

**HIGH COURT OF TRIPURA  
AGARTALA**

**WP(C) (PIL) 04 of 2023**

Smt. Sudipa Nath  
D/o Mr. Sujit Kumar Nath,  
Permanent resident of West Chandrapur,  
PS: Dharmanagar, PO: Chandrapur,  
District- North Tripura, PIN: 799251

Presently residing at Lake Chowmuhani,  
Supari Bagan, Krishna Nagar, PIN: 799001.

**----Petitioner(s)**

**Versus**

1. Union of India  
Represented by Ministry of Corporate Affairs Government of India,  
having its office at Shastri Bhavan, New Delhi-110001
2. The Secretary, Ministry of Corporate Affairs  
Having his office at Shastri Bhavan, New Delhi, 110001.
3. Insolvency Bankruptcy Board of India  
Represented by its Chairperson, 2<sup>nd</sup> Floor jeevan Vihar Building,  
Parliament Street, New Delhi 110001.

**---- Respondent(s)**

---

For Appellant (s)	: Mr. Krishnan, Sr. Adv. Ms. R. Guha, Adv. Mr. Angshuman Khound, Adv.
For Respondent(s)	: Mr. B. Majumder, Deputy SGI
Date of hearing	: 18.01.2023
Date of pronouncement	: 18.01.2023
Whether fit for reporting	: YES

---

**HON'BLE THE CHIEF JUSTICE (ACTING)  
HON'BLE MR. JUSTICE ARINDAM LODH**

**Judgment & Order**

The petitioner is a practicing advocate and a resident of state of Tripura. The petitioner is before this court claiming public interest and no direct or indirect personal motive /interest and prays as follows:

- (a) This is an application under Article 226 of Constitution of India for issuance of a writ of Mandamus and/or in the nature thereof to issue appropriate orders or direction, directing the respondent to forthwith take steps to declare Section 66(1) of the Insolvency and Bankruptcy Code, 2016 as ultra vires on the vice of Article 14 of the Constitution of India for being manifestly arbitrary and unconstitutional, unless to save it from unconstitutionality and in consonance with the scheme and object of IBC, scope thereof is enlarged by this Hon'ble Court by expanding the powers and jurisdiction of the NCLT by enabling it to declare fraudulent business transactions as void under Section 66 independent as void under Section 66 independent of Sections 43, 45, 47, 49 and 50.
- (b) This is an application under Article 226 of Constitution of India for issuance of a writ of Mandamus and/or in the nature thereof to issue appropriate orders or direction, directing the respondent to forthwith take steps to declare section 66(1) of the Insolvency and Bankruptcy Code, 2016 as ultra vires on the vice of Article 14 of the Constitution of India for being, manifestly arbitrary and unconstitutional, unless to save it from unconstitutionality and in consonance with the scheme and object of IBC, scope thereof is enlarged by this Hon'ble Court by expanding the powers and jurisdiction of the NCLT by enabling it to entertain application under Section 66(1) on its merits even if filed by any creditor or contributory of the Corporate Debtor;
- (c) This is also an application under Article 226 of Constitution of India for issuance of a writ of Mandamus and/or in the nature thereof to issue

appropriate orders or direction, directing the Respondent to forthwith take steps to declare Section 66(1) of the Insolvency and Bankruptcy Code, 2016 as ultra vires on the vice of Article 14 of the Constitution of India for being manifestly arbitrary and unconstitutional, unless to save it from unconstitutionality and in consonance with the scheme and object of IBC, scope thereof is enlarged by this Hon'ble Court by expanding the powers and jurisdiction of the NCLT by enabling it to pass an Order making liable to make such contributions to the assets of the corporate debtor as it may deem fit, not only against any persons who were knowingly parties to the carrying on of the business of the Corporate Debtor in such manner but also against other organizations legal entities (other than the corporate debtor) with whom such business was carried out;

- (d) In addition the petitioner filed this application under Article 226 of Constitution of India for issuance of a writ of Mandamus and/or in the nature thereof to issue appropriate orders or direction, directing the Respondent to forthwith take steps to declare Section 66(1) of the Insolvency and Bankruptcy Code, 2016 as ultra vires on the vice of Article 14 of the Constitution of India for being manifestly arbitrary and unconstitutional, unless to save it from unconstitutionality and in consonance with the scheme and object of IBC, scope thereof is enlarged by this Hon'ble Court by expanding the powers and jurisdiction of the NCLT by enabling it pass an Order making liable to make such contributions to the assets of the corporate debtor as it may deem fit, not only against any persons who were knowingly parties to

the carrying on of the business of the Corporate Debtor in such manner but also against any persons responsible for carrying on the business with Corporate Debtor in such organizations/legal entities;

(e) The petitioner also filed this application under Article 226 of Constitution of India for issuance of a writ of Mandamus and/or in the nature thereof to issue appropriate orders or direction, directing the Respondents to forthwith consider introducing appropriate amendments in Section 66(1) of Insolvency and Bankruptcy Code, 2016 expanding the powers and jurisdiction of the NCLT.

**(2)** The petitioner contended the frauds of gigantic proportion are being played by the corporate to defraud the gullible creditors to siphon off public money. He contended that introduction of Insolvency Bankruptcy Code (IBC) itself is in public interest. According to him, grant of the prayer made by him would serve public interest and would enable maximum recoveries under IBC for the creditors of a corporate debtor.

**(3)** The petitioner further submitted that there is urgent need of passing appropriate directions as prayed for by him in the interest of justice. The prayers if granted would strengthen the framework for insolvency & bankruptcy and would cause immense benefit to the creditors at large who would be able to make higher recoveries.

**(4)** The petitioner also submitted that to the best of his knowledge, the issue raised herein has never been raised in any petition, pending or disposed of, before any court.

**(5)** The petitioner submitted that although broadly Section 339(1) of the Companies Act, 2013/Section 542 of the Companies Act, 1956 may appear to be *pari*

*materia* to Section 66(1), there is clear distinction in the application of the provisions and the scheme under the Companies Act vis a vis IBC.

(6) While making submission, the petitioner relied on the judgments of the Hon'ble Supreme Court in ***Usha Ananthasubramanian vs. Union of India (2020) 4 SCC 122*** which is the context of Section 339(1) of the Companies Act, 2013, of Hon'ble Kerala High Court in ***South India Paper Mills Pvt. Ltd vs. Sree Rama Vilasam Press & Publications 1980 SCC Online Ker 298*** which is in the context of Section 542 of the Companies Act, 1956, and of the Hon'ble Calcutta High Court in ***Prashant Properties Limited vs. SPS Steels Rolling Mills Ltd. MANU/WB/2456/2019*** which is in the context of Section 66 of IBC. Relying on the aforesaid mentioned judgments, the petitioner submitted that those shall be wholly inapplicable for considering the powers and jurisdiction of National Company Law Tribunal (NCLT) under Section 66(1) of IBC. The petitioner further submitted that in ***Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd-(2020) 8 SCC 401***, particularly in paragraph 32.1 thereof is mere orbiter and not ratio decidendi, thus are also not binding. He has also referred to the orders passed by National Company Law Appellate Tribunal (NCLAT) and of Hon'ble Supreme Court in the matter of ***Deepak Parasuraman vs. Sripriay Kumar*** to claim that even though the application was filed by resolution Professional under Section 43 and Section 66 read with Section 60(5) of IBC, NCLT shall have power to pass same order if the application was solely under Section 66 of IBC. He further submits that in any event none of the judgments are in the context of challenge to the validity of the impugned provision. The three provisions discussed are as under:

Section 542 of Companies Act, 1956	Section 339(1) of Companies Act, 2013	Section 66(1) of Insolvency and Bankruptcy Code, 2016
<p>542. Liability for fraudulent conduct of business.</p> <p>(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 any other persons or for any fraudulent purpose, the Court, on the application of the Official Liquidator, or the liquidator or nay creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the</p>	<p>339. Liability for fraudulent conduct of business</p> <p>(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 any other persons or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any person, who is or has been a director, manager, or officer of</p>	<p>66. Fraudulent trading or wrongful trading</p> <p>(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 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</p>

<p>business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct. On the hearing of an application under this sub-section, the Official Liquidator or the liquidator, as the case may be, may himself give evidence or call witness.</p>	<p>the company or any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct: Provided that on the hearing of an application under this sub-section, the Official Liquidator or the Company Liquidator, as the case may be, may himself give evidence or call witness.</p>	<p>liable to make such contributions to assets of the corporate debtor as it may deem fit.</p>
---	--	--

**(7)** The above tabulation of three provisions in the context of prayer would show:

- (a) Under the Companies Act, 2013 or 1956, the application under Section 339(1) or Section 542 as the case may be would be filed only in the course of the winding up of company. However, an application under Section 66(1) of IBC can be filed during the corporate insolvency resolution process or a liquidation process. Corporate Insolvency Resolution Process (CIRP) having been introduced laid down vide IBC, the legislature has consciously extended the application of the provisions even to the matters during corporate insolvency resolution process, instead of restricting it during the liquidation process.
- (b) In all three provisions, the common mandatory pre-requisite satisfaction is that if any business of the company/corporate debtor has been either carried on
- (i) Intent to defraud creditors of the company/ corporate debtor or
  - (ii) For any fraudulent purpose
- (c) Under the Companies Act, the application filed by the official liquidator or the liquidator or any creditor or contributory of the company could be entertained. However, under section 66(1) of the IBC, only an application filed by resolution professional can be entertained by NCLT.
- (d) All the three provisions are aimed at fixing the liability of persons responsible for such conduct of business of the company/corporate debtor which is with fraudulent purpose and a required *mens rea*.
- (e) Under the Companies Act, the provision empowers the court/tribunal to hold such persons personally responsible before taking limitation



of liability for all or in of the debts or any other liability of the company and the court may direct. However, under Section 66(1) of IBC, the NCLT can pass an order holding such person liable to make contribution to the assets of the corporate debtor or it may deem fit. The legislature has carefully made this distinction in Section 66(1) of the IBC that this section may also apply during corporate insolvency resolution process and need not be only during liquidation. If no resolution plan is received under IBC or in any event has provided in IBC, corporate debtor would be subject to liquidation and the assets of the corporate debtor would be distributed amongst the creditors in the manner provided in IBC.

**(8)** In the context of companies Act, 2013 in ***Usha Ananthasubramanian vs. Union of India (2020) 4 SCC 122***, the Hon'ble Supreme Court was pleased to consider the extent of application of section 339(1) and was pleased to observe as under:

***7) Section 337 refers to penalty for frauds by an officer of the company in which mis-management has taken place. Likewise, Section 339 refers to any business of the company which has been carried on with intent to defraud creditors of that company. Obviously, the persons referred to in Section 339(1) as persons who are other than the parties "to the carrying on of the business in the manner aforesaid" which again refers to the business of the company which is being mismanaged and not to the business of another company or other persons.***

***8) This being the case, it is clear that powers under these sections cannot possibly be utilized in order that a person who may be the head of some other organization be roped in, and his or her assets be attached. This being the case, we set aside the impugned order passed by the NCLAT and well as the NCLT. The appeal is allowed in the aforesaid terms.***

***9) We may clarify that nothing stated in this judgment will have any effect insofar as the investigation conducted by the CBI or the investigation by the Serious Fraud Investigation Office (SFIO) is concerned.***

- (9) In the context of Companies Act, 1956 in **South India Paper Mills Pvt. Ltd. Vs Sree Rama Vilasam Press & Publications, 1980 SCC Online Ker 298**, the High Court of Kerala was pleased to observe that

**"5. It will be useful to compare the provisions of Section 542 with those of Sections 543 and 531. Section 543 empowers the court to assess damages against delinquent directors and others who occupy a fiduciary position in relation to a company. They are expected to act at all times in the interests of the company, eschewing fraud, underhand dealings and motives of personal aggrandisement. They also owe a duty of care. If they are found to be in breach of the duties attached to their special position, they are liable in damages under Section 543, and the court can order them to make good the loss sustained by the company as a result of their conduct. Misfeasance proceedings under the section lies for breach of any duty, even if it does not amount to a perpetration of fraud. The thrust of Section 531, on the other hand, is against "fraudulent preference", i.e., parting with the assets of the company in favour of a few creditors with a view to defeating the others. The court is given power under this section to invalidate such transfers made on the eve of winding-up. The three sections are thus part of a scheme for reducing the liabilities of the company, recovering its assets and recouping its losses, if the conditions prescribed by them are found to exist on an examination of its affairs, after winding-up. While Section 542 seeks to relieve the company of the liabilities incurred by fraudulent trading making those responsible for the fraud personally answerable, the purpose of Section 531 is to recover assets which should have belonged to the company but for fraudulent preference. Fraud is a common ingredient for both, whereas the proceedings under Section 543 are designed to recoup losses sustained by a breach of duty which may fall short of fraud.**

- (10) In **Prashant Properties Limited vs. SPS Steels Rolling Mills Ltd MANU/WB/2456/2019** in the context of Section 66 of IBC, the Calcutta High Court was pleased to observe as under:

**29. Even if Section 66 of the IBC applied to past transactions, unlike Sections 44, 48 and 51 IBC (under which the NCLT, as Adjudicating Authority, can avoid past transactions), under Section 66, the NCLT cannot avoid past transactions, even if fraudulent, but under Section 66(2) can only direct the Director/partner of the Corporate Debtor, and not other parties to the transaction, to make contribution to assets of the Corporate Debtor....."**

**"64. Upon hearing both sides, it is seen that Sections 43 and 44, as well as Section 45 of the IBC are inapplicable to the present case, in view of those being maintainable only at the instance of a liquidator or a resolution professional..."**

**(11)** In *Jaypee Infratech Ltd. Interim Resolution Professional v Axis Bank Ltd* (2020) 8 SCC 401, inter alia, in the context of Section 66 of IBC, the Hon'ble Supreme Court was pleased to observe that:

*"32.1. 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 therefore. 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."*

**(12)** In the matter of *Deepak Parasuraman vs. Sripriya Kumar* vide an order dated 21.09.2021 in Company Appeal (AT) (Insolvency) No.349 of 2020, the NCALT was pleased to confirm an order passed by NCLT allowing the application filed by resolution professional under Section 43 and 46 read with section 60(5) of IBC.

**(13)** As evident from the aforesaid precedence Section 339 or Companies Act, 2013 and *pari material*, the provisions of section 542 of Companies Act, 1956

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

such organization/legal entities and persons responsible for conduct of their business with corporate debtor.

**(14)** Regulation certified "preferential or other transaction"

All the insolvency and bankruptcy Board of India (Insolvency resolution process for corporate persons) regulations 2016 stipulates strict time limits for formation of requisite action by the resolution professional by any transaction to be hit Sections 43, 45, 50 and 66 for making determination thereof under the intimation to the Board and also for applying to NCLT for appropriate relief.

**(15)** Further, in *Phoenix ARC (P) Ltd. Vs. Spade Financial Services Ltd. (2021) 3 SCC 475* the Hon'ble Supreme Court inter alia observed that:

**51. The IBC has made provisions for identifying, annulling or disregarding "avoidable transactions" which distressed companies may have undertaken to hamper recovery of creditors in the event of the initiation of CIRP. Such avoidable transactions include:**

- (i) preferential transactions under Section 43 of the IBC;**
- (ii) undervalued transactions under Section 45(2) of the IBC;**
- (iii) transactions defrauding creditors under Section 49 of the IBC;**  
**and**
- (iv) extortionate transactions under Section 50 of the IBC. The IBC recognizes that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors."**

**(16)** Thus, the IBC specially empowers NCLT to consider application to declare certain transaction namely preferential, undervalued or extortionate credit transaction as void and to pass appropriate orders under Section 44 (orders in case of preferential transaction) Section 48 (orders in case of undervalued transaction) Section 51 (orders of adjudicating authority in respect of extortionate credit transaction). Such orders are aimed at reversing adverse effect by the concerned transaction *inter-alia* requiring the person who

benefits from any such transaction to pay back any gain he may have made as a result of the transaction, if an application for avoidance of such transaction is made.

(a) By a liquidator or resolution professional under section 43 (in case a preferential transaction) section 45 (in case undervalued transaction) or section 50 (in case extortionate credit transaction) respectively.

(b) By a creditor member or partner or corporate debtor under section 47 (in case of undervalued transaction) not reported to NCLT by the liquidator or resolution professional.

Further, IBC empower NCLT to make an order under section 49 (in case of transaction, defrauding, creditor. In interest of the victims of undervalued transaction referred in section 45 (2) of the IBC. If it is established that such transaction was deliberately entered into by corporate debtor for defrauding creditors.

**(17)** IBC contains adequate measures to make appropriate application by liquidator or resolution professional or by creditor or member or partner of corporate debtor for avoiding certain transaction under appropriate provisions of sections 43, 45, 47, and 50. It is clear from the language of section 66(1) that unlike application provided under section 43, section 45, section 50 and section 47 or avoiding of such transaction and de hors these provisions. An application contemplated exclusively under section 66(1) is not made for avoidance of any transaction. Even if fraudulent but to fix the liabilities of the persons reasonable for conducting the business of corporate debtor which is fraudulent or wrongful, that too an application made by resolution professional during the CIRP or a liquidation process.

- (18)** In *Swiss Ribbons (P) Ltd. vs. Union of India 2019 4 SCC 17* that the primary focus of the legislature to ensure revival and continuation of corporate debtor by protecting it from its own management and from a corporate by liquidation. Even its long title does not in any manner refer to liquidation which is only availed of as a last resort. If there is either no resolution plan or the resolution plan submitted are not upto the mark. The IBC is a beneficiary legislature which puts the corporate debtor back on its feet not being a mere recovery legislature for creditors.
- (19)** Therefore, in legislature wisdom and as apparent from the text of 66(1) it is clear that firstly it confers no jurisdiction but declaring any transaction as void, even if fraudulent, but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of corporate debtor which is fraudulent or wrongful. Secondly section 66(1) contemplates an application thereunder only by the resolution professional and by none other. Thirdly section 66 (1) also restricts the power of NCLT subject to being satisfy with pre-requisite that any business of the corporate debtor has been carried on with intent to defraud creditors or the corporate debtors or for any fraudulent purpose and if satisfied it powers to pass an order is only against such person who are responsible for the conduct of such fraudulent business of the corporate debtor with *mens rea* to make them personally liable to make such contributions to the assets of the corporate debtor as it may deem fit.
- (20)** There is no arbitrariness, matchless manifest arbitrariness in section 66(1) of IBC to entertain the instant petition to declare the said provisions as *ultra vires* of Article 14 and unconstitutional as alleged or otherwise. There is no

merit in the submission of the petitioner and the prayers made cannot be considered.

**(21)** With the above observation this court has no hesitation to dismiss the present writ petition. Accordingly the writ petition stands dismissed.

**JUDGE**

**CHIEF JUSTICE (ACTING)**

