

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH, COURT-II  
KOLKATA**

**I.A. (IB) No. 406/KB/2021**

**in**

**C.P. (IB) No. 184/KB/2018**

*An application under sections 25(2)(j), 43, 45, 49, 50 and 66(1) of the Insolvency and Bankruptcy Code, 2016 read with regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*

*In the matter of:*

**Sangita Fiscal Services Private Limited and Ors.**

*... Financial Creditor*

Versus

**Duncans Industries Limited**

*... Corporate Debtor*

*And*

*In the matter of:*

**Ram Ratan Modi, Resolution Professional of Duncans Industries Limited**

*... Applicant*

Versus

- 1. Dail Consultants Limited**
- 2. North India Fertilisers Limited**
- 3. Leyden Leasing & Financial Services Limited**
- 4. Pentonville Software Limited**
- 5. Santipara Tea Company Limited**
- 6. Harsh Credit Private Limited**
- 7. Emperor Commercial and Tradco Private Limited**
- 8. Merico Agro Industries Private Limited**
- 9. Nagri Farm Tea Co. Ltd.**
- 10. Andhra Cements Limited**
- 11. The Bhagwati Pressing Co. Ltd.**
- 12. ISG Traders Limited**
- 13. SKF India Limited**
- 14. Ballarpur Industries Limited**
- 15. Duncan Brothers & Company Limited**
- 16. Duncan Services Ltd.**
- 17. Duncans Tea Ltd.**
- 18. Odyssey Travels Ltd.**
- 19. Continuous Forms (Calcutta) Ltd.**
- 20. ABC Tea Workers Welfare Services**
- 21. Swissind Filters Limited**
- 22. Woodlands Multispecialty Hospital Limited**

*... Respondents*

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**Order pronounced on: 14 July 2023**

*Coram:*

**Shri Rohit Kapoor** : **Member (Judicial)**  
**Shri Balraj Joshi** : **Member (Technical)**

*Appearances (through hybrid mode)*

**For the Resolution Professional** : 1. Mr. Joy Saha, Senior Advocate  
2. Mr. Dipankar Das, Advocate

**For the Respondent No. 8** : 1. Mr. Jishnu Saha, Senior Advocate  
2. Mr. U Banerjee, Advocate  
3. Mr. Avishek Guha, Advocate

**For the Respondent No. 9** : 1. Mr. Deepan Kr. Sarkar, Advocate  
2. Ms. Ashika Daga, Advocate

**For the Respondent No. 11, 15 & 16** : 1. Ms. Meenakshi Manot, Advocate  
2. Mr. Navneet Misra, Advocate

**For the Respondent No. 12, 17, 18 & 19** : 1. Ms. Kiran Sharma, Advocate  
2. Mr. Prithwish Roy Chowdhury, Advocate

**For the Respondent No. 22** : 1. Mr. Shaunak Mitra, Advocate  
2. Ms. Iram Hassan, Advocate  
3. Mr. Sanket Saragul, Advocate  
4. Mr. Subhajit Ghosh, Advocate

**ORDER**

*Per Rohit Kapoor, Member (Judicial)*

1. This Court convened through hybrid mode.
2. The present I.A. has been filed by the Resolution Professional of Duncan Industries Limited under sections 25(2)(j), 43, 45, 49, 50 and 66(1) of the Insolvency and Bankruptcy Code (“Code”) seeking directions upon the Respondents to make such contributions to the assets of the Corporate Debtor as it may deem fit.
3. This Adjudicating Authority *vide* order dated 05 March 2020 admitted Duncan Industries Limited (“Corporate Debtor”) under Corporate Insolvency Resolution Process (“CIRP”) on a Petition filed under section 7 of the Code by Sangita Fiscal Services Private Limited and Others, registered as C.P. (IB) No. 184/KB/2018.

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**4. *Submissions of the learned Senior Counsel appearing on behalf of the Applicant***

4.1. The Applicant appointed M/s S. Poddar & Co. as the Transaction Auditor to conduct the Transaction Audit of the Corporate Debtor for a period of two years starting from 04 March 2018 to 05 March 2020. The Auditor submitted its Transaction Report on 24 February 2021 in which the Auditor had observed that there were transactions which fall under section 66 of the Code.

**4.2. Transactions with respect to Respondent Nos. 1 to 4**

4.2.1. The Corporate Debtor made investments in various companies including Respondent Nos. 1 to 4, in addition, the Corporate Debtor has certain amounts recoverable from these companies. The aggregate book value of the investments and amount recoverable is Rs.12,15,61,770/-.

4.2.2. The Respondent Nos. 1 to 4 are wholly owned subsidiaries of the Corporate Debtor and have been struck off from the register of the Registrar of the Companies. No efforts were made by the Corporate Debtor to realize the amount recoverable from the Respondent Nos. 1 to 4.

**4.3. Transactions with respect to Respondent No. 5**

4.3.1. The Corporate Debtor has made substantial investment in Santipara Tea Company Limited by purchasing 42,68,932 shares of the said Company. The Respondent No. 5 is a related party of the Corporate Debtor. The books of the Corporate Debtor show an investment value of Rs.8,53,78,000/- as on 31 March 2019.

4.3.2. As per the notes under the investment schedule of the audited financial statements, the Corporate Debtor has an aggregate amount recoverable of Rs.13,52,41,901/- out of which Rs.8,53,78,000/- was purportedly converted to advance against Equity Participation, however, no physical/demat

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shares were received nor the formalities for issue of shares were completed.

4.3.3. The paid up share capital of Santipara Tea Company Limited was Rs.97,44,000/- as per the MCA portal, which is less than the value of investment shown in the books of the Corporate Debtor. 30% shareholding of the Corporate Debtor as shown in the audited financial statements of Santipara Tea Company Limited amounts to Rs.29,23,200/- approximately.

4.3.4. The Corporate Debtor did not make any effort to recover the said amount hence, the transactions have been entered with the intent to defraud the creditors.

4.4. Transactions with respect to Respondent Nos. 6 and 7

4.4.1. Loan was granted to Respondent No. 7 in the year 2005 but the agreement was executed only in 2018. The period of repayment of loan has not been stipulated in the agreement even though the loan is mentioned as a Short Term Loan. The account ledger of Respondent No. 7 does not reflect payment of any interest nor deduction of any TDS under section 194A of the Income Tax Act.

4.4.2. The agreement provided is only a pledge agreement for loan of Rs.30Crore, which is not the whole amount of the loan but only a part of the loan. Security was provided by way of shares of ISG Traders Limited, the charge of the secured loan was not registered with the Registrar of Companies. Further there are no Board Resolutions approving such loan or accepting the loan.

4.4.3. With respect to the Respondent No. 6, the Transaction Auditor has made similar observations and stated the transactions entered into with the Respondent No. 6 to be collusive in nature and come under the purview of section 66 of the Code.

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4.4.4. Respondent No. 6 and 7 were declared to be related parties *vide* order dated 06 January 2021 and were removed from the Committee of Creditors.

4.5. Transactions with respect to Respondent Nos. 8 and 9

4.5.1. The Respondent No. 8 had possession of four tea gardens- Tulsipara Tea Garden, Dumchipara Tea Garden, Hantapara and Garganda Tea Garden and was permitted to use the entire sum realized from the sale of tea produced and manufactured from the said tea gardens. The Respondent did not pay any lease rental or any sum otherwise to the Corporate Debtor.

4.5.2. The Respondent No. 9 was given possession of Marybong Tea Estate but no lease rental was given to the Corporate Debtor for such possession.

4.5.3. The Respondent Nos. 8 and 9 were permitted to use the entire sum realized from the sale of tea produced and manufactured from the said tea gardens. In addition to the aforesaid amount generated, a sum of Re. 1 for every kg of tea leave produced would be payable to the Respondent by the Corporate Debtor.

4.5.4. Certain current financial assets amounting to Rs.420.44Lakh has been written off by way of impairment allowances. Receivables amounting to Rs.1166.56Lakh have been written off by way of impairment allowance. Debtors amounting to Rs.284.45Lakh have been written off by way of impairment and provisions. The Company has received Rs.1061lakh towards release of land and lease rights. Certain immovable properties have been acquired through amalgamation for which the title deeds have not been registered in the name of the Corporate Debtor.

4.6. Transactions with respect to Respondent Nos. 10 and 12

4.6.1. The Corporate Debtor made an investment by the purchase of 41,28,094 shares of ISG Traders Limited as per the

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Investment schedule of the Audited Financial Statement for the Financial Year 2018-2019 valued at Rs.42,60,19,000/-.

As per the ledger of ISG Traders Private Limited, the value of the investment is reflecting for an amount of Rs.3,03,19,84,962/-. The closing balance of ISG Traders Private Limited reflected in the books of the Corporate Debtor as on 31 March 2019 was Rs.8,71,740/- other than the investment value.

4.6.2. The Corporate Debtor had given a loan amounting to Rs.390.46Lakh to Andhra Cement Limited in the year 2017-2018 which is now recoverable from ISG Traders Private Limited by virtue of an agreement.

4.7. Transactions with respect to Respondent No. 11

4.7.1. The Corporate Debtor has made an investment in 80000 shares of Bhagwati Pressing Company Limited and the value of shares is NIL as per the investment schedule of the Financial Statement for the Financial Year 2018-19.

4.7.2. On analysing the investment ledger of the Corporate Debtor taken from its accounting software, the investment value is Rs.44,000/-, no efforts have been made to recover the said sum from the Respondent.

4.8. Transactions with respect to Resp.Nos. 15, 16, 17, 18, 20,21, 22

4.8.1. The Corporate Debtor has made an investment in 10 shares of Continuous Forms (Calcutta) Limited and the value of the shares is NIL as per the investment schedule of the financial statement for the Financial Year 2018-19. However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.103/-. It should be noted that the status of the Company is active on the MCA Portal. The closing balance as reflected on 31 March 2019 in the books of the Corporate Debtor is Rs.1,75,580/-.

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- 4.8.2. The Corporate Debtor has made an investment in 1012 shares of Duncans Brothers and Company Limited and the value of shares are Rs.4,99,999/- as per the investment schedule of the financial statement for the Financial Year 2018-19, However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.2,07,460/-. The closing balance as reflected on 31 March 2019 in the books of the Corporate Debtor is Rs.2,30,01,844/-.
- 4.8.3. The Corporate Debtor has made an investment in 360 shares of Duncan Services Limited and the value of shares is NIL as per the investment schedule of the financial statement for the Financial Year 2018-19, However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.18,000/-.
- 4.8.4. The Corporate Debtor has made an investment in 9100 shares of Duncans Tea Limited and the value of shares are Rs.33,72,000/- as per the investment schedule of the financial statement for the Financial Year 2018-19, However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.9,10,000/-.
- 4.8.5. The Corporate Debtor has made an investment in 40000 shares of Odyssey Travels Limited and the value of shares is NIL as per the investment schedule of the financial statement for the Financial Year 2018-19, However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.4,00,000/-. The closing balance as reflected on 31 March 2019 in the books of the Corporate Debtor is Rs.20,74,568/-.
- 4.8.6. The Corporate Debtor has made an investment in 18942 shares of ABC Tea Workers Welfare Services and the value of shares is NIL as per the investment schedule of the financial statement for the Financial Year 2018-19,

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However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.1,89,420/-.

4.8.7. The Corporate Debtor has made an investment in the shares of Swissind Filters Limited and the value of shares are NIL as per the investment schedule of the financial statement for the Financial Year 2018-19, However, on analysing the investment ledger of the Corporate Debtor, the investment value is Rs.65,606/-.

4.8.8. The Corporate Debtor has made an investment in 1850 shares of Woodlands Multispeciality Hospital Limited and the value of shares is Rs.3,10,000/- as per the investment schedule of the financial statement for the Financial Year 2018-19, However, on analysing the investment ledger of the Corporate Debtor, the investment value is NIL.

4.8.9. The Corporate Debtor has taken no effort to recover the amount from the Respondents.

**5. *Submissions of the learned Senior Counsel appearing on behalf of the Respondent No. 8***

5.1. The learned Senior Counsel submitted that the allegations against the Respondent No. 8 are confined to paragraph 5(a) of the application.

5.2. It is relevant to note that the applicant had filed an application being I.A. (IB) No. 1256/KB/2020, *inter alia*, praying for a direction that possession of the Dhumchipara, Tulsipara, Hantapara and Garganda Tea Estates along with documents be handed over to the applicant as those Tea Gardens belong to the Corporate Debtor.

5.3. This Adjudicating Authority was pleased to dismiss the aforesaid IA by an order of 28 May 2021, upon holding that the said Tea Gardens were assets of the State of West Bengal and not of the Corporate Debtor and as the leasehold interests granted by the State of West Bengal to the Corporate Debtor in respect of each of the said Tea Gardens stood terminated decade before the commencement of

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CIRP against the Corporate Debtor and unconnected with Insolvency Process and not renewed, the said Tea Gardens are neither "assets of the Corporate Debtor within the meaning of section 18(1)(f) of the Code, nor the Applicant could claim any legal right over the Tea Gardens. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in *Embassy Property Developments Pvt Ltd. v. State of Karnataka & Ors. (2020) 13 SCC 308* para 38 – 40 and *Gujrat Urja Vikas Nigam Ltd v. Amit Gupta" & Ors. (2021) 7 SCC 209*.

5.4. By the order of 28 May 2021, this Adjudicating Authority was further pleased to observe that despite expiry of the Corporate Debtor's leasehold interest in respect of each of the aforesaid Tea Gardens, the Corporate Debtor remained in wrongful and unauthorised possession of the same as a trespasser. Dates on which the leases of the said Tea Gardens to the Corporate Debtor stood terminated by efflux of time are set out hereunder

Name of Garden	Date of expiry of lease
Dhumchipara	12.09.2004
Tulsipara	17.04.2004
Hantapara	02.12.2004
Garganda	19.09.1995

5.5. It is submitted that as the leases of the said tea estates granted to the Corporate Debtor stood terminated by efflux of time decades before admission of CIRP against the Corporate Debtor and as the said terminations bear no nexus whatsoever to the insolvency of the Corporate Debtor, this Adjudicating Authority does not have the jurisdiction to determine whether the Corporate Debtor has any residual right under the said lease agreements. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in

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*Tata Consultancy Services v. Vishal Ghisulal Jain', (2022) 2 SCC 583, para 26, 27.*

5.6. The Applicant contended that the lease of the Corporate Debtor in respect of Garganda Tea estate had been renewed and was subsisting. Such contention is false and belied by the statement in the Information Memorandum prepared by the applicant himself that as per the Land Department Government of West Bengal, renewal of lease in respect of the Gargand Tea Estate was improper. Factually, as the purported renewal of the lease of Garganda Tea Estate as clandestinely obtained was contrary to the express statutory provisions of 'The West Bengal Estate Acquisition Rules, 1054' and the set down terms or wilful failure to pay 'Salami' the said purported renewal was invalid and void. In this connection reference is also invited to the letter dated 23 July 2019 bearing Memo No.146/TZS issued by the District Magistrate & Collector, Alipurduar, Govt. of West Bengal intimating such invalidation to higher Authority. It is submitted that no Court could lend its aid to anyone who founded cause of action upon an illegal act or transaction. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in *Narayanamma & Anr. v. Govindappa & Ors., (2019)19 SCC 42.*

5.7. In the aforesaid circumstances this Adjudicating Authority held that the applicant cannot seek to exercise and authority or control over any of the said Tea Gardens. While the applicant has preferred an appeal being Company Appeal No. 672 of 2021 against the order of this Adjudicating Authority dated 28 May 2021, the Applicant has failed to obtain any stay of such order, which continues to be binding.

5.8. As the Corporate Debtor grossly mismanaged the Tea Gardens and abandoned, with the publication of the Notification dated 28 January 2016 under the provisions of the Tea Act, 1953 the Corporate Debtor further lost its right to both possess and manage the aforesaid Tea Gardens, which stood vest upon the Tea Board. As the CD's

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challenge to the said Notification did not succeed before the Hon'ble High Court, In an Appeal filed by the Corporate Debtor the Division Bench of the Hon'ble High Court without setting aside or even stating the operation of the order of the learned Single Judge dismissing the Corporate Debtor's challenge, made an interim arrangement vide order dated 20<sup>th</sup> September 2016 "only for the purpose of improving the workers as also that of the Gardens" and permitted the Corporate Debtor to manage the Tea Gardens for the benefits of the workers and of the Gardens and to pay all arrears and to pay current regular dues of the workers.

5.9. Admittedly, the Corporate Debtor neither had any will or financial capability to ensure compliance of the interim liberty so provided. While the Corporate Debtor kept closed 3 Tea Gardens without any compliances, it entered into agreements with the R8 to take over and manage the above referred to 4 Tea Gardens, based on bipartite Agreements followed by Tripartite Meetings with the consent and concurrences of the Workers, State and Tea Board Authorities.

5.10. On entering into management of the aforesaid 4 Tea Estates, the Respondent No. 8 opened the 4 Tea Gardens. Under the said Agreements between the Corporate Debtor and Respondent No. 8 vetted by the Authorities, Respondent No. 8 undertook the entire huge financial responsibilities of payments to 6500 workers, their legitimate entitlements and benefits and statutory payments, costs and expenses towards rejuvenation of the closed Gardens, their running, operational managing costs and due maintenance and developments of the 4 Tea Estates and other payments towards taxes, levies, land rents, etc..

5.11. By such process, Corporate Debtor obtained substantial financial benefits of Crores of Rupees per year. Respondent No. 8 has already invested more than Rs.100 Crores and Corporate Debtor not having discharged any obligation obtained huge financial savings. Respondent No. 8 is running the Gardens most efficiently as model

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to other Garden Managements. While the all the 6500 workers submitted mass petition to the State Authorities for grant of leases to the Respondent No. 8, both the State and the Tea Board also in principle agreed to provide the necessary Leases to the Respondent No 8.

5.12. In the aforesaid circumstances, there can be no question of the act of the Corporate Debtor handing over possession and management of the aforesaid 4 Tea Estates to the Respondent No. 8, constituting a transaction carried on with the intent to defraud creditors of the Corporate Debtor of for any fraudulent purpose.

5.13. The learned Senior Counsel submitted that the application is thus misconceived and there can be no question of Respondent No. 8 being required to contribute the said 4 Tea Gardens to the asset of the Corporate Debtor, particularly in the light of law as subscribed in the Statute read with Judicial pronouncements and the subsisting solemn order of this Adjudicating Authority dated 28 May 2021, wherein it has categorically been held that the said Tea Estates are not assets of the Corporate Debtor and whereby this Adjudicating Authority has refused the applicant's prayer.

5.14. The allegation that the agreement between the Corporate Debtor and Respondent No. 8, whereunder Respondent No. 8 has been inducted into possession and management of the said 4 Tea Estates is undervalued or without consideration is utterly misconceived and baseless. In terms of Section 2(d) of the Contracts Act, 1872, when the promise at the request to the promisor has done or abstained from doing something, or promises to do or abstain from something, such act or abstinence constitutes "consideration". It is submitted that 'Consideration' cannot be weighted in terms of mere receivable money, but to be valued in terms of benefits so derived. 'Consideration' means "something in return", i.e. quid pro quo that is an essential element to find out the genuine intention of the parties of the promise to create legal relationship and the entire Document

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must have to be read harmoniously to give effect to the primary intentions. Thus, this I.A. is not entitled to any relief against R8 in the instant application.

**6. *Submissions of the learned Counsel appearing on behalf of the Respondent No. 9***

- 6.1.The Respondent no. 9 i.e. Nagri Farm Tea Co. Limited belongs to Chamong Group of Tea Companies. The Respondent No. 9 engages directly or indirectly 1000 workmen including permanent and temporary workmen, hence approximately 5000 persons are dependent for their livelihood on Marybong Tea Estate. The applicant has alleged that Marybong Tea estate is an asset of the Corporate Debtor.
- 6.2.The learned Counsel submitted that the original lease in respect of Marybong Tea Estate was granted to Marybong & Kyle Tea Estate Private Limited on 08 February 1970 for a period of 30 years, the Corporate Debtor came in control of Marybong Tea Estate.
- 6.3.The abovementioned lease expired on 08 February 2000 and on and from that date, there is no valid or subsisting lease existing in the name of the Corporate Debtor or its predecessor-in-interest.
- 6.4.The Respondent No. 9 received a letter from the Trade Union of Marybong Tea Estate on 06 November 2003 complaining about the state of affairs and requesting the Respondent to take over the said Tea Estate. A Memorandum of Understanding was executed between the Corporate Debtor and the Respondent No. 9 dated 01 January 2004 and the Respondent No. 9 took over Marybong Tea Estate.
- 6.5.As per the MoU, the Marketing and Management Agreement was amended and renewed from time to time for the periods 01 January 2005 to 31 December 2005, 01 January 2006 to 31 March 2007 and 01 April 2007 to 31 March 2008.
- 6.6.Another MoU was executed on 05 July 2013, wherein it was agreed that the Respondent No. 9 would have exclusive control and

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management over its affairs. An additional consideration of Rs.375 Lakh was to be paid by the Respondent for vesting of the Marybong Tea Estate in its favour.

6.7.The Ministry of Commerce and Industry constituted a committee and the committee in its report acknowledged that Chamong Group is the present owner/representative of Marybong Tea Estate. The Respondent has applied before the District Magistrate and Collector, Darjeeling District paying for lease of Marybong Tea Estate on 27 February 2020.

6.8.The learned Counsel submitted that the application is in gross suppression of material facts and does not disclose any cause of action.

6.9.The Applicant seeks adjudication of the matter of grant of lease of Marybong Tea Estate and this issue can only be dealt with the Government of West Bengal and is beyond the scope of this Adjudicating Authority.

6.10. The lease of the Corporate Debtor with respect to Marybong Tea Estate expired on 08 February 2000, hence, the Corporate Debtor is no longer a lessee in respect of Marybong Tea Estate. The Respondent has paid full consideration to the Corporate Debtor for Marybong Tea Estate and for the assignment of right to seek renewal of the lease in favour of Nagri Farm.

6.11. Thus, the Corporate Debtor has no surviving right, title or interest over Marybong Tea Estate for the last 16 years and since the Tea Estate is not an asset of the Corporate Debtor, the Applicant is estopped from making any claim with respect to Marybong Tea Estate.

6.12. Therefore, no questions can be raised about the business rationale of the transactions since this is the usual mode and manner of transaction in the tea estate business.

***7. Submissions of the learned Counsel appearing on behalf of the Respondent No. 11***

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- 7.1. The learned Counsel submitted that there is no cause of action under the Code, the Applicant has not arrived at any conclusion but has only reproduced the transaction audit report. The Transaction Auditor's report does not classify the transactions with the Respondent No. 11.
- 7.2. There is no irregularity alleged to have committed by the Respondent No. 11 and the allegation at best pertains to the internal accounts maintained by the Corporate Debtor which is of no concern or relevance to the Respondent No. 11 and is beyond the Respondent No. 11's control. The Respondent No. 11 cannot be blamed for any purported irregularities in the internal investment ledger of the Corporate Debtor.
- 7.3. The shares of the Respondent No. 11 were acquired by the Corporate Debtor pursuant to a scheme sanctioned by the Hon'ble High Court at Calcutta on 16 November 1999.
- 7.4. There is no basis disclosed in the Transaction Audit Report or in the I.A. to treat the transaction with the Respondent No. 11 under the Code.
- 7.5. The Resolution Professional has stated in the I.A. that he had sought for clarification from all the Respondents after receipt of the Transaction Auditors Report and no reply was given by any of the Respondents, which is completely false. The Respondent No. 11 had replied and had stated that the Corporate Debtor holds 8000 shares of Rs.10/- each in the Respondent No. 11 and it was further clarified that the Respondent No. 11 has no knowledge of the cost of acquisition of those shares, value as per Investment schedule and Investment Ledger of the Corporate Debtor.
- 7.6. There is no compliance of regulation 35A of the CIRP Regulations and there is no determination made by the Resolution Professional and the I.A has been filed merely as an eyewash.
8. *Submissions of the learned Counsel appearing on behalf of the Respondent No. 12*

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- 8.1. The learned Counsel submitted that the book value of the investment of the Corporate Debtor in Respondent No. 12 for Rs. 303,19,84,962. However, the Corporate Debtor has valued the same at Rs.42,60, 19,000 for 41,28,094 shares i.e., each share is valued at Rs. 103.20. The accounting treatment to arrive at the aforesaid value per share was Rs. 129, as on 31 January 2021.
- 8.2. The valuation of the share has depreciated by 20% because the shares of the Respondent are not traded in the market, thus, resulting in the reduced value. Though the closing balance is reflected as Rs.8,71,740 in the books of the Corporate Debtor, the Respondent submits it is entitled to receive an amount of Rs. 18,79,000.
- 8.3. The Applicant has failed to prove as to how the transaction of investment can be classified as undervalue or avoidance or fraudulent in nature alongwith documentary evidence in support of its averments levelled against the Respondent.
- 8.4. The Applicant has not submitted any evidence in support of his averment regarding the investment transaction between the parties. Consequently, it is baseless and without any evidence in support and therefore, no purported amounts are due and payable to the Corporate Debtor, as alleged or at all.
- 8.5. The transaction was undertaken in the ordinary course of business and on an arm's length basis, and therefore, does not fall under the purview of fraudulent transitions' as envisaged under the provisions of section 66 of the Code.
- 8.6. The Applicant has relied mechanically upon the Transaction Audit Report dated 24 February 2021, which is heavily caveated as to its own accuracy, completeness, and as to inferences and conclusion drawn therein. The Transaction Audit Report itself suggests that its contents should not be sole basis of any decision or a course action without independent verification.
- 8.7. The Applicant has failed to form any opinion that the Corporate Debtor or the suspended board of directors of the Corporate Debtor

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or any of them had given any preference in respect of the transactions with the Respondent.

8.8. The application has been filed on 27 March 2021, which is on the 388<sup>th</sup> day from the date of the corporate insolvency resolution process i.e., 05 March 2020. No reason for such delay has been stated nor has any condonation of the same been prayed for and thus on this score alone the application is liable to be set aside. No prima facie case established.

8.9. S. Poddar & Co. i.e., the auditor has categorically provided a disclaimer at the beginning of the TAR dated February 24, 2021, stating that the Report is in the nature of a fact-finding engagement and is not a re-audit/ audit of the account balances/ financial statements of the Corporate Debtor. The Auditor does not intend to act as an expert witness or advocate any position on behalf of the Applicant and the Applicant shall be fully responsible for applying independent judgment with respect to the findings in the TAR to make appropriate decisions in relation to future course of action. The Applicant has limited his application, only to the findings of this Report and thereafter filed a supplementary affidavit purely as an afterthought to show that there has been some application of mind by the Applicant, when in truth the Applicant has only repeated what has been stated in the TAR.

8.10. It is trite law, as per section 18(1) (a) that the IRP has to collect all necessary information relating to the assets, finances and operation of the corporate debtor and it is not even essential to have a TAR to arrive at any findings by the RP Mr. Nitin Bharal Ex-Director/ Promoter Vs. Stockflow Express Put. Ltd. Through Liquidator, Mr. Sanjay Gupta; Company Appeal (AT) (Insolvency) No. 454 of 2022 (Arising out of Order dated 21.01.2022, passed by NCLT, New Delhi, Bench V in IA No. 2153 of 2020 C.P. (IB) No. 2414(ND)/2019)]. Therefore, the RP cannot solely rely on the TAR and present the findings of the same as his own independent opinion.

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- 8.11. Furthermore, from a perusal of even the TAR it would appear that the transactions in question can at best be said to be bad commercial decisions and a simple bad commercial decision cannot be said to be fraudulent or wrongful trading under the provisions of the Code. [Mr. Venkatesan Sankaranarayanan, the RP for RTIL Ltd. Vs. Mr. Nitin Shambhukumar Kasliwal & Ors., M.A. 05 of 2019 in C.P. No. 382/I&B/ MB/2018]
- 8.12. The Applicant has not formed any independent opinion (within 75th day of CIRP or determination (within 115th day of CIRP) or finding on the allegations as required by Section 66 of the Code or Regulation 35A of the CIRP Regulations).
- 8.13. Furthermore, a transaction of a Corporate Debtor can only be scrutinized and/or investigated for the look back period/ review period which is 2 years prior to the CIRP commencement date for related parties and 1 year prior to the CIRP commencement date for the non-related parties. However, the Transaction Auditor has looked at the transactions beyond the lookback period of two years as prescribed under the provisions of the Code. It is submitted that the Applicant has not only failed to establish as to how the transaction between the Answering Respondent and Corporate Debtor can be covered under the provisions of Section 43/45 or 66 of the Code, but also failed to provide any explanation as to why the transaction is fraudulent in nature or even how the same could have been called into question at all even though the same is beyond the statutory prescribed look back period
9. ***Submissions of the learned Counsel appearing on behalf of the Respondent No. 15***
- 9.1. The learned Counsel submitted that insofar as the respondent No. 15 is concerned, there is no cause of action under any of the said provisions and no cause of action has been disclosed in the application either. The application as against Respondent No.15 is beyond the purview of the Code and CIRP Regulations thereunder.

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9.2. An application under Section 66 of the Code can be filed by Resolution Professional only when the Resolution Professional has arrived at a conclusion and formed an opinion of any fraud and specific material facts are required to be pleaded. In the given circumstances, the RP has failed to establish any fraud committed by the answering respondent. The Resolution Professional has made no pleading whatsoever as required to be made under the provisions of Code against the Respondent No. 15.

9.3. The Resolution Professional has failed to make any case of fraud, nor has the Resolution Professional been able to establish that the transaction as challenged falls under the provisions of the Code. There is total non-application of mind by the Resolution Professional.

9.4. It is further submitted that the application is a mechanical reproduction of a transaction audit report, the said report itself does not classify the transaction with respondent No. 15 as being hit by sections 43, 45, 49 or 66 of Code. In the said application, the Resolution Professional has only averred of the transaction between the corporate debtor and the Respondent No. 15 at pg. 21 being para 4(e) as follows:-

"The corporate debtor has made an investment in 1012 shares of Duncans Brothers and Company Limited and the value of the shares are Rs.4,99,999- as per the investment schedule of the financial statement for the F.Y 2018-19. However, on analyzing the investment ledger of the Corporate Debtor taken from its accounting software, the investment value is Rs 2,07,460/-. It should be noted that the closing balance as reflected on 31.03.2019 in the books of the Corporate Debtor is Rs. 2,30,01,844-. No efforts have been made to recover the said sum from the said respondent by the Corporate Debtor."

9.5. Further, there is no irregularity alleged to have committed by the Respondent No. 15 and the allegation at best pertains to the internal

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accounts maintained by the Corporate Debtor which is of no concern or relevance to Respondent No. 15 and is beyond respondent No. 15's control. Respondent No. 15 cannot be blamed for any purported irregularities in the internal investment ledger of Corporate Debtor. Even in the Transaction Audit report, a bare, vague and meaningless allegation has been made at page 83 of the application again relating to the internal ledger maintained by the Corporate Debtor which has nothing to do with Respondent No. 15. It has not been even pleaded by the Resolution Professional as to what is the wrong act of respondent No. 15 at all. In fact, the document at Pg. 83 inter alia states as follows:

"The Corporate Debtor has invested in 1012 shares of DBCL and is valued at INR 4,99,000.00 as per the Investment schedule of the Audited Financial Statements. On analyzing the investments Ledger of DBCL extracted from ERP of CD it was observed that the investment value was standing at INR 207460.00. The closing balance reflected as on 31.03.2019 in the books of CD is INR 2,30,01.844 00 of DBCL. The ledger has been annexed in Annexure-3."

9.6. It is pertinent to mention here that at Annexure 3 at Pg. 177D and 177E of the said application, the ledger details are only of the dues pertaining to rent. Respondent No. 15 was the landlord of the Corporate Debtor's office accommodation at 31, Netaji Subhas Road, Kolkata. The rent agreement with the Corporate Debtor was terminated by Respondent No. 15 on 01 January 2019 due to non-payment of rent. The total outstanding rent which is due and payable by the Corporate Debtor to respondent No. 15 up to the Financial Year 2015-2016 is Rs. 1,86,41,747.71/-. In fact, thereafter also the Corporate Debtor had failed to pay the rent and due to continuous non-payment of the rent, the rent agreement was terminated. The Resolution Professional has failed and neglected to factor in that the rent agreement was entered on 30.03.2007 and the said outstanding

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rent is recoverable by the Respondent No. 15 from the Corporate Debtor. In fact, the Respondent No. 15 has duly filed its claim with the RP in respect of the outstanding rent and a copy whereof is annexed at pg. 18 of the reply affidavit.

9.7. There is also no basis disclosed in the transaction audit report or in the application or in the supplementary affidavit to treat the transaction with Respondent No. 15 under any of the sections purportedly invoked. Vague, unparticularized, unsubstantiated and generalized averments have been made to the effect that all the transactions mentioned in the application are preferential/wrongful/fraudulent without, however, indicating any particulars in support and without satisfying any of the ingredients of the sections purportedly invoked to file the application.

9.8. Respondent No. 15 in its reply affidavit has also set out the relevant facts including the fact that the Corporate Debtor acquired by transmission 1012 shares in respondent No.15 pursuant to scheme of amalgamation sanctioned by the Hon'ble High Court at Calcutta on 16 November 1999, involving, *inter-alia*, the Corporate Debtor. The relevant facts in this regard are pleaded at para 11, pages 12, 13, 14 and 15 of the reply affidavit of Respondent No. 15.

9.9. The Resolution Professional in the said application has made allegations at para 2(k) page 17 of the application, wherein it is alleged that Resolution Professional had sent a notice to all respondents and sought clarification/ comments on the transaction audit report and that there was no response to the said notice. The allegation of the Resolution Professional is untrue and incorrect. The reply was given by the Respondent No. 15 and the clarification was provided by the Respondent No. 15 and the same is part of "Annexure A-6" at pg. 308 of the application. In the reply affidavit, Respondent no. 15 has confirmed that the respondent No. 15 had duly replied to such notice (see first 5 lines at page 13 of Reply Affidavit).

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9.10. Lastly, there is also no compliance with regulation 35A of the CIRP Regulations. There is no determination as required under regulation 35A (2), which further demonstrates non-application of mind and the totally cavalier, callous and negligent manner in which the Resolution Professional has filed this application. Realizing this, a supplementary affidavit was affirmed by the RP on 16.8.2021. In such supplementary affidavit, no pertinent or relevant information is brought on record but only vague and baseless allegations are made to avoid any adverse scrutiny by the Adjudicating Authority. Even in the supplementary affidavit, no allegation is made against Respondent No. 15. However, the position remains that the application is nothing but a "copy-paste" exercise from the Transaction Audit report without application of mind.

9.11. It is also apparent from the application that the RP has mechanically and without any independent application of mind, sought to pass off the views of the transaction auditor as that of the Resolution Professional. This is in derogation of the duties of a Resolution Professional in the matter of filing an avoidance application. It is apparent that the Resolution Professional has filed the application not with any bona fide intention but merely as an eyewash.

9.12. That being the position, it is humbly submitted that the application as against Respondent No. 15 deserves to be rejected with costs for unnecessarily harassing the Respondent No. 15 without there being even any pleading, let alone basis, to implead Respondent No. 15 or to seek any orders against Respondent No. 15.

***10. Submissions of the learned Counsel appearing on behalf of the Respondent No. 16***

10.1. The learned Counsel submitted insofar as the Respondent No.16 is concerned, there is no cause of action under any of the said provisions and no cause of action has been disclosed in the

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application either. The application as against Respondent No. 16 is beyond the purview of the Code and Regulations thereunder.

10.2. An application under section 66 of the Code can be filed by the Resolution Professional only when the Resolution Professional has arrived at a conclusion and formed an opinion of any fraud and specific material facts are required to be pleaded. In the given circumstances, the Resolution Professional has failed to establish any fraud committed by the answering respondent. The Resolution Professional has made no pleading whatsoever as required to be made under the provisions of Code against the Respondent No. 16.

10.3. The Resolution Professional has failed to make any case of fraud, nor has the Resolution Professional been able to establish that the transaction as challenged falls under the provisions of the Code.

10.4. There is total non-application of mind by the Resolution Professional. Moreover, the application is a mechanical reproduction of the transaction audit report, which report itself does not classify the transaction with Respondent No. 16 as being hit by sections 43, 45, 49 or 66 of the Code. In the said application, the Resolution Professional has only averred of the transaction between the Corporate Debtor and the Respondent No. 16 at pg. 21 being para 4(f) as follows:-

"The corporate debtor has made an investment in 360 shares of Duncan Services Limited and the value of the shares is NIL as per the investment schedule of the financial statement for the F.Y 2018-19. However, on analyzing the investment ledger of the Corporate Debtor taken from its accounting software, the investment value is Rs 18,000/. The same can be recovered from the respondents. No efforts have been made to recover the said sum from the said respondent by the Corporate Debtor."

10.5. Further, there is no irregularity alleged to have committed by the Respondent No. 16 and the allegation at best pertains to the internal

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accounts maintained by the Corporate Debtor which is of no concern or relevance to respondent no. 16 and is beyond respondent No. 16's control. Respondent no. 16 cannot be blamed for any purported irregularities in the internal investment ledger of the Corporate Debtor. Even in the Transaction Audit report, a bare, vague and meaningless allegation has been made at page 85 of the application again relating to the internal ledger maintained by the Corporate Debtor which has nothing to do with respondent No. 16. It has not been even pleaded by the Resolution Professional as to what is the wrong act of respondent no. 16 at all.

10.6. Respondent No. 16 in its reply affidavit has set out the relevant facts including the fact that the Corporate Debtor was allotted 360 shares in Respondent no. 16 wherein 180 shares were issued as bonus shares to the Corporate Debtor. The relevant facts in this regard are pleaded at para 11, pages 13 and 14 of the reply affidavit of Respondent No. 16.. It has also been stated by Respondent No. 16 that in the records of respondent No. 16, the Corporate Debtor is reflected as a shareholder. There is also no basis disclosed in the Transaction Audit report or in the application or in the supplementary affidavit to treat the transaction with respondent No.16 under any of the sections purportedly invoked.

10.7. It is submitted that vague, unparticularized, unsubstantiated and generalized averments have been made to the effect that all the transactions mentioned in the application are preferential/wrongful/fraudulent without, however, indicating any particulars in support and without satisfying any of the ingredients of the sections purportedly invoked to file the application.

10.8. The Resolution Professional has made false allegations in the application at para 2(k) page 17 of the application, wherein it is alleged that Resolution Professional had sent a notice to all respondents and sought clarification/ comments on the transaction audit report. However, the documents disclosed as Annexure A-6 to

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the application shows that no notice was ever sent to Respondent No. 16 and in the reply affidavit, Respondent No. 16 has confirmed that no such notice was ever received by Respondent No. 16. Had the Resolution Professional actually issued any such notice, Respondent No. 16 would have promptly clarified any concern which would have avoided the present application being filed against respondent No. 16.

10.9. Lastly, there is also no compliance with regulation 35A of the CIRP Regulations. There is no determination as required under regulation 35A (2), which further demonstrates the non-application of mind and the totally cavalier, callous and negligent manner in which the RP has filed this application. Realizing this, a supplementary affidavit was affirmed by the Resolution Professional on 16 August 2021.

10.10. In the supplementary affidavit, no pertinent or relevant information is brought on record but only vague and baseless allegations are made, none against the respondent No. 16 to avoid any adverse scrutiny by the Adjudicating Authority. Even in the supplementary affidavit, no allegation is made against Respondent No. 16. However, the position remains that the application is nothing but a "copy-paste" exercise from the Transaction Audit report without application of mind.

***11. Submissions of the learned Counsel appearing on behalf of the Respondent No. 17***

11.1. The learned Counsel submitted that the transaction was undertaken in the ordinary course of business and on an arm's length basis, and therefore, does not fall under the purview of fraudulent transactions' as envisaged under the provisions of Section 66 of the IBC. Application filed with non-application of mind.

11.2. The Applicant has relied mechanically upon the Transaction Audit Report dated 24 February 2021 for its Application, which is

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heavily caveated as to its own accuracy, completeness, and as to inferences and conclusion drawn therein. The Transaction Audit Report itself suggests that its contents should not be sole basis of any decision or any course action without independent verification.

11.3. The application has been filed on 27 March 2021, which is on the 388<sup>th</sup> day from the date of the CIRP i.e., 05 March 2020. No reason for such delay has been stated nor has any condonation of the same been prayed for and thus on this score alone the application is liable to be set aside.

11.4. The learned Counsel submitted that the Answering Respondent issued 9,100 shares to the Corporate Debtor (pre-merger) at the face value of Rs. 100 per share in the year 1983 for i.e., Rs. 9,10,000/- (Rupees Nine Lakh Ten Thousand only) on an arms' length basis and is running its business activities, compliant to the provisions of the Companies Act, 2013. The Corporate Debtor is still a shareholder of the Answering Respondent and is appearing in the List of Shareholders' of Respondent No. 17 as on March 31, 2021.

11.5. Subsequently, it is clear that an investment amount of Rs. 9,10,000/- (Rupees Nine Lakh Ten Thousand only) is paid by the Corporate Debtor to the Respondent No. 17, only for the purposes of investment in the Answering Respondent.

11.6. The Respondent humbly submits that the Applicant has not submitted any evidence in support of his averment regarding the investment transaction between the parties. Consequently, it is baseless and without any evidence in support and therefore, no purported amounts are due and payable to the Corporate Debtor, as alleged or at all.

11.7. The transaction was undertaken in the ordinary course of business and on an arm's length basis, and therefore, does not fall under the purview of fraudulent transitions' as envisaged under the

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provisions of Section 66 of the IBC. Application filed with non-application of mind.

***12. Submissions of the learned Counsel appearing on behalf of the Respondent No. 18***

- 12.1. The learned Counsel appearing on behalf of the Respondent No. 18 submitted that the Respondent No. 18 is a public limited company incorporated on 27 September 1994 and engaged in the business of travels and booking air tickets, issued 40,000 shares to the Corporate Debtor (pre-merger) at the face value of Rs. 10 per share in the year 1999 for i.e., Rs. 4,00,000/- (Rupees Four Lakh only) on an arms' length basis and is running its business activities, compliant to the provisions of the Companies Act, 2013. The Corporate Debtor is still a shareholder of the Answering Respondent and is appearing in the List of Shareholders' of Respondent No. 18 as on March 31, 2021.
- 12.2. Subsequently, it is clear that an investment amount of Rs. 4,00,000 (Four Lakh only) is paid by the Corporate Debtor to the Respondent, only for the purposes of investment in the Answering Respondent.
- 12.3. It is upon the Applicant to prove alongwith documentary evidence in support of its averments levelled against the Answering Respondent, as to how the transaction of investment can be classified as undervalue or avoidance or fraudulent in nature. The Applicant has failed in this regard.
- 12.4. The Respondent humbly submits that the Applicant has not submitted any evidence in support of his averment regarding the investment transaction between the parties. Consequently, it is baseless and without any evidence in support and therefore, no purported amounts are due and payable to the Corporate Debtor, as alleged or at all.
- 12.5. The transaction was undertaken in the ordinary course of business and on an arm's length basis, and therefore, does not fall

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under the purview of fraudulent transitions' as envisaged under the provisions of Section 66 of the IBC. Application filed with non-application of mind.

- 12.6. The Applicant has relied mechanically upon the Transaction Audit Report dated 24 February 2021 for its Application, which is heavily caveated as to its own accuracy, completeness, and as to inferences and conclusion drawn therein. The Transaction Audit Report itself suggests that its contents should not be sole basis of any decision or any course action without independent verification.
- 12.7. The Applicant has failed to form any opinion that the Corporate Debtor or the suspended board of directors of the Corporate Debtor or any of them had given any preference in respect of the transactions with the Respondent.
- 12.8. The application has been filed on 27 March 2021, which is on the 388<sup>th</sup> day from the date of the CIRP i.e., 05 March 2020. No reason for such delay has been stated nor has any condonation of the same been prayed for and thus on this score alone the application is liable to be set aside. No prima facie case is established
- 12.9. S. Poddar & Co. i.e., the auditor has categorically provided a disclaimer at the beginning of the Transaction Audit Report dated 24 February 2021, stating that the Report is in the nature of a fact-finding engagement and is not a re-audit/audit of the account balances/financial statements of the Corporate Debtor. The Auditor does not intend to act as an expert witness or advocate any position on behalf of the Applicant and the Applicant shall be fully responsible for applying independent judgment with respect to the findings in the Transaction Audit Report to make appropriate decisions in relation to future course of action. The Applicant has limited his application, only to the findings of this Report and thereafter filed a supplementary affidavit purely as an afterthought to show that there has been some application of mind by the

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Applicant, when in truth the Applicant has only repeated what has been stated in the Transaction Audit Report.

- 12.10. It is trite law, as per section 18(1)(a) that the Interim Resolution Professional has to collect all necessary information relating to the assets, finances and operation of the corporate debtor and it is not even essential to have a Transaction Audit Report to arrive at any findings by the Resolution Professional.. The learned Counsel placed reliance on *Mr. Nitin Bharal Ex-Director/ Promoter v. Stockflow Express Put. Ltd. Through Liquidator, Mr. Sanjay Gupta; Company Appeal (AT) (Insolvency) No. 454 of 2022*. Therefore, the RP cannot solely rely on the TAR and present the findings of the same as his own independent opinion.
- 12.11. Furthermore, from a perusal of even the Transaction Audit Report it would appear that the transactions in question can at best be said to be bad commercial decisions and a simple bad commercial decision cannot be said to be fraudulent or wrongful trading under the provisions of the Code. Reliance is placed on *Mr. Venkatesan Sankaranarayanan, the RP for RTIL Ltd. v. Mr. Nitin Shambhukumar Kasliwal & Ors., M.A. 05 of 2019 in C.P. No. 382/I&B/MB/2018*.
- 12.12. The Applicant has not formed any independent opinion (within 75th day of CIRP) or determination (within 115th day of CIRP or finding on the allegations as required by Section 66 of the Code or Regulation 35A of the CIRP Regulations).
- 12.13. Furthermore, a transaction of a Corporate Debtor can only be scrutinized and /or investigated for the look back period/review period which is 2 years prior to the CIRP commencement date for related parties and 1 year prior to the CIRP commencement date for the non-related parties.
- 12.14. However, the Transaction Auditor has looked at the transactions beyond the lookback period of two years as prescribed under the provisions of the Code. It is submitted that the Applicant has not

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only failed to establish as to how the transaction between the Answering Respondent and Corporate Debtor can be covered under the provisions of Section 43/45 or 66 of the Code, but also failed to provide any explanation as to why the transaction is fraudulent in nature or even how the same could have been called into question at all even though the same is beyond the statutory prescribed look back period.

12.15. The Respondent submits that the Applicant has mechanically relied on the purported Report and has utterly failed to prove and/or establish any malafide or misfeasance by /with Respondent.

***13. Submissions of the learned Counsel appearing on behalf of the Respondent No. 19***

13.1. The Corporate Debtor has invested in 10 shares of the answering respondent but as the shares are not traded in the market, no value can be assigned to them and hence it is reflected as NIL value.

13.2. It is the burden upon the Applicant to prove alongwith documentary evidence in support of its averments levelled against the Answering Respondent, as to how the transaction of investment can be classified as undervalued or avoidance or fraudulent in nature. The Applicant has failed in this regard.

13.3. The Respondent submitted that the Applicant has not submitted any evidence in support of his averment regarding the investment transaction between the parties. Consequently, it is baseless and without any evidence in support and therefore, no purported amounts are due and payable to the Corporate Debtor, as alleged or at all.

13.4. The transaction was undertaken in the ordinary course of business and on an arm's length basis, and therefore, does not fall under the purview of fraudulent transactions' as envisaged under the provisions of section 66 of the Code. Application filed with non-application of mind.

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- 13.5. The Applicant has relied mechanically upon the Transaction Audit Report dated 24 February 2021 for its Application, which is heavily caveated as to its own accuracy, completeness, and as to inferences and conclusion drawn therein. The Transaction Audit Report itself suggests that its contents should not be sole basis of any decision or any course action without independent verification.
- 13.6. The Applicant has failed to form any opinion that the Corporate Debtor or the suspended board of directors of the Corporate Debtor or any of them had given any preference in respect of the transactions with the Respondent.
- 13.7. The application has been filed on 27 March 2021, which is on the 388th day from the date of the corporate insolvency resolution process i.e., 05 March 2020. No reason for such delay has been stated nor has any condonation of the same been prayed for and thus on this score alone the application is liable to be set aside. No prima facie case is established.
- 13.8. S. Poddar & Co. ie., the auditor has categorically provided a disclaimer at the beginning of the TAR dated February 24, 2021, stating that the Report is in the nature of a fact-finding engagement and is not a re-audit audit of the account balances/financial statements of the Corporate Debtor.
- 13.9. The Auditor does not intend to act as an expert witness or advocate any position on behalf of the Applicant and the Applicant shall be fully responsible for applying independent judgment with respect to the findings in the Transaction Audit Report to make appropriate decisions in relation to future course of action. The Applicant has limited his application, only to the findings of this Report and thereafter filed a supplementary affidavit purely as an afterthought to show that there has been some application of mind by the Applicant, when in truth the Applicant has only repeated what has been stated in the Transaction Audit Report.

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- 13.10. It is trite law, as per section 18(1)(a) that the Resolution Professional has to collect all necessary information relating to the assets, finances and operation of the corporate debtor and it is not even essential to have a Transaction Audit Report to arrive at any findings by the Resolution Professional. Reliance has been placed on *Mr. Nitin Bharal Ex-Director/ Promoter v. Stockflow Express Put. Ltd. Through Liquidator, Mr. Sanjay Gupta; Company Appeal (AT) (Insolvency) No. 454 of 2022*. Therefore, the Resolution Professional cannot solely rely on the Transaction Audit Report and present the findings of the same as his own independent opinion.
- 13.11. Furthermore, from a perusal of even the Transaction Audit Report it would appear that the transactions in question can at best be said to be bad commercial decisions and a simple bad commercial decision cannot be said to be fraudulent or wrongful trading under the provisions of the Code. Reliance has been placed on *Mr. Venkatesan Sankaranarayanan, the RP for RTIL Ltd. v. Mr. Nitin Shambhukumar Kasliwal & Ors., M.A. 05 of 2019 in C.P. No. 382/I&B/MB/2018*.
- 13.12. The Applicant has not formed any independent opinion (within 75th day of CIRP) or determination (within 115th day of CIRP) or finding on the allegations as required by Section 66 of the Code or Regulation 35A of the CIRP Regulations).
- 13.13. Furthermore, a transaction of a Corporate Debtor can only be scrutinized and/or investigated for the look back period / review period which is 2 years prior to the CIRP commencement date for related parties and 1 year prior to the CIRP commencement date for the non-related parties.
- 13.14. However, the Transaction Auditor has looked at the transactions beyond the lookback period of two years as prescribed under the provisions of the Code. It is submitted that the Applicant has not

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only failed to establish as to how the transaction between the Answering Respondent and Corporate Debtor can be covered under the provisions of section 43/45 or 66 of the Code, but also failed to provide any explanation as to why the transaction is fraudulent in nature or even how the same could have been called into question at all even though the same is beyond the statutory prescribed look back period.

13.15. The Respondent submits that the Applicant has mechanically relied on the purported Report and has utterly failed to prove and/or establish any malafide or misfeasance by/ with Respondent.

**14. *Submissions of the learned Counsel appearing on behalf of the Respondent No. 22***

14.1. The learned Counsel submitted insofar as the Respondent No. 22 is concerned, there is no cause of action under any of the said provisions and no cause of action has been disclosed in the application either. The application as against Respondent No. 22 is beyond the purview of the Code and Regulations thereunder.

14.2. An application under section 66 of the Code can be filed by the Resolution Professional only when the Resolution Professional has arrived at a conclusion and formed an opinion of any fraud and specific material facts are required to be pleaded. In the given circumstances, the Resolution Professional has failed to establish any fraud committed by the answering respondent. The Resolution Professional has made no pleading whatsoever as required to be made under the provisions of Code against the Respondent No. 22.

14.3. The Resolution Professional has failed to make any case of fraud, nor has the Resolution Professional been able to establish that the transaction as challenged falls under the provisions of the Code.

14.4. There is total non-application of mind by the Resolution Professional. Moreover, the application is a mechanical reproduction of the transaction audit report, which report itself does

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not classify the transaction with Respondent No. 22 as being hit by sections 43, 45, 49 or 66 of the Code.

14.5. The observations of the Transaction Audit Report regarding the transaction between the Corporate Debtor and the Respondent No. 22 are totally misconceive and in any event, does not and cannot give rise to any cause of action against Respondent No. 22. It is alleged that the Corporate Debtor invested in 1850 shares of the Respondent No. 22 valued at Rs.3.10Lakh and that the Corporate Debtor's records does not reflect the said investments.

14.6. It is further submitted that the Corporate Debtor was allotted 1850 shares in the Respondent No. 22 pursuant to a Scheme of Amalgamation sanctioned by the Hon'ble High Court at Calcutta on 29 November 2010. The said allotment of shares at dace value of Rs.10/- each was made to the Corporate Debtor on a written application dated 21 June 2011 made by the Corporate Debtor to the Respondent No. 22, the said allotment was made on 23 June 2011.

14.7. Further, there is also no compliance with regulation 35A of the CIRP Regulations. There is no determination as required under regulation 35A (2), which further demonstrates the non-application of mind.

***Analysis and Findings***

15. Heard the learned Senior Counsel appearing on behalf of the Applicant, the learned Senior Counsel appearing on behalf of the Respondent No. 8 and the Learned Counsel appearing for Respondent Nos. 9, 11, 15, 16, 17, 18, 19 and 22 and perused the record.

16. The Respondent Nos. 1 to 7 and Respondent No. 13, 14, 20 and 21 have not entered appearance and hence, they are declared to be *ex-parte* in the matter pertaining to the Respondent Nos. 1 to 7 and Respondent No. 13, 14, 20 and 21.

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17. The Corporate Debtor was admitted into CIRP on 05 March 2020. The Respondents have raised the defense that the I.A. has not been filed within the given timeline under Regulation 35A of the CIRP Regulations. The timeline under given under regulation 35A of the CIRP Regulations has been held to be directory and not mandatory by the Hon'ble NCLAT in *Jagdish Kumar Parulkar, RP of Tayal Foods Pvt. Ltd. v. Vinod Agarwal*. Hence, the delay in filing the I.A. can be condoned in view of the above judgment.

18. Before going into the merits of the case let us consider whether the Resolution Professional has followed the detailed approach laid down by the Hon'ble Supreme Court in paragraph 28.1 in *Anuj Jain vs. Axis Bank Limited and Ors. MANU/SC/0228/2020*,

*“28.1. Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:*

*1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.*

*2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to*

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*bifurcation of the identified transactions into two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.*

*3. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.*

*4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to Clause (a) of Sub-section (2) of Section 43.*

*5. In yet further step, such of the scanned and scrutinised transactions that are found covered by Clause (a) of Sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by Sub-section (3) of Section 43.*

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*6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the Clauses (a) and (b) of Sub-section (3) of Section 43.*

*7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of Sub-section (4) and Sub-section (2) as also negative test of Sub-section (3).*

*28.2. On a motion made by the resolution professional after and in terms of the exercise aforesaid, the Adjudicating Authority, in its turn, shall have to examine if the referred transaction answers to all the descriptions noted above and shall then decide as to what order is required to be passed, for avoidance of the impugned transaction or otherwise.”*

19. Although the above steps to be taken by the Resolution Professional have been laid down in exercise for identifying and determining preferential transactions, the same shall also apply to all avoidable transactions. On perusal of the I.A. and the Supplementary Affidavit, it is clear that the Resolution Professional has relied only on the observation by the Transaction Auditor in the Transaction Audit Report.
20. The Resolution Professional has stated that he has determined the transactions based on the report submitted by the Transaction Auditor. Considering the provisions of section 43 of the Code, we see that the Liquidator or the Resolution Professional has to form his own opinion. We are of the view that the Transaction Audit Report can act in aid for forming such determination but it cannot be the only basis for determining a transaction to be preferential or avoidable transaction and therefore we are of the view that the purported determination by the

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Resolution Professional is not in accordance with the position of law as brought out herein above including the judgment passed by the Hon'ble Supreme Court in *Anup Jain supra..*

21. Since the Resolution Professional has not followed the steps as laid down and required in exercise for determining these transactions to be avoidable transactions in terms of the judgment of the Hon'ble Supreme Court in *Anup Jain supra..*, therefore, this I.A. is liable to be rejected and the same is hereby rejected. However, this should not be construed as our affirmation or rejection that these are not the avoidable transactions. The main Company Petition numbered C.P. (IB) No. 184/KB/2018 shall be listed on 24 July 2023.
22. The Registry is directed to send email copies of the order forthwith to all the parties and their learned Counsel for information and for taking necessary steps.
23. Certified Copy of this order may be issued if applied for, upon compliance of all requisite formalities.

**Balraj Joshi**  
Member (Technical)

**Rohit Kapoor**  
Member(Judicial)

**Order signed on the 14<sup>th</sup> day of July 2023.**

GGRB\_LRA