

**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**  
**COURT-V**

**Item No.-1**

IB-1794/ND/2019

IA/1495/2021

**IN THE MATTER OF:**

Mr. Idemitus Lube India Pvt. Ltd.

**Vs.**

M/S. Nath Motors Pvt. Ltd.

**.....Respondent**

**....Applicant**

**SECTION**

U/s 66 of IBC

**Order delivered on 27.04.2023**

**CORAM:**

**SHRI P.S.N PRASAD,  
HON'BLE MEMBER (JUDICIAL)**

**SHRI RAHUL BHATNAGAR,  
HON'BLE MEMBER (TECHNICAL)**

**PRESENT:**

For the Applicant :

For the Respondent :

**ORDER**

Order pronounced in open Court vide separate sheets.

IA/1495/2021in IB-1794/ND/2019 **is dismissed.**

Sd/-

**(RAHUL BHATNAGAR)  
MEMBER (T)**

Sd/-

**(P.S.N PRASAD)  
MEMBER (J)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH**  
**COURT-V**

**IA/1495/2021**  
**IN**  
**C.P. (IB).No.1794 (ND)/2019**

**IN THE MATTER OF:**

M/s Idemitus Lube India Pvt. Ltd. ... Operational Creditor

Versus

M/s Nath Motors Pvt. Ltd. ... Corporate Debtor

**AND**

**IN THE MATTER OF:**

**Mr. Anil Goel**

Resolution Professional  
(M/s Nath Motors Private Limited)  
Partner AAA Insolvency Professional LLP  
E-10A, LGF, Kailash Colony,  
Greater Kailash-I  
New Delhi - 110048

**... (Resolution Professional/Applicant)**

**Versus**

**1. Girish Bhatia**

Director,  
M/s Nath Motors Private Limited  
D-878, New Friends Colony,  
New Delhi - 110025

**.... Respondent No. I**

**2. Rajesh Kumar**

Director,  
M/s Nath Motors Private Limited  
House No. 883, Gali No. 16,  
Lakhpat Colony – 2,  
Mithapur, Jaitpur,  
New Delhi – 110044

....Respondent No.2

**3. Molika Garg**

Director,  
M/s Nath Motors Private Limited  
4277, Sector-B,  
Pocket -5 and 6,  
Vasant Kunj  
New Delhi - 110070

....Respondent No.3

**Order delivered on:27/04/2023**

**CORAM:**

**SH. P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)**

**SH. RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)**

**ORDER**

**PER: SH. P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)**

The present Application under Section 66 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "the Code") is filed by Mr. Anil Goel ('Applicant/Resolution Professional') of the Corporate Debtor i.e. M/s Nath Motors Private Limited seeking following reliefs:

*(a) Allow the present Application;*

*(b) "Direct the Respondents to make good the losses caused to the creditors of the Corporate Debtor as concluded in the present application as envisaged under Section 67(2) of the Code which are detailed out as follows:*

*a. Direct the respondents to contribute Rs.125.19 Lakhs  
(Rupees One Crore Twenty Five Lakhs Nineteen Thousand*

*Only) which have been siphoned off by the Respondents as enunciated in transaction – A of the present application.*

*b. Direct the Respondents to contribute Rs.73.78 Crores (Rupees Seventy Three Crores Seventy Eight Lakhs Only) which have been siphoned off by the Respondents as enunciated in Transaction – B of the present application;*

*(c) Report the said transaction to the Insolvency & Bankruptcy Board of India for making a Complaint to the Special Court under Section 236 of the Code.*

*(d) Pass any other order(s) as this Hon'ble Tribunal may deem fit in the interest of justice.”*

2. Succinctly stated the facts of the present case as averred by the Applicant are that the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor vide this Adjudicating Authority order dated 16.10.2019, and Mr. Anil Goel, was appointed as the Interim Resolution Professional ("IRP") of the Corporate Debtor who was later confirmed as the Resolution Professional ("RP") by the CoC as well as by the Adjudicating Authority vide order dated 02.01.2022 in CA No. 172 of 2019. It is submitted that in the First CoC Meeting the applicant had apprised the members of the COC about the meeting with Respondent No.1, wherein the Respondent No.1 had informed the applicant that the Corporate Debtor had neither any asset nor any business activity to run and the books of accounts were complete as on 31.03.2017 only. Further, it was submitted that no advance/recoverable has been identified by the Applicant on the examination of the available/limited books of accounts of the Corporate Debtor up to 31.03.2017.

3. Further, it was submitted that the Corporate Debtor had executed transactions with various related parties of the Corporate Debtor regarding payments to the related parties of the Corporate Debtor. The CoC in the 1<sup>st</sup> Meeting also deliberated on an agenda to conduct Forensic Audit of the Corporate Debtor for identifying the transactions under Section 43,45,49, 50 and 66 of the code whereby a Resolution was passed by the COC for the appointment of AKG & Associates. However, in the 1<sup>st</sup> Meeting of the COC, a resolution was passed for liquidating the corporate Debtor by members of the CoC, the forensic audit could not be conducted for a substantial period of time due to lack of documents and data to be provide by the Respondents. The applicant states that as per the balance sheets for the financial year 2016-17, the applicant identified that the inventory of the Corporate Debtor had reduced from 55.83 Crores to 38.14 Crores, the trade payables drastically reduced from Rs.9.92 Crores to Rs.1.57 Crores and the Unsecured loans availed by the Corporate Debtor were also reduced to Rs.1.82 Crores from Rs.4.88 Crores.
4. However, it is submitted that due to unavailability of proper books of accounts and the financial statement for the period after 2016-17, the transactions under Section 43,45 and 66 of the code could not be made out by the Applicant and in the interim, the transaction audit of the Corporate Debtor was conducted with the limited data availability. The Transaction Auditor in his report stated that certain transactions created an apprehension of being of a fraudulent nature. Meanwhile, an application CA No. 605/2020 under Section 33(2) of the code for initiating liquidation of the corporate debtor was filed by the applicant on 16.01.2020 and liquidation was initiated vide order dated 24.05.2022 read with 27.05.2022.

5. The details of the transaction determined by the Applicant in terms of the audit report falling in the category of 'Fraudulent and Wrongful Transactions' are divided into two parts which are as below:-

- a) Part-A: Dealing with questionable transactions with the related parties having inadequate documentation;
- b) Part-B: Dealing with transactions having inadequate documents.

<b>Transaction No.</b>	<b>Type of Transaction</b>	<b>Amount siphoned off</b>
Transaction A	Questionable Transactions with the related parties having Inadequate Documentations	Rs.125.19 Lakhs
Transaction B	Other Transactions having inadequate documents	Rs.73.78 Crores

6. The applicant submits that the said transactions were made by the respondents with the related parties during 2018-19 which is within the 1 year preceding the commencement of Corporate Insolvency Resolution Process and the funds been siphoned off with sole intention to defraud the creditors of the Corporate Debtors. Further, it is submitted that the current assets of the Corporate Debtor amount to a cumulative sum of Rs.62,00,49,251/- which have not been handed over to the Applicant by the Respondents and it was also informed by the

Respondents that no assets of the Corporate Debtor are available and no recoveries can be made.

7. It is submitted that the assets of the Corporate Debtor as on 31.03.2017 amounted to a cumulative sum of Rs. 68.76 Core and on the date of Commencement of the CIRP of the Corporate Debtor, the Resolution Professional was not handed over any inventory or assets. The applicant further apprised that he had received claims amounting to a total sum of Rs. 59,52,63,764/- from the financial creditors of the Corporate debtor. It is further submitted that respondents have not paid any sum to its creditors and the monies realised from siphoning off the assets of corporate Debtor has been utilized by the Respondents for the reason best known to them.
8. The applicant has relied upon the ratio laid down by the **Hon'ble Supreme Court in the case of "Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited"**, wherein it was held that the Hon'ble Tribunal has dealt with the features of the transaction in question as being preferential at a relevant time but recorded combined findings on all three aspects of transaction being preferential, undervalued and fraudulent.
9. Per Contra, the Respondent No.1 and Respondent No.2 had filed their reply, wherein it is submitted that audit report was unable to ascertain the nature of transaction as the Corporate Debtor had 14 Bank Accounts whereas the Applicant as well as Transaction Auditor had relied only on 5 bank accounts. It is submitted that the HDFC Account No. 20348640000082 ('082 Bank Account') is crucial and its non-consideration by the RP and by the Audit Report is fatal to this Application filed by RP. It is submitted that 082 Bank Account reflects all the entries wherein the sister concerns (Rain and Hana) have returned the amount to the CD either on the same day or within a span

of 2-3 days for all transactions stated by RP under the head Transaction A of the Application.

10. Further, with regard to Transaction B raised by the Applicant, it is submitted that RP has failed to appreciate that the CD in the financial years 2017-2018 and 2018-2019 was functioning as a going concern and had disbursed Rs.55,15,04,947 towards Repayment of EMI's, Operational Expenses, Rent Expenses, Salary Expenses, Statutory Dues, Vendor Payments in the year 2017-18 and in similar fashion, for the financial year 2018 to 2019, the Corporate Debtor has incurred Rs.47,03,31,953 as its expenses.
11. Per Contra, the Respondent No 3 had filed its reply, wherein it is submitted that the applicant had failed to appreciate that Respondent No.3 was limited to the brand interaction and was on salary only, therefore has no financial interest other than salary in the Corporate Debtor. Further, it is submitted that the applicant had failed to consider that as per the balance sheets, Respondent No.3 has not been a party and the said balance sheets prima facie concludes that the Respondent No.3 has not been a party or have any role in banking transactions of the Corporate Debtor.
12. The Applicant had filed its rejoinder wherein it is submitted that from the series of transaction it is apparent that as per Section 66 of the Code, 2016, the Respondents have failed to take all reasonable steps to curtail the financial burden on the business of the Corporate Debtor and therefore, it is the duty of the Suspended Board of Directors to make good for the losses incurred to the assets of the Corporate Debtor. Further, it is submitted that the applicant had filed an application under Section 19(2) of the Code, 2016 for the non-cooperation by the respondents.
13. We have heard Ld. Counsel for both the parties and perused the averments made in the application, reply and the written arguments. The relevant documents annexed with the application have been examined. In the above backdrop the point that emerges for consideration is that whether the

transactions as specified as Transaction A and Transaction B are fraudulent in terms of Section 66 of the I & B Code 2016?.

14. Before proceeding further on the matter, it would be appropriate to refer to Section 66 of the Code, 2016 relating to fraudulent transaction, which reads as under:

**“Section 66: Fraudulent trading or wrongful trading.**

66. (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.*

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

*Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”*

15. From the averments and in the submissions made by the Applicant, it is seen that the Applicant is trying to make a sweeping allegation by stating that there were impairments of assets and payments just simply relying upon the Forensic Auditor report and further taking the plea of non-cooperation by the Suspended Board of Directors. However, on the other hand, the Respondents have placed on record instances of various transactions between the Corporate Debtor and other parties to prove that the payments to the other parties are in the ordinary course of business of the Corporate Debtor or towards the repayment of earlier loans as per the loan agreements.
16. For instance, the respondents had provided the below Table along with supporting Bank Statements and details of all amounts that were transferred by Corporate Debtor to Hana (Related Party) and Rain (Other Related Party) and their respective repayments by Hana or Rain to the CD is provided. The Respondent had placed on record several instances considering the regular practices in the automobile industry, wherein the customer who for instance visited the Corporate Debtor and paid booking charges for a car of Honda Brand but later switched its choice to some other car, for instance belonging to Hyundai, the booking charge was subsequently transferred by Corporate Debtor to Rain or Hana. The table representing the payments to and from Hana or Rain is represented is represented below-

Date	Parties	Paid By Cd (Rs)	Received By Cd (Rs)	Remark	Relevant Pg. No. in Reply
07.07.2018	HANA	87,000	87,000	Received by CD from Hana on-07.07.2018. Rs 87,000/- Int. No. No.807073513915	Pg. 49
08.08.2018	HANA	60,000	60,000	Received by CD from Hana on 08.08.2018. Rs 60,000/- Int. No. 808081773622	Pg. 50
31.08.2018	HANA	10,00,000	10,00,000	Repayment by CD to earlier amount received from HANA Rs 5,00,000/- On 30.08.2018 Inst No: - 0000808308468354  Rs 5,00,000/- On 30.08.2018 Inst No: - 0000808308464965	Pg. 51
18.09.2018	HANA	12,05,000	15,00,000	Repayment by CD to the earlier amount received from HANA Rs 15,00,000/- On 17.09.2018 Inst No. 809175053014	Pg. 52
18.09.2018	HANA	9,60,000	10,50,000	Repaid by HANA Rs 8,00,000/- On 19.09.2018 Inst No: - 0000809196827739  Repaid by HANA Rs 2,50,000/- On 18.09.2018 InstNo: - 0000809186435373.	Pg. 54

02.01.2019	HANA	21,000	21,000	Amount reverse towards booking amount	
14.01.2019	HANA	14,00,000	16,50,000	Earlier received by CD Rs 16,50,000/- On 20.12.2018 Inst No. 812201326216	Pg. 56
14.01.2019	HANA	3,00,000	3,30,000	Earlier received by CD Rs 2,80,000/- On 27.12.2019 Inst No. 812276418153  Earlier received by CD Rs 50,000/- On 27.12.2019 Inst No. 812276139419	Pg. 57
14.01.2019	HANA	11,00,000	11,00,000	Earlier received by CD Rs 11,00,000/- On 14.12.2018 Inst No. 812147043347	Pg. 55
21.01.2019	HANA	50,000	55,000	Earlier received by CD Rs 55000/- On 24.12.2018 HDFC A/c 20348640000082	
22.01.2019	HANA	6,00,000	6,00,000	Earlier received by CD Rs 100000/-	Pg. 58

(Table: Transactions between Hana and Corporate Debtor)

**TABLE B**

Date	Parties	Paid (In Rs)	Remarks	Relevant Pg. No. In Reply
19.09.2018	RAIN	Rs. 7,50,000	It is repaid by CD against the amount of Rs 37,50,000/- received from Rain vide Chq No :-0000809186032662 Dt: - 18.09.18.	Pg. 53
19.09.2018	RAIN	Rs. 6,20,000		Pg. 53
19.09.2018	RAIN	Rs. 8,50,000		Pg. 53
24.12.2018	RAIN	Rs. 10,00,000		Pg. 53
08.02.2018	RAIN	Rs. 81,000		Pg. 53

(Table: Transactions between Rain and Corporate Debtor)

17. It is an undisputed fact that the Corporate Debtor is a dealer for Honda Car. Along with the CD, there were two other dealer entities, namely, Hana Motor Plaza Pvt. Ltd ["Hana"] for Hyundai cars, and Rain Automotive India Private Limited ["Rain"] for Ford cars. Rain, Hana and the CD were sister concerns occupying rented premises in the same vicinity, i.e., A-30, Mohan Corporative Industrial Estate and were using the software provided by Honda Brand to maintain their inventory recording the sale. In 2018, Central Bureau of Investigation had conducted a raid on the premises of the Corporate Debtor, consequent to which the Banks had stopped supporting the Corp[orate Debtor in financing the working capital.
18. From the submissions of the parties, it is clear that the applicant had not considered the inflow and outflow of money from the other bank accounts of the Corporate Debtor and had relied on the limited bank accounts of the Corporate Debtor while performing the exercise of ascertaining the fraudulent transaction.
19. Under the said circumstances and on perusing the documents placed on record, the reasons and explanations given by the Respondents in respect of the Transactions of Category A and Category B the transaction appear to be plausible and cannot be brought under Section 66(2) of the Code, 2016. Further, the Applicant had miserably failed to substantiate that the Respondents have not taken diligent care to minimize the potential loss to the creditors. The Applicant has very conveniently opted to present a dump of transactions conducted by the Corporate Debtor with its related parties and other parties in the normal course of business before this Adjudicating Authority for seeking relief under Section 66 of the Code, 2016.

20. In the case of **Regen Powertech Pvt. Ltd. Vs. Wind Construction Private Limited and Ors. in Company Appeal (AT) (CH) (Ins) No. 349/2022**, the **Hon'ble NCLAT held that :-**

33. Be it noted, this 'Tribunal', significantly, points out that, whenever 'Fraud' on a 'Creditor' is perpetrated in the course of 'carrying on Business', it does not necessarily follow that the 'Business' is being carried on with an 'Intent to Defraud' the 'Creditor' 34. One cannot remain 'oblivious' of the candid fact that, if the 'Directors' of a 'Company' had acted on a 'bona fide 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'.

21. Considering the ratio of the above citation and the facts of the present case, we hold that transactions in dispute cannot be called "fraudulent transactions" within the meaning of section 66 of the IBC, 2016. Further, the transaction audit report dated 27.06.2022 has only highlighted that certain transaction may be potential fraudulent transaction, however, the transaction audit report does not have any reference to siphoning off or diversion of funds in any manner. Therefore, there is no credible rational input based on which a Section 66 application can be entertained and application deserves to be dismissed.

22. The applicant is at liberty to file a fresh application under 66 of the Code, 2016, after considering all the information and the transactions conducted in the other Bank Accounts of the Corporate Debtor in order to provide a correct picture of the fraudulent transactions, if any conducted in the Corporate Debtor.
23. With the above observation the I.A. 1495/2021 in CP No. 1794/2019 stands dismissed.

**Sd/-**

**(SH. RAHUL BHATNAGAR)**  
**MEMBER (TECHNICAL)**

**Sd/-**

**(SH. P.S.N. PRASAD)**  
**MEMBER (JUDICIAL)**