

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

IA (IBC)/945(CHE)/2023 in CP/559/IB/2017

(Filed under Section 66(1) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

In the matter of Inasra Technologies Private Limited

S. Kannan

Liquidator of Inasra Technologies Private Limited
27, Skyline Castle,
Abdul Razack Street,
Saidapet, Chennai – 600 015

... Applicant

-Vs-

1. **Yogendra Vasupal**
Erstwhile Managing Director
4/420, 6th South Cross Street, Kapaleeswarar Nagar,
Neelankarai, Chennai – 600 041
2. **Sachit Singhi**
Erstwhile Director
834, Sangam Apartments,
159 Beracah Road,
Kalpak, Chennai – 600 010
3. **Avinash Bajaj**
Erstwhile Director
Flar No.4, 4th Floor, Sanghi House,
94, Nepean Sea Road,
Mumbai – 400 026
4. **Rajinder Venkatarajan Balaraman**
Erstwhile Director
431, Joseville, 6 Peter Dias Road,
Bandra West, Mumbai – 400 050
5. **Anup Kumar Gupta**
Erstwhile Director
B-1202, Floor 12 Raheja Atlantis,
G K Marg, Lower Parel,
Mumbai – 400 013

6. **Shree Shyam Trading Company**
No.19C, Mukta Ram Babu Street,
1st Floor, Kolkatta – 700 007

... Respondent

Along with

IA (IBC)/946(CHE)/2023 in CP/559/IB/2017

(Filed under Section 66(1) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

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G K Marg, Lower Parel,
Mumbai – 400 013

6. **Ray Enterprise**
No.3, Munshi Sadaruddin Lane,
3rd Floor, Kolkatta – 700 007

... Respondent

Along with

IA (IBC)/1711(CHE)/2023 in CP/559/IB/2017

(Filed under Section 66(1) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

In the matter of Inasra Technologies Private Limited

Rajinder Venkatarajan Balaraman
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431, Joseville, 6 Peter Dias Road,
Bandra West, Mumbai – 400 050

... Applicant

-Vs-

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Mumbai – 400 013

6. **Ray Enterprise**
No.3, Munshi Sadaruddin Lane,
3rd Floor, Kolkatta – 700 007

... Respondent

Along with

IA (IBC)/1025(CHE)/2023 in CP/559/IB/2017

(Filed under Section 66(1) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

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-Vs-

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94, Nepean Sea Road,
Mumbai – 400 026
4. **Rajinder Venkatarajan Balaraman**
Erstwhile Director
431, Joseville, 6 Peter Dias Road,
Bandra West, Mumbai – 400 050
5. **Anup Kumar Gupta**
Erstwhile Director
B-1202, Floor 12 Raheja Atlantis,
G K Marg, Lower Parel,
Mumbai – 400 013
6. **Shruti Creations**
No.7/1A, Grant Lane,
3rd Floor, Room No.318
Kolkatta – 700 007

... Respondent

Along with

IA (IBC)/1026(CHE)/2023 in CP/559/IB/2017

(Filed under Section 66(1) of IBC, 2016 read with Rule 11 of the NCLT Rules, 2016)

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... Applicant

-Vs-

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Neelankarai, Chennai – 600 041

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834, Sangam Apartments,
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5. **Anup Kumar Gupta**
Erstwhile Director
B-1202, Floor 12 Raheja Atlantis,
G K Marg, Lower Parel,
Mumbai – 400 013
6. **Elmac Trade Solution**
No.3, Kalipada Mukherjee Road,
Kolkatta – 700 008

... Respondent

Along with

IA (IBC)/1027(CHE)/2023 in CP/559/IB/2017

(Filed under Section 66(1) of IBC,2016 read with Rule 11 of the NCLT Rules, 2016)

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5. **Anup Kumar Gupta**
Erstwhile Director
B-1202, Floor 12 Raheja Atlantis,
G K Marg, Lower Parel,
Mumbai – 400 013

6. **Bhagwati Traders**
No.159, Rabindra Sarani,
Kolkatta – 700 007

... Respondent

Order Pronounced on 19th February 2024

CORAM

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

For Applicant : V. Manivannan, Advocate

For Respondent : T. Gowthaman, Advocate for R1 & R2
Arun Karthik Mohan, Advocate for R2 & R3
Pratiksha Eshwar, Advocate for R5

COMMON ORDER

(Hearing Conducted through physical mode)

Since the transactions impugned in all the applications filed under Section 66 of IBC, 2016 i.e. IA(IBC)/945, 946, 1025, 1026, 1027 (CHE)/2023 pertain to the same Corporate Debtor, all these applications are being disposed of by way of this common order.

2. The Applicant / Liquidator has sought for the following reliefs in these applications;

- a. To declare the above said transactions as fraudulent transaction and the transactions has been carried on with the intend to defraud the creditors of the Corporate Debtor under Section 66 of the Insolvency and Bankruptcy Code, 2016 and make liable to such contribution to the assets of the Corporate Debtor as it may deem fit and*
- b. To direct the Respondents to return the amount to the Liquidation estate of the Corporate Debtor*
- c. To pass such other orders as it deems fit in the above circumstances of the case and thus render justice.*

3. IA(IBC)/1711(CHE)/2023 is an Application filed by Rajinder Venkatarajan Balaraman seeking thereof to delete his name from the array of parties in IA(IBC)/946(CHE)/2023 as Respondent No.4.

BRIEF FACTS OF THE CASE:

4. On an Application filed by an Operational Creditor under Section 9 of IBC, 2016 this Tribunal vide its order dated 15.09.2017 initiated Corporate Insolvency Resolution Process (CIRP) as against the Corporate Debtor viz. Inasra Technologies Private Limited. Thereafter, this Tribunal vide its order dated 16.08.2018 ordered for Liquidation of the Corporate Debtor and appointed the applicant herein as the Liquidator.

5. It is stated that on scrutinizing the books of accounts, the Applicant observed lot of financial deviations. The Applicant conducted the meeting of the Stakeholders Consultation Committee (SCC) meeting on 01.09.2022 and brought it to the knowledge of the members regarding the financial deviations observed in the books of the Corporate Debtor. It is stated that the SCC members authorized the Liquidator to appoint an auditor to conduct the Transaction Audit of the books of accounts of the Corporate Debtor.

6. It is stated that the Applicant / Liquidator appointed M/s. RVKS and Associates to conduct the transaction audit to cover the PUFET Transactions falling under Section 43, 45, 50 and 66 of IBC, 2016. It is stated that the auditors carried out the transaction audit of the books of the Corporate Debtor for the period upto 31.03.2017 and submitted the final report to the Liquidator on 06.02.2023. It is stated that the auditor has observed that there are fraudulent payment invoices of Rs.555.80 Lakhs for the period 2016 – 2017 and the details of the same are as follows;

4. *On verification of the parties, to whom the Corporate Debtor has made payments in respect of the advertisements, we had found that the payments made by the Corporate Debtor with respect to the following parties are not substantiated by appropriate evidence.*

S. No.	PARTY NAME	ADDRESS OF PARTIES	CREDITORS SURPRISE AUDIT OBSERVATION	PAYMENT YEAR	AMOUNT IN LAKHS	% OF TOTAL
1	Bhagwati Traders	No.159, Rabindera Sarani, Kolkatta	The six storied house named Omkar Mansion" is in the business district of Burrabazar area in Kolkata and close to famous tourist attraction "Nakhoda Masjid Canara Bank's Burra Bazar Branch is also located in one side of the ground floor of the said premises. <u>Visited all the floors of the premises to find out the office of the creditor but we have neither found any existence of the creditor nor any office in the name of "M/s Bhagwati Traders" on any of the floors.</u> Liftman of the premises who has also told us that there is no such office in the name of "M/s Bhagwati Traders	2016 – 17	33.40	6.01%

2	Shree Shyam Trading & Co	No.19C, Mukta Ram Babu Street, 1 st Floor, Kolkatta – 700 007	The three storied old house is close to Marble Palace, which is a popular tourist destination in North Kolkata. Entered into the old house & went to th floor to find out the office of the Creditor. <u>Neither found any existence of the creditor nor any office in the name of "M/s Shree Shyam Trading Co" on the 1st floor,</u> Met with one person of Rabi Tour & Travels having office in the said 1st floor doing travel business for the last three years, to find out the whereabouts of the creditor they informed that they have never seen any such office in the name of "M/s Shree Shyam Trading Co. Subsequently met with one family living for a long period last twenty five years) in the ground floor of the said premises, who had told us that the name of the creditor is Shyam khemka" who had an office in the name of <u>"M/s Shree Shyam Trading Co" on the 1st floor & had cheated a number of people & left the premises more than three years ago.</u>	2016 - 17	116.00	20.87%
3	Shruti Creations	No.7/1A Grant Lane, 3 rd Floor, Room No.318, Kolkatta – 700 001	Visited the premises which was named after the legendary businessman "Lal Chand Roy" dealt in paper & paper products, publishing & printing business for last sixty years. The old house is in the business district of Lal Bazar area in Central Kolkata and close to famous Kolkata Police Headquarter in Lal Bazar. Visited 3rd floor of the house to find out the existence of the creditor. Room No 318 was found locked. Spoke to a person sitting in an office named "Ganapati Chambers" having two offices, ie, Room No 310 & 311 just opposite to Room No 318 of the said premises who has told us that Room No 318 has been under lock & key for the past one & half years. we were also informed that the tenant has left the premises & has not paid any rent and electricity for a long period.	2016 – 17	21.00	3.78%

			<u>Neither any existence of the creditor was noticed nor any office in the name of "M/s Shruti Creations" was found in the premises</u>			
4	Ray Enterprise	No.3, Munish Sadaruddin Lane, 3 rd Floor, Kolkatta – 700 007	Visited the premises the three storied old house is in the business district of Chitpur in Kolkata. Entered into the old house & went to the 3rd floor to find out the office of the Creditor & have noticed that all rooms on the 3rd floor were locked and none of the rooms had any name plate on the doors. Hence, there was no existence of the creditor nor any office in the name of "M/s Ray Enterprises." on 3rd Floor of the premises. Then spoke to one person of " <u>M/s Ankit Enterprise</u> " <u>having office in the 2nd floor of the said premises, who have also informed us that that they have not seen any such office in the name of "M/s Ray Enterprises".</u>	2016 – 17	344.40	61.96%
5	Elmac Trade Solution	No.3, Kalipada Mukherjee Road, Kolkatta – 700 008	Visited the property the two storied house is in the residential area in Panchanantala near Sakherbazar, Behala, South Kolkata and having a Lord Shiva Temple within the premises. Met with the owner of the house named Mr. Thakurdas Ghosh, very old and renowned resident of that locality to find out the existence of the creditor. The owner of the property confirmed us that he has not let out any portion of his property to any tenant in the name of "M/s Elmac Trade Solution". Spoke with only tenant having a garage space next to Main gate of the property doing business in the name of Basanti Neon Service who has also confirmed about the non-existence of any such tenant in the name of M/s. Elmac Trade Solution."	2016 – 17	41.00	7.38%
	TOTAL				555.80	100%

5. On further drill down of books of accounts and the available Invoice copies in respect of above referred parties, we have identified a pattern of errors/mistakes that was common in the invoice/delivery challan of all the above-mentioned parties, to whom payments were made in respect of the same.

a. All those parties had mentioned the name of the company as "Insara Technologies P Ltd" instead of "Inasra Technologies P Ltd" in their invoices/ delivery challans

b. All the above companies are based out in Kolkata. The address mentioned in respect of these entities

c. As per the available Invoice copies of the above parties, they had supplied flip brochures, key chains, Multimedia Bluetooth Speakers, Table clock. Stickers, and other marketing materials. However, none of the copies of samples were attached to the said invoices

d. All the available invoices provided are prepared in similar formats

e. All the available invoices provided have similar kind of seal and signatures. Attached the copies of these invoices as annexure

6. Further, letters were sent out to these entities in order to obtain the details of the samples supplied along with the outstanding balances in respect of the Corporate Debtor. It is to be noted that all the letters sent were returned stating "non-existence of the addressee".

7. The Liquidator has also appointed a professional to visit the registered office of the above said entities. They have, after visiting the locations as mentioned in the invoices and submitted their reports after making sufficient enquiry with the neighbours, stating that "No entities,

as mentioned above was operating in that place. The reports submitted by the said professional is included in the exhibit to this report.

8. *It is clearly evident from the above acts, that no such entities were existing as reflected in the invoices, further payments were also made from the Corporate Debtor to these entities.*

Conclusion

It is therefore evident from the above that, the business of the Corporate Debtor was merely carried out with intent to defraud the creditors of the Corporate Debtor and could be potentially classified as Fraudulent Transactions as per Section 66 of the Insolvency and Bankruptcy Code, 2016.

7. Based on the above observations made by the auditor, it is stated that it is clearly evident that such entity had not operated with clean hands and further payments were made by the Corporate Debtor to these entities. Further, it is stated that according to the transaction audit report, after verification, it was found that the Corporate Debtor has made payments to the 6th Respondent which are not substantiated by appropriate evidence.

8. It is stated that the Applicant on 17.12.2022 emailed the draft Transaction Audit Report to the Respondent Nos. 1 to 5 and sought clarification in respect of the same, to which, the Respondents sent their

replies and the same are appended as Annexure – 10 to 12 to the Application. It is stated that since the response of the Respondents did not clarify the queries, the Applicant has filed the present Applications before this Tribunal.

REPLY OF RESPONDENT NOS. 1 AND 2

9. It is stated that since the year 2014, the Board of the Corporate Debtor was controlled by the Investment firms through their nominee directors having 3 out of 5 seats and who were also the majority shareholders of the Corporate Debtor. The Corporate Debtor had raised over 190 Crores in multiple rounds over 3 years from the investment firms and was competing in a highly contested online travel segment with competitors such as Makemytrip, Oyo, Airbnb and booking.com.

10. It is stated that the Corporate Debtor started moving some of its online advertising to offline via brand activations and promotions at partner hotels, guesthouses, homestays etc. The brand activations were done by distributing flyers and placing Stayzilla branded collaterals in strategic places like keychains for the room keys, Push & Pull Stickers next to door handles etc.

11. It is stated that the draft Transaction Audit Report which was shared to the Respondents 1&2 has not made any specific allegation against the Respondents 1&2. IT is stated that the Finalized Transaction Audit Report annexed in the applications has not been shared with the Respondents 1&2. Further, it is stated that the applications in the captioned matters are deeply flawed and miserably fail to show any fraud much less fraud or benefit derived by any of the Directors. It is instead premised on 5 unrelated points that have been juxtaposed to create a cloud of suspicion and the same are replied as follows;

10.1. All these vendors were from Kolkata

It is stated that the Corporate Debtor had an office in Kolkata since late 2015 as can be seen from the rental agreement (pg 271-303). It is but natural and a normal decision in the course of business to use vendors from places where the office is situated. It is stated that the rental agreement- that was in the possession of the Liquidator since 2019- was not sent or missed by the auditors, despite pointing the same in the reply to the draft Transaction audit report, which was later converted to the final Transaction audit report with not a change between both.

10.2. There was no evidence or marketing samples

It is stated that 10-20 large Cartons of marketing material and also the samples that were kept along with the invoices were not at all taken into consideration by the Liquidator and also by the Transaction auditor despite pointing out the same in the reply to the draft Transaction audit report.

10.3. The invoices were billed to Insara Technologies Pvt Ltd

It is stated that 'Insara' is a very common mispronunciation of the Corporate Debtor's legal name Inasra. These mistakes tend to cascade when vendors have a common facilitator as is usually the case with offline vendors whether it be in Chennai or in Kolkata. Even the original applicant who used to facilitate many different vendors for payment had in the initial days also made the same clerical error before he was corrected by the promoter directors who were involved in day to day operations at that period. It is stated that no *malafide* action on the part of directors is indicated by such a common clerical error by mispronouncing the legal name of the Corporate Debtor as Insara instead of Inasra.

10.4. Similarities between Invoices

It is stated that the format of the invoice, common or otherwise, is immaterial when the content in said invoices is legitimate and uniquely identifiable and independently verifiable such as the Sales Tax number, Pan number, bank detail's etc which

are some of the requisite information in the invoice for the Corporate Debtor to process the payments from the bank. Further, all payments to these vendors have been made directly to their bank accounts from the Corporate Debtor's bank accounts as is the process for all vendor payments that the Corporate Debtor had to settle.

It is stated that there are many other invoices from many other vendors from other cities that can be said to be similar without even there being a common facilitator or common function or common usage or common field of deliverables amongst them. It is stated that no malafide action by the directors is indicated by similarities in the invoices when it has been received in the normal course of business, with substantial business activity backing the consumption of the deliverables in the invoice, and it is not sent or received by the Directors directly or any one known to them personally.

10.5. Current absence of Respondent No.6 of all above captioned matters at the address given 7 years back

It is stated that the vendors arrayed as Respondent No.6 in the captioned matters were very much active at the time of the transaction period in 2016, when 2 of them had even sent attested balance confirmation to the auditors of the Corporate Debtor. It is further stated that all of them had authenticated Government

registration numbers (like TIN or PAN or Sales Tax Numbers) at that point of time as can be seen in the copies of invoices beginning in pg. 82 of the applications in the captioned matters and/or in pg. 370-380 of this counter. Them being or not being in business today due to whatever reason is immaterial to the transactions that happened almost 8 years ago. There was also a worldwide pandemic and associated lockdowns that caused closure of millions of businesses, especially those that were associated or dependent on free physical movement of consumers.

It is further stated that all payments were made from the Corporate Debtor's bank to the vendor's bank account even as per the application and the Transaction Audit Report and the vendors were appropriately registered with relevant Government bodies verified under KYC norms of the Banks.

12. Thus, it is submitted that the present application filed by the Liquidator are misconceived and sans merit and are required to be dismissed.

REPLY OF THE 3RD, 4TH AND 5TH RESPONDENT

13. It is stated that the 3rd and 4th Respondents were nominated by Matrix Partners India Investment Holdings II, LLC (Matrix Partners) to

be appointed as a nominee non – executive director on the Board of the Corporate Debtor. The 5th Respondent was nominated by Nexus Ventures III, Ltd as a nominee non – executive Director of the Corporate Debtor.

14. It is stated that by way of a shareholder's resolution passed in an extra ordinary general meeting of the shareholders of the Corporate Debtor dated 30.09.2013 regarding appointment of directors, it was *inter alia* resolved that the nominee directors of Matrix Partners shall not be responsible, nor be a part of nor have any role in the operations and day-to-day management of the Corporate Debtor or the business or affairs of the Corporate Debtor and that the Corporate Debtor shall not identify the nominee directors of Matrix Partners as an 'officer in default' for the purposes of the Companies Act, 1956 or any other applicable laws.

15. It is stated that the appointment of Respondents as a non-executive director on the board of the Corporate Debtor as a nominee director was reported to the Registrar of Companies through the filing

of Form - 32 under Section 303(2), 264(2) or 266(1)(a) and 266(1)(b)(iii) of the Companies Act, 1956.

16. It is stated that thereafter, due to other professional commitments, the Respondents resigned as a non-executive director from the Board of the Corporate Debtor. It is stated that the Registrar of Companies was also accordingly notified of the Respondent resignation through Form No. DIR-11 pursuant to section 168 (1) of the Companies Act, 2013 and Rule 16 of The Companies (Appointment and Qualification of Directors) Rules, 2014.

17. It is stated that on 17.12.2022, the Applicant circulated the Draft Report which set out six itemized observations with respect to the affairs of the Corporate Debtor including certain payments made by the Corporate Debtor to Respondent No.6 i.e., the Alleged Fraudulent Transactions which are also the subject matter of the Final Report. It is stated that the Draft Report alleged various degrees and types of fraudulent activities assessed up to the end of the financial year 2016-17.

The Draft Report concluded that there existed fraudulent trading and wrongful trading as specified under Section 66 of the Code.

18. It is stated that the Draft Report, cursorily summarized that the directors of the Corporate Debtor were grossly negligent in carrying out their duties. In reply to the same, the Respondents have provided a detailed response. The response to the Draft Report *inter alia* clarified that the Respondents being a non-executive nominee director of the Corporate Debtor, were neither consulted nor involved in the day-to-day management of the Corporate Debtor's business activities. The Respondents also emphasized that, being a non-executive nominee directors of the Corporate Debtor, they were neither privy to any of the transactions, including the Alleged Fraudulent Transactions, nor they were consulted or involved in any process in relation to the Alleged Fraudulent Transactions. Based on the same the Respondents requested the Applicant to take the same into account and modify the Draft Report accordingly to *inter alia* remove the name of the Respondents from the Draft Report and duly clarify his role as an erstwhile non-executive director of the Corporate Debtor.

19. It is stated that to hold a non-executive director liable in respect of acts of omission or commission of a company, it is necessary to show that such acts had occurred with his knowledge, attributable through the board processes and with his consent or connivance or where he had not acted diligently, as provided for under Section 149(12) of the Companies Act, 2013. The role and responsibility of non-executive directors in this regard has also been clarified by a circular issued by the Ministry of Corporate Affairs dated 02 March 2020 numbered F.No.16/1/2020-Legal which is annexed hereto and marked as Annexure R-5.

20. It is stated that there is no evidence to indicate any consent, connivance or involvement on the part of the Respondents in relation to the Alleged Fraudulent Transactions or any of the other alleged fraudulent transactions forming the subject matter of the Final Report. It is stated that the Applicant has failed to consider that the Shareholders' Resolution passed prior to the appointment of the Respondent specifically stated that the Nominee Directors shall not be responsible, nor be a part of and shall not have any role in the operations and day-to-day management of the Corporate Debtor or the business or

affairs of the Corporate Debtor. Thus, it is submitted that no liability can be fastened upon a non-executive director

21. It is stated that the Applicant has failed to make out any case against or in relation to these Respondents and the same is devoid of any specifics attributing any knowledge or involvement of the Respondents in relation to the Alleged Fraudulent Transactions. Under such circumstances, the Respondents have sought dismissal of the present Applications.

FINDINGS OF THIS TRIBUNAL

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

23. 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.

24. A careful perusal of Section 66 of IBC, 2016 would manifest the fact that it deals with two transaction; 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;

25. 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.

26. 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;

27. 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.

28. 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 to the present case, the Applicant sought the Respondents to make contribution to the Corporate Debtor, under Section 66(1) of IBC, 2016.

29. By keeping in mind the scope of sub – section (1) of Section 66 of IBC, 2016, this Tribunal is required to examine as to whether the transactions as alleged by the Applicant in the present Application

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.

30. From the above judgment of the Hon'ble Apex Court, it is to be 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(1) of IBC, 2016.

31. 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;

32. The Applicant 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. However, the Liquidator himself has stated that the payments have been made to the 6th Respondents from the bank accounts of the Corporate Debtor. The observations made by the Transactions Auditor to come to a conclusion that the impugned transactions falls under Section 66 of IBC, 2016 are as follows;

- (i) The name of the Company has been wrongly mentioned.
- (ii) All the above companies are based out in Kolkata and those entities are not functioning right now.
- (iii) The copies of the sample were not attached with the invoice.
- (iv) All the invoices have similar kind of seal and signatures.

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)/945(CHE)/2023, IA(IBC)/946(CHE)/2023, IA(IBC)/1025(CHE)/2023, IA(IBC)/1026(CHE)/2023 and IA(IBC)/1027(CHE)/2023 stands **dismissed**. No costs.

37. IA(IBC)/1711(CHE)/2023 stands **disposed of**.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond