

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

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **09.05.2024** THROUGH VIDEO CONFERENCING

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

IN THE MATTER OF : Allwin Cargo Service
Vs
Sri Padmabalaji Steels Pvt Ltd

MAIN PETITION NUMBER : TCP/363/IB/2017

(IA/MA) APPLICATION NUMBERS

IA(IBC)/1117(CHE)2023

ORDER

Present: None for the Applicant / Liquidator.

Ld. Counsel Shri. Anish GK for the Respondent.

Vide separate order announced in Open Court, the application is
dismissed.

Sd/-

(VENKATARAMAN SUBRAMANIAM)
MEMBER (TECHNICAL)

MG

Sd/-

(SANJIV JAIN)
MEMBER (JUDICIAL)

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

IA/1117/IB/2023 in TCP/363/IB/2017

(filed under Section 66 (2) of the Insolvency and Bankruptcy Code, 2016)

N. Sivachalam

Liquidator of M/s. Padmabalaji Steels Private Limited
12, Govindarajulu Street (Stanes Road)
Avinashi Road, Tirupur – 641 602

... Applicant/Liquidator

-Versus-

- 1. Shri M. Ravichandhiran,**
Erstwhile Managing Director,
M/s. Padmabalaji Steels Private Limited
No 3 C, 3rd Cross, Lakshimipuram,
Ganapathy- Coimbatore-641 006.
- 2. Smt R. Vasuki,**
Director, of M/s. Padmabalaji Steels Private Limited
No 3 C, 3rd Cross, Lakshimipuram,
Ganapathy- Coimbatore- 641 006.

...Respondents

Order Pronounced on 9th May 2024

CORAM:

**SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)**

ORDER

(Heard through hybrid mode)

This Application is filed by the Applicant / Liquidator under section 66 of the IBC, 2016 seeking the following reliefs

- i. To declare the above transactions as transactions has been carried on with the intend to defraud the creditors of the corporate debtor under Section 66 (1) of the IBC, 2016 and make liable to such contribution to the assets of the corporate debtor as it may deem fit and*
- ii. To direct the erstwhile Managing director and Director of the corporate debtor to return Rs.3028.96 Lakhs the diverted funds as per the Forensic Audit Report to the Liquidation estate and*
- iii. To grant the Applicant such further relief which this Hon'ble Tribunal may deem fit and proper in the circumstance of this case and in the interest of the Applicant."*

2. It is stated that the CIRP in respect of the Corporate Debtor was initiated by this Tribunal vide order dated 11.09.2017 and one Shri S. Muthuraju was appointed as the IRP. Thereafter, this Tribunal vide its order dated 20.12.2017 appointed the Applicant herein as the RP.

3. It is stated that in the 3rd COC meeting dated 22.02.2018, the COC unanimously with 100% voting share, resolved to liquidate the

Corporate Debtor and accordingly the Applicant moved an Application seeking liquidation of the Corporate Debtor. This Tribunal vide order dated 05.03.2018 ordered Liquidation of the Corporate Debtor and appointed the Applicant herein as the Liquidator.

4. It is stated that, based on the unaudited tally data of the Corporate Debtor received on 16.05.2018, the Applicant suspected major accounting deviations and hence the Applicant appointed a forensic auditor CA M Jayasree on 13.10.2018. The report of the said forensic auditor is appended as Annexure- 2 of the Application.

5. It is stated that, the forensic auditor in her report has made the following observations;

A. Funds were diverted to the following group concerns to the extent of Rs.3028.96 Lakhs.

Diversion to	Amount Rs. (In Lakhs)
Surya Balaji Steels (P) Ltd	1084.29
Venkateswara Steel & Rolling Mills	233.17
Surya Steels	204.41
Directors	19.22
Others among	1487.87
Total	3028.96

6. It is stated that, the Applicant sent an e-mail on 13.12.2018 to R1 and R2 to furnish the details of the funds allegedly diverted amounting to Rs.3028.96. Pursuant to the same, one Mr. G Narayana Subramani- Chief Financial Manager of the Corporate Debtor sent a reply mail to the Applicant on 08.01.2019.

7. The Liquidator has stated that the reply sent by the Chief Financial Manager of the Corporate Debtor is not admissible as the funds were transferred from the Corporate Debtors account to the group concerns.

8. It is stated that, the transactions were carried out with the intention to defraud the creditors of the Corporate Debtor and they may be classified as Fraudulent Transactions as per Section 66 of IBC, 2016.

9. The 1st and 2nd Respondent have filed counter in the present Application.

10. It is stated that, in response to the email dated 13.12.2018 sent by the Applicant, the Respondents have sent a detailed reply mail dated 21.12.2018.

11. The 1st and 2nd Respondent have denied the observation made in the forensics auditor report that the funds were diverted to the group concerns to the extent of Rs.3028.96 lakhs.

12. It is stated in the reply that the said transactions between the group concerns are genuine business and trade transactions and no funds from the Company were diverted and there were transactions of receipts and payments arising out of genuine business between the company and other group companies.

13. It is stated in the reply that, the Respondent went through the books of the Corporate Debtor and could not correlate the figures in which the forensic auditor has referred. In response to the transactions referred by the forensic auditor, the respondent has submitted as follows:-

S.No	Name of the Group Company	Amount -Rs. In Lakhs	Our Submissions
1.	Suryabalaji Steels Private Limited	1084.79	An amount of Rs.1157.01 Lakhs was invested as equity by Suryabalaji Steels Pvt limited to the company

			(and vice versa as caution deposit) for the purpose of cross investments to comply with TNEB norms for wind energy generation and group captive consumption scheme with specific knowledge of State Bank of India. The bank statement evidencing the proof of amount received from Suryabalaji steels private limited to the extent of Rs.881.50 Lakhs is also enclosed to the reply/clarification sent to the forensic auditor.
2.	Venkateshwara Steels and Rolling Mills	233.17	Though the respondent could not find the figure referred in steels & rolling mills (Rs.233.17 Lakhs), the respondents confirm that this was on account of genuine trade and business transactions. The bank statement is enclosed evidencing the same to the forensic auditor.
3.	Surya steels	204.41	This does not belong to the respondents group. However the amounts were settled in the

			subsequent years of transactions.
4.	Directors	19.22	Though the respondents could not find the figure referred (Rs.19.22) we confirm that these pertain to salary, rent advances and that the amounts were settled in the subsequent years.
5.	Other among group and within	1487.87	Though the respondents could not find the figure referred in (Rs.1487.87 Lakhs) the respondents confirm that these were the outcome of genuine trade and business transactions within the company and between the group concerns. However we confirm that the amounts were settled in the subsequent years.

14. It is stated that, regarding the share advance details as on 31.03.2014 required through the forensic auditor's mail, ledger printouts from origination of entries to reversal with relevant BRS and excel sheets were furnished in Annexure A for the forensic auditor's perusal. The share advance is in anticipation of the funds from outside banking

sources which had not been materialized due to the coercive action taken by the bank.

15. Regarding the details of the group concern to which the funds were transferred as share advance or otherwise and the details of amount returned to the company, the respondents stated that in anticipation of the funds from the global and domestic investors, the Cheques were received and accounted in the books. It is stated that these Cheques were reversed and returned to the respective investors in the subsequent years since the prospective investors withdrew the proposal. Hence remittances to the group concerns to the Liquidation Estate does not arise.

16. It is stated that, there was depletion of staff leaving abruptly due to the panic reaction around the date of NPA classification and on the date of the physical possession by the Bank, the number of staffs were reduced to single digit.

17. It is stated that, the statutory auditor who was associated with the Group Company since inception also had left abruptly. The promoters

also could not concentrate on these issues, as they were bogged down by legal issues and looking out for fresh investors to settle bank dues.

18. It is stated that, the routing of the transactions is done properly and there is no breach of duty, misfeasance on the part of the respondents herein on the affairs of the Company.

19. It is stated that each bank transaction is genuine business transaction and hence this present application is not maintainable and is liable to be dismissed *in liminie*.

20. Heard the submissions made by the Learned Counsel for both the parties and perused the record.

21. From the relief as extracted above, it is seen that the Applicant has filed the present Application under Section 66(1) 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.

22. 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;

23. 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.

24. 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;

25. 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.

26. 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.

27. 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 Inrfatech 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 undervaluation 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.

28. 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.

29. 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;

30. The Liquidator has sought reversal of an amount of Rs.3028.96 to the coffers of the Corporate Debtor. The transactions as alleged by the Liquidator are as follows;

Diversion to	Amount Rs. (In Lakhs)
Surya Balaji Steels (P) Ltd	1084.29
Venkateswara Steel & Rolling Mills	233.17
Surya Steels	204.41
Directors	19.22
Others among	1487.87
Total	3028.96

31. In relation to the above table, it is seen that the 1st and 2nd Respondent have sent a detailed reply on 13.12.2018 to the Liquidator. The said reply is extracted in para 13 (*supra*). The 1st and 2nd Respondent have given a detailed reply to each and every transaction as pointed out in the Forensic Auditor Report. For instance, in so far as transfer of Rs.1084.29 Lakhs to Surya Balaji Steels (P) Ltd, it is stated that an amount of Rs.1157.01 Lakhs was invested as equity by Suryabalaji Steels Pvt limited to the company (and vice versa as caution deposit) for the purpose of cross investments to comply with TNEB norms for wind energy generation and group captive consumption scheme with specific knowledge of State Bank of India. The bank statement evidencing the proof of amount received from Suryabalaji steels private limited to the

extent of Rs.881.50 Lakhs is also enclosed to the reply/ clarification sent to the forensic auditor.

32. Similarly, for each and every transaction, the 1st and 2nd Respondent have given a reply and the same is is extracted in para 13 (*supra*). The Liquidator without going into the merits of the reply dated 13.12.2018 of the 1st and 2nd Respondent has preferred to file the present Application before this Tribunal.

33. These findings of the Transactions Auditors do not *per se* fall under Section 66(1) of IBC, 2016. In fact, the Respondents had given a detailed reply to the said observations made by the Transactions Auditor. In spite of the same, the Liquidator has filed the present Application 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.

34. 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)

35. 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 *san* merit and are liable to be dismissed.

36. Accordingly IA(IBC)/1117(CHE)/2023, stands **dismissed**. No costs.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)