is made of Section 447 of the Companies Act, 2013, Section 17 of the Indian Contract Act, 1872. Hence It is stated that the application has no merits and deserves to be dismissed.

9.6. In rejoinder, it is stated that Section 66 of IBC, 2016 provides that during the CIRP or a liquidation process if it is found that any business of Corporate Debtor has been carried on with intent to defraud the creditors of the Corporate Debtor or for any fraudulent purpose, the Adjudicating Authority may pass an order against any person who are knowingly parties to such transaction to make such contribution to the assets of the

Corporate Debtor. It is stated that by virtue of this provision, the Liquidator can also file an application for fraudulent trading after the commencement of the liquidation of the Corporate Debtor. Reference is made of the Insolvency Committee Report dated Feb 2020 and Section 35 of the Code. It is stated that there is no specific look back period under Section 66 and the maxims, “once a fraud, always a fraud” and “fraud” vitiates every transaction into which it enters, the primary reason of not having a look back period is that if any person has acted intentionally or dishonestly against the interest of creditors, such person should not be allowed to get away by using the defense of lapse of time. It is stated that the alleged transactions are not the bad commercial business transaction as alleged by the Respondent, but had been carried out by the Respondents intentionally to defraud the stakeholders. The Respondents did not hand over the records. They handed over the record only after the intervention of this Tribunal. It is stated that a sum of Rs.20 lakhs was received from Kompac Trading Co for the purpose of transfer as “loan return” and there was no claim lodged by the unsecured creditor with the Applicant / Liquidator. It is stated that the sale of Kompac Trading Co amounting to Rs.20 lakhs was booked as a credit sale and it shall be recoverable from Kompac Trading Co as the Trade Debtor.

FINDINGS OF THIS TRIBUNAL

11. Heard the submissions made by the Learned Counsel for the parties and perused the records.

12. In relation to IA/1319/IB/2020, IA/1327/IB/2020, IA/1322/IB/2020, IA/1324/IB/2020, IA/1325/IB/2020, IA/1321/IB/2020, IA/1326/IB/2020, the same have been filed by the Liquidator under Section 66 of IBC, 2016.

13. The Learned Counsel for the Respondent referred to the Report of the Insolvency Law Committee, February 2020, and stated that Section 66 of IBC, 2016 does not enable the Liquidator to file Application under Section 66 of IBC, 2016;

CHAPTER 3: RECOMMENDATIONS REGARDING ACTIONS AGAINST AVOIDABLE TRANSACTIONS AND IMPROPER TRADING IN THE CORPORATE INSOLVENCY RESOLUTION AND LIQUIDATION PROCESSES

2.6. **It was also highlighted that Section 66 only allows the resolution professional to file applications against improper trading. Though the scope of this provision also envisages such actions to be filed during liquidation, the liquidator has not been given the power to file under this provision. The Committee noted that this may be a clerical error, and the liquidator should also be allowed to file applications under Section 66 of the Code.**

14. The Learned Counsel also submitted that the Insolvency and Bankruptcy Board of India vide its Invitation of comments from public on proposed changes to the Corporate Insolvency Resolution and Liquidation Framework under Insolvency and Bankruptcy Code, 2016 dated 23.12.2021 has proposed certain amendments to be made in Section 66 of IBC, 2016 in order to enable the Liquidator also to file applications under Section 66 of IBC, 2016;

2. Streamlining avoidable transactions and wrongful trading

2.1. Sections 43-51, 66, and 67 of the Code lay down various transactions that may be avoided by the resolution professional or liquidator (collectively referred to as "avoidable transactions"), and the actions that can be taken against erstwhile management for fraudulently or wrongfully trading during the CIRP or liquidation process (referred to as "wrongful trading"). These provisions are primarily aimed at enhancing the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors. Stakeholders have suggested that there is lack of clarity regarding certain aspects of proceedings for avoidance of transactions and wrongful trading. The following changes are proposed to the law to crystallise the procedure of filing and disposing avoidable transactions and wrongful trading

(v) Section 66 does not mention the 'liquidator' due to a clerical error and thus, may be amended to expressly state that the liquidator is also permitted to file applications under this section.

15. Thus, it is stated that the law which is prevailing as on date under Section 66 of IBC, 2016 does not enable the Liquidator to file an Application under Section 66 of IBC, 2016 and as such the present

application filed by the Liquidator as against the respondents is required to be dismissed *in limine*.

16. In order to address the said issue, we refer to the Judgment of the Hon'ble NCLAT in the matter of **Amardeep Singh Bhatia –Vs- Abhishek Nagori & 5 Ors** in *Company Appeal (AT)(Ins) No. 671 of 2020*, wherein it is held as follows;

11. Now we address to 'Fraudulent Trading' or 'Wrongful Trading' as provided for under Section 66 of the Code. For ready reference, the said Section is being reproduced as hereunder:

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

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

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the

commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

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

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.] Explanation. – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”

12. There is no look back period specified under Section 66, which refers to ‘Fraudulent Transactions’. If the Liquidator finds that there is a fraud committed by the ‘Corporate Debtor’ at any time, he can approach the Adjudicating Authority and file an Application seeking necessary directions

17. The Hon’ble NCLAT in the judgment referred *supra* has held that if the Liquidator finds that there is a fraud committed by the ‘Corporate Debtor’ **at any time**, he can approach the Adjudicating Authority and file an Application seeking necessary directions. Thus, we are of the view that the Liquidator has the locus to file application under Section 66 of IBC, 2016 before this Tribunal.

18. Coming to the facts of the present case, it is seen that the Liquidator has filed the present Application under Section 66 of IBC, 2016. However, the Liquidator has not clarified whether the transactions impugned in these applications pertain to 66(1) or 66(2) of IBC, 2016. In this context it is relevant to extract Section 66 of IBC, 2016, which is as follows;

66. Fraudulent trading or wrongful trading. –

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

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

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

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

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under subsection (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

19. A careful perusal of Section 66 of IBC, 2016 would manifest the fact that it deals with two transactions; Section 66(1) of IBC, 2016 deals with 'Fraudulent Trading' and Section 66(2) of IBC, 2016 deals with 'Wrongful Trading'. Section 66(1) of IBC, 2016 imposes liability on 'any person' who were knowingly parties to the carrying on the business with a dishonest intention to defraud the creditors, to make contribution to the assets of the Corporate Debtor. Thus, essentially for a transaction to qualify under Section 66(1) of IBC, 2016, the following conditions should be satisfied;

- (a) Liability can be fixed upon 'any person';
- (b) The said person should knowingly carry on the business with the Corporate Debtor;
- (c) The said person should have a dishonest intention to defraud the creditors;

20. It can be seen that Section 66(1) of IBC, 2016 is *pari materia* to the provisions of Section 213 of UK Insolvency Act, 1986, which is extracted hereunder;

213 Fraudulent trading.

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

21. On analysing Section 66(2) of IBC, 2016 it is to be seen that it deals with 'Wrongful Trading' and for a transaction to qualify under Section 66(2) the following conditions must be satisfied;

- (a) Liability can be fixed upon only 'Director' or 'Partner';
- (b) They knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvency proceedings;
- (c) They did not take due diligence with a view to minimizing the potential loss to the company's creditors;

22. It can be seen that Section 66(2) of IBC, 2016 is akin to the provisions of Section 214 of UK Insolvency Act, 1986, which is extracted hereunder;

214 Wrongful trading.

(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

(2) This subsection applies in relation to a person if—

(a) the company has gone into insolvent liquidation,

(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and

(c) that person was a director of the company at that time; but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he had

knowledge of the matter mentioned in subsection (2)) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and
- (b) the general knowledge, skill and experience that that director has.

(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

(6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(6A) For the purposes of this section a company enters insolvent administration if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration.

(7) In this section “director” includes a shadow director.

(8) This section is without prejudice to section 213.

23. Thus, there seems to be a stark contrast in relation to Section 66(1) and 66(2) of IBC, 2016. It is needless to say that even the scope of sub – section (1) and (2) of Section 66 of IBC, 2016 are different. As already adumbrated *supra*, the Liquidator has not clarified whether the transactions impugned is sought to be reversed under Section 66(1) or 66(2) of IBC, 2016.

24. By keeping in mind the scope of Section 66 of IBC, 2016, this Tribunal is required to examine as to whether the transactions as alleged by the Applicant in the Applications against the Respondents would fall within the confine of ‘Fraudulent Trading’ that is to say that whether the business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose. In this context, it is significant to refer to the decision of the Supreme Court in the matter of **Anuj Jain IRP for Jaypee Infotech Limited –Vs- Axis Bank Limited Etc.**, in *Civil Appeal No. 8512 – 8527 of 2019*;

29.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme

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

25. From the above judgment of the Hon'ble Apex Court, it is noted that specific material fact in relation to the transaction which is sought to be challenged by the Resolution Professional / Liquidator is

required to be pleaded in the Application. As to the present case, the Applicant sought to reverse the transactions purported to be done by the Respondents under Section 66 of IBC, 2016.

26. From the averments and from the ingredients extracted supra, it is seen that the Applicant is required to prove the following;

- (a) The person should knowingly carry on the business with the Corporate Debtor;
- (b) The said person should have a dishonest intention to defraud the creditors;

27. In relation to IA/1327/IB/2020 it is seen that the first issue is pertaining to the Diesel Expenses amounting to Rs.10,04,658/-. It is stated by the Respondent that the TNEB connection was allowed to be terminated since the cost of payment is more than of using a Diesel Genset and that it is a commercial decision taken by them to save the money of the Corporate Debtor. Thus, the said decision of the Respondent to terminate the electricity connection and continue with the running of the Diesel Generator cannot constitute a fraudulent transaction.

28. The second issue is in relation to the cash expenses to the tune of Rs.6,02,000/-. In this regard it is seen that the Respondent has given a breakup of the expenditure which is already captured in the table *supra*. The Liquidator has not proved any dishonest intention on the part of the Respondent.

29. The third issue is in relation to indirect expenses to the tune of Rs.64,56,518/-. In this regard it is seen that the Respondent has categorically stated that a sum of Rs.33,12,869/- was towards finance charges to the Bank. Further, it is seen that a sum of Rs.28,48,019/- has been spent towards indirect expenses representing Factory expenses, General expenses, office expenses and repairs and maintenance. It is stated that this increase was caused by Genset hire charges, additional periodic cleaning expenses, repair expenses, etc. Thus, it is already held that hiring of Diesel Generator is a commercial decision and as such the expenses incurred on this behalf cannot constitute a fraudulent transaction.

30. The fourth issue is in relation to the cash expenses incurred to the tune of Rs.1,56,000/-. In this regard it is seen that the said transaction has been made towards sanitary maintenance payment, the

allegation of the Liquidator that it has been made in cash and as such the same constitute fraudulent transaction is devoid of merits.

31. The fifth issue is in relation to the missing assets (i) 30Kva Genset, (ii) Toyoto Fortuner car and (iii) TVS XL & Yamaha. The Respondent has stated that the Genset was affected by Flood and it was sent to repair for three time and the cost of repaid was more than the actual value and hence it was left with the mechanic. Further, it is stated that the Corporate Debtor has made advance towards the Toyota Fortuner car and it was used, however the Corporate Debtor could not settle the balance payment to the owner and hence the owner took the car. Further, it is seen that the two motorcycles were sold at scrap value to the employees since the same was affected very badly during the flood. Hence, these transactions also do not fall within the purview of fraudulent transaction as envisaged under Section 66 of IBC, 2016.

32. In relation to IA/1319/IB/2020 it is seen that the Liquidator while identifying the Trade debtors of the Corporate Debtor, demanded for repayment of Rs.13,40,806/- towards the total goods value of

Rs.35,73,013/- from Kerala Trade Zone (KTZ) one of the debtor, supplied by the Corporate Debtor on 06.03.2018 and 21.03.2018. The Liquidator sought to impugn this transaction as a fraudulent transaction under Section 66 of IBC, 2016.

33. In relation to IA/1322/IB/2020 it is seen that a sum of Rs.67,539/- was due from the 3rd Respondent and the Liquidator issued a demand notice dated 14.05.2019 to the 3rd Respondent demanding repayment but it was returned with the endorsement "Left". The Liquidator sought to impugn this transaction as a fraudulent transaction under Section 66 of IBC, 2016.

34. In relation to IA/1324/IB/2020 it is seen that the Liquidator after identifying the trade debtors, demanded repayment of Rs.2,29,495/- from the trade debtor M/s. Annai Apirami Printers towards the goods supplied by the Corporate Debtor, but he did not get any response. The Liquidator sought to impugn this transaction as a fraudulent transaction under Section 66 of IBC, 2016.

35. In relation to IA/1325/IB/2020 it is seen that from the books of accounts of the Corporate Debtor, the Liquidator has identified the

debts remained unpaid to the Corporate Debtor. Accordingly, on 14.07.2022 he demanded Maruthi Trading Company, one of the debtor of the Corporate Debtor for repayment of Rs.2,73,371.83 being the balance towards the advance payments made for the goods to be purchased by the Corporate Debtor by 22.07.2020. The notice to 3rd Respondent received back unserved with the report "No Such Person". The Liquidator sought to impugn this transaction as a fraudulent transaction under Section 66 of IBC, 2016.

36. In relation to IA/1321/IB/2020 it is seen that on the basis of books of accounts of the Corporate Debtor, the Liquidator identified the trade debtors of the Corporate Debtor and demanded repayment of pending dues of Rs.58,665.06/- from M/s. Digital Plate Systems Private Limited, one of the trade debtor, on 14.09.2018 towards the goods supplied. However, he did not get any response. The Liquidator sought to impugn this transaction as a fraudulent transaction under Section 66 of IBC, 2016.

37. In relation to IA/1326/IB/2020 it is seen that from the books of accounts of the Corporate Debtor, the Liquidator has identified that

some of the trade transactions by the Corporate Debtor with Kompac Trading Company were not justifiable. The Liquidator sought to impugn this transaction as a fraudulent transaction under Section 66 of IBC, 2016.

38. It is pertinent to note here that these applications have been filed in respect of the dues which were pending from the Trade debtors of the Corporate Debtor. It is to be noted here that the Hon'ble NCLAT in the matter of **Shri Ramachandra D. Choudhary –Vs- Bansal Trading Company & Anr.** in *Company Appeal (AT)(Ins) No. 810 of 2020* has held as follows;

14. The only point which is to be examined is whether the Adjudicating Authority was justified in dismissing the Applications preferred by the Liquidator as not maintainable. The Resolution Professional is required under Section 18 of the Code to take control and custody of the assets of the 'Corporate Debtor'. The amounts stated to be 'due and payable' to the 'Corporate Debtor' by other Sundry Debtors are required to be included in the Information Memorandum and when included, the person/entity purchasing the assets of the 'Corporate Debtor' would have knowledge of the value of the assets/Liquidation Value as stated in the Information Memorandum. The Hon'ble Supreme Court in '**Gujarat Urja Vikas Nigam Limited' Vs. 'Mr. Amit Gupta & Ors.'**', Civil Appeal No. 9241 of 2019, in paras 67 & 68 noted as follows:

"67. The institutional framework under the IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. in the absence

of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful, reorganization or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in Innoventive (supra) this court observed that "one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of "speeding up of the insolvency process". The principle was reiterated in Arcelor Mittal (supra) where this court held that "the non-obstante Clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings". Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction adjudicate disputes, which arise solely from or which relate to the insolvency of the Corporate Debtor. However, in doing do, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.

68. It is appropriate to refer to the observations in the Report of the BLRC, wherein it noted the role of the NCLT, as the Adjudicating Authority for the CIRP, in the following terms:

"An adjudicating authority ensures adherence to the process. At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the directors and management the entity, recommendations from the creditors committee. All material actions and events

during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalize frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behavior of the insolvency professional are directed to the Regulator/Adjudicator."

As such, it is important to remember that the NCLT's jurisdiction shall always be circumscribed by the supervisory role envisaged for it under the IBC, which sought to make the process driven by trained resolution professionals."

15. Keeping in view the aforementioned ratio in 'Gujarat Urja Vikas Nigam Limited' (Supra), **we hold that the remedy for recovery of debts, disputed or not, cannot be determined in summary proceedings and the Code does not contemplate adjudication of any such nature. Any such steps taken under Section 60(5) of the Code before the Adjudicating Authority, would tantamount to bypassing/short-circuiting the Judicial Proceedings. Keeping in view the submissions of the Respondents, to adjudicate whether the amount is due and payable by the 'sundry debtors' who have raised disputes, would require calling for evidence and cannot be proceeded under the Code. The Appellant is well within its powers to take appropriate steps to file legal proceedings, if the circumstances so warrant. The Code expressly provides for the Liquidator to institute or defend any Suit, Prosecution or other Legal Proceedings, Civil or Criminal, in the name or on behalf of the 'Corporate Debtor'.**

(emphasis supplied).

39. Thus, the recourse for the Liquidator to recover the amount from the Trade Debtors of the Corporate Debtor is to properly institute or defend any Suit, Prosecution or other Legal Proceedings, Civil or Criminal, in the name or on behalf of the 'Corporate Debtor'. The

recovery of the money from the Trade Debtors of the Corporate Debtor cannot be brought under Section 66 of IBC, 2016.

40. Thus, the Liquidator in the present case has miserably failed to prove the dishonest intention of the Respondents to defraud the creditors. Even upon perusal of the entire Application it is seen that the Liquidator has not made any averments in relation to the dishonest intention on the part of the Respondents in making the payments.

41. Further, it is also required to be noted that the Respondents had given a detailed reply to the said observations made by the Transaction Auditor. In spite of the same, the Liquidator has filed the Applications under Section 66 of IBC, 2016 fastening liability upon the Respondents, however without fulfilling the essential ingredients required under Section 66(1) of IBC, 2016 to maintain the present Application. The Liquidator has made only allegations against the Respondents and no documentary proof has been filed in support of the same, to show that the business of the Corporate Debtor was carried out by the Respondents with a dishonest intention and to defraud the creditors.

42. In this regard, it is significant to refer to the Judgment of the Hon'ble NCLAT in the matter of **Regen Powertech Pvt. Ltd. –Vs- Wind Construction Pvt. Ltd.** in *Company Appeal (AT)(Ins) No.349 of 2022*, wherein it is held as follows;

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'.*

38. *Barring the aforesaid 'Reliefs' / 'Directions' being sought for, by the 'Appellant' / 'Applicant' in IA(IBC)/489(CHE)/2021 in IBA/1099/2019, there are no 'Convincing Tangible' / 'Documentary Materials' to fortify the 'Plea' of the 'Appellant' / 'Applicant' that the 'Business' of the 'Corporate Debtor' was carried out by the Respondents with a 'Dishonest Intention' and, especially, to 'Defraud' the 'Creditors'. To put it precisely, the averments projected by the 'Appellant' / 'Applicant' in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 do not come within the 'Four Parameters', of the ingredients of Section 66 of the Insolvency and Bankruptcy Code, 2016). Viewed in that perspective, the 'Impugned Order' dated 01.07.2022 in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 passed by the 'Adjudicating Authority' (National*

Company Law Tribunal, Division Bench – II) in ‘dismissing’ the ‘Application’, without Costs, is ‘free from any ‘Legal error’. Consequently, the ‘Appeal’ fails.

*In fine, the instant Comp App (AT) (CH) (Ins) No.349/2022 is ‘dismissed’, for the reasons assigned by this ‘Tribunal’, in this ‘Appeal’.
No Costs.*

(emphasis supplied)

43. In the light of what has been stated above, we are of the view that the Applicant has not made a case of fraud or dishonest intention on the part of the Respondents except making sweeping allegations and hence Section 66 of IBC, 2016 cannot be invoked under such circumstances. Under the said circumstances, the present Applications are *san* merit and are liable to be dismissed.

44. Accordingly IA/1319/IB/2020, IA/1327/IB/2020, IA/1322/IB/2020, IA/1324/IB/2020, IA/1325/IB/2020, IA/1321/IB/2020, IA/1326/IB/2020 stand **dismissed**. No costs.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond