

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

IA No. 81/JPR/2022
In CP No. (IB)- 158/9/JPR/2020

In the matter of:

M/S BALAJI LIFESTYLE TECHNOLOGIES PVT. LTD.

...OPERATIONAL CREDITOR

VERSUS

M/S EXCEL TECHNOVATION PVT. LTD.

...CORPORATE DEBTOR

And in the matter of IA No. 81/JPR/2022:

**M/S EXCEL TECHNOVATION PVT.
LTD.**

Through its Resolution Professional
Shri Prashant Agrawal

Having its office at F-106, Sumer Complex,
Gautam Marg, B/h Bagadia Bhawan, Jaipur

...Applicant

VERSUS

MR. RAJESH SINGH

*(Suspended Director of Excel Technovation
Pvt. Ltd.)*

R/o 802, Unique Sanghi Apartment,
Mahavir Nagar, Near Durgapura Railway
Station, A C Jobner, Jaipur- 302018, Raj.

...Respondent No. 1

MS. ANJU SINGH

*(Suspended Director of Excel Technovation
Pvt. Ltd.)*

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R/o 802, Unique Sanghi Apartment,
Mahavir Nagar, Near Durgapura Railway
Station, A C Jobner, Jaipur- 302018, Raj.

...Respondent No. 2

MR. DEV SHARMA

*(Suspended Director of Excel Technovation
Pvt. Ltd.)*

R/o Ground Floor, Block No. 12, DDA Flats,
Tilak Nagar, West Delhi, Delhi-110018.

...Respondent No. 3

FOR APPLICANT(S) : Prashant Agrawal, Liquidator
Jatin Chawla, Adv.
FOR RESPONDENT(S) : Rohan Agarwal, Adv.

Order Pronounced On: 03.05.2024

ORDER

Per: Shri Deep Chandra Joshi, Judicial Member

1. The present Application bearing *IA No. 81/JPR/2022* has been filed by *Mr. Prashant Agrawal ('Applicant'/ 'Resolution Professional'/ 'Liquidator')*, then Resolution Professional of *M/s Excel Technovation Pvt. Ltd.* ('Corporate Debtor') under Section 66 of the Insolvency and Bankruptcy Code, 2016 ('IBC'/ 'Code') seeking the following reliefs:

- i. *Direct the Non-Applicants to make contributions to the assets of the Corporate Debtor for the losses incurred by the Corporate Debtor for the wrongful transactions undertaken under section 66 of the Code, 2016 as suspended directors of Corporate Debtor did not exercise due diligence in minimizing the potential loss to the Corporate Debtor.*
- ii. *Pass any other order which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case may be granted.*

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2. This Adjudicating Authority, by order dated 30.09.2021, admitted the Application filed by *M/s Balaji Lifestyle Technologies Pvt. Ltd.* ('Operational Creditor') under Section 9 of the Code for the initiation of Corporate Insolvency Resolution Process ('CIRP') of the Corporate Debtor and *Mr. Prashant Agrawal* was appointed as Interim Resolution Professional ('IRP'). Later on, the appointment of the IRP as the Resolution Professional ('RP') was approved by the CoC. Subsequently, an order for Liquidation was passed by this Adjudicating Authority on 31.10.2023, and the RP was appointed as the Liquidator.

3. The present application has been filed on the following set of facts:

3.1. It is submitted that the Applicant has observed several transactions executed by the Respondents falling within the purview of Section 66 of the Code. Consequently, the Applicant conducted a Transaction Audit (IBC) of the Corporate Debtor through a Chartered Accountancy Firm. In their report, the firm noted that sufficient information was not provided, leading them to refrain from providing any remarks.

3.2. The Transaction Audit (IBC) Report provides that a tender was allocated to the Corporate Debtor by the State of Rajasthan under the name "Creation of SECC- Rajasthan" at Rs. 6,86,77,200/- (Rupees Six Crores Eighty-Six Lakhs Seventy-Seven Thousand and Two Hundred Only). The Corporate Debtor has sublet the same at Rs. 7,99,40,073.00/- (Rupees Seven Crores Ninety-Nine Lakhs Forty

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Thousand and Seventy-Three Only). Thus, the Corporate Debtor has sublet the project at a loss of Rs. 1,12,62,873/- (Rupees One Crore Twelve Lakhs Sixty-Two Thousand Eight Hundred and Seventy-Three Only), and the transaction appears to be suspicious. The Applicant sent emails dated 24.11.2021, 03.12.2021, and 15.12.2021 seeking explanation from the Respondents *qua* suspicious transactions. The aforementioned emails were replied to by the Respondents *vide* emails dated 24.11.2021 and 27.11.2021, however, no appropriate response was provided.

3.3. Further, it is submitted that the Corporate Debtor has incurred following losses in near past:

Financial Year	Losses (in Rs.)
2018-2019	3,12,80,124.86/-
2019-2020	1,30,80,758.58/-
2020-2021	30,34,487.63/-
01.04.2021 to 30.09.2021	1,18,875.20/-

The Respondents were further asked to furnish a strategy to meet the aforementioned losses of the Corporate Debtor; however, no appropriate response was received. This act of the Respondents implies that they were engaged in carrying out the business of the Corporate Debtor wrongfully and fraudulently with the intent to defraud creditors.

3.4. The Respondents have failed to provide any explanation regarding the booking of bad debts and loss on fixed assets of the Corporate Debtor for the Financial Year 2020-2021. Thus, the act of the Respondents in

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booking bad debts and loss of fixed assets falls under the purview of wrongful transactions with the intention to defraud creditors of the Corporate Debtor. Additionally, the opening balance in the books of accounts for the Financial Year 2020-2021 was not carried forward properly. The books of accounts for the Financial Year 2020-2021 depicts a difference in the opening balance of Rs. 20,21,147/- (Rupees Twenty Lakhs Twenty-One Thousand One Hundred and Forty-Seven Only) on the assets side thereby defrauding the creditors to the extent of amount of unavailable assets.

4. The Respondent No. 1 and 2 filed their Reply *vide* Diary No. 3749/2022 dated 15.12.2022, stating as below:

4.1. The Respondent No. 1 & 2 have categorically denied the allegations of the Applicant and stated that they extended full cooperation to the Applicant. It is further submitted that the transaction audit of the Corporate Debtor does not specify the transactions executed by the Respondents which fall within the purview of section 66 of the Code. Additionally, the answering Respondents have no knowledge of the performance of the transaction audit by the Applicant.

4.2. In the Report, no timeframe as to the commencement of the transaction audit and the completion of the transaction audit has been specified. However, it is the duty of the Applicant and Chartered Accountancy Firm to specify the date of commencement and completion of the

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transaction audit. In the said scenario, the audit report filed by the Chartered Accountancy Firm cannot be considered as conclusive evidence towards non-corporation of the Respondents or their indulgence in any fraudulent transactions.


4.3. In respect to subletting, it is submitted that this project was allocated through tender to the Corporate Debtor at Rs. 6,86,77,200/- (Rupees Six Crores Eighty-Six Lakhs Seventy-Seven Thousand and Two Hundred Only) and it was subsequently sublet to various subcontractors by the Corporate Debtor. However, due to escalation of prices by the subcontractors, the Corporate Debtor suffered losses which were never reimbursed by the State Government. Thus, the answering Respondents were never indulged in wrongful trading in the due course of business.

4.4. Concerning the losses incurred by the Corporate Debtor, it was submitted that a pursual of books of accounts will reveal that the answering Respondents were putting efforts to improve the financial health of the Company resulting in reduction of losses. Furthermore, the Corporate Debtor is engaged in the business of government contracts and bids are granted on a competitive basis; therefore, the answering Respondents were not indulged in wrongful and fraudulent trading.

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- 4.5. It is submitted that the answering Respondents have supplied sufficient information to the Applicant with respect to booking of bad debts and loss on fixed assets. Additionally, the information sought by the Applicant was duly reverted by the answering Respondents *vide* email dated 16.08.2022. Further, the answering Respondents also undertakes to extend cooperation and support to the Applicant whenever required. Thus, Section 66 of the Code is not attracted in the present situation.
5. The Applicant *vide* Dairy No. 816/2023 dated 28.03.2023 has submitted the Rejoinder wherein it was submitted that the transaction audit was conducted according to the provisions of the Code, thus, there was no requirement of specifying the time period of the audit. Further, it is argued that the answering Respondents have not provided any justification on record explaining how subcontractors escalated their prices, and the Respondents, without any escalation from the government, increased the prices of subcontractors during the ongoing contract.
6. It is pertinent to mention herein that no representation has been received on behalf of Respondent No. 3. Thus, this Adjudicating Authority, *vide* order dated 05.02.2024, initiated *ex-parte* proceedings against the Respondent No. 3.
7. We have heard the Ld. Counsels for the parties and perused the averments made in the Application, Reply and Rejoinder along with the documents enclosed therein.

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8. The Applicant has relied upon Transaction Audit (IBC) Report in which certain transactions have been highlighted as potentially fraudulent or wrongful under Section 66 of the Code. The allegations of the Applicant are as follows:

8.1. **Subletting of tender at loss:** The tender i.e., Creation of SECC-Rajasthan, was sublet by the Corporate Debtor at a loss of Rs. 1,12,62,873/- (Rupees One Crore Twelve Lakhs Sixty-Two Thousand Eight Hundred and Seventy-Three Only).

8.2. **Continuous losses in the business:** No explanation has been provided about continuous incurring of losses in the previous financial years. Further, the Respondent have failed to provide a plan to mitigate these losses in the future.

8.3. **Booking of Bed Debts and Loss on sale of Fixed Assets:** No justification has been given with regards to booking of bed debts and loss on fixed assets.

8.4. **Difference in opening balance on assets side of Balance Sheet:** Opening balance in the book of accounts of FY 2020-2021 was not carried forward properly.

9. Before proceeding further with the matter, it would be apposite to refer Section 66 of the IBC which reads as under:-

Section 66: Fraudulent trading or wrongful trading.

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“....(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.”

10. This Adjudicating Authority is of the view that the Section 66(1) of the Code is attracted if the business of Corporate Debtor has been carried on with the intent to defraud its creditor or for any fraudulent purpose whereas, Section 66(2) of the Code entails non exercise of due-diligence during the twilight period. Therefore, while looking into the purported/alleged transaction it has to be clearly established that the transaction was made with intention to defraud the creditors or the business was conducted in a wrongful manner during the twilight period.

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11. The Bench in the succeeding paragraphs would analyse the alleged fraudulent/ wrongful transaction and see whether the Respondents have acted in a *malafide* fraudulent/ wrongful manner in taking these business decisions. The pointwise analyses in this regard are as under:

11.1 **Subletting of tender at loss:** The findings mentioned in the Transaction Audit (IBC) Report pertaining to subletting are as follows:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

1. *As per the tender wise working provided to us, it was noticed that the company has executed one work named “Creation of SECC- Rajasthan” same was allotted to the ETPL at Rs. 6,86,77,200/- and ETPL sublet the same at a cost of Rs. 7,99,40,073/- i.e., at a loss of Rs. 1,12,62,873/-.”*

Further, the Applicant *vide* its email dated 24.11.2021 asked the Respondents to furnish the answer to the question that “*Why do company sublet contracts at operational loss?*”. The answering Respondents *vide* email dated 27.11.2021 reverted that the Company sometimes sublet contracts at operational loss due to adverse market situation. The answering Respondents in their reply further submitted that due to escalation in prices by the sub-contractors, the Corporate Debtor suffered losses which were never reimbursed by the State Government.

For adjudicating the issue at hand, it is pertinent to take note of the judgement of the Hon’ble NCLAT in *Mr. Tenny Jose & Ors. Vs. Mr.*

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Prathap Pillai Resolution Professional of M/s. Tenny Jose Limited,
[Company Appeal (AT) (CH) (INS.) No. 95 / 2023 wherein it has held that:

“40. In Law’, a Fraudulent Intent’, is to be proved’, after a careful examination of all materials / evidence, as the case may be. If a Fraudulent Intent’ or Fraudulent Purpose’, is made out, the Liability’, must follow. An action can also lie, when there is a Fraudulent Purpose’, upon the Customers’ of the Company’. The Burden of Proof’, is the same as in a Civil’ case, where Serious Allegations of Misconduct’, such as, Fraud’ are in issue’. In an isolated fraud’ case, an Individual Tort Action’ (‘Civil Wrong’), will lie.”

Further, 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’.”

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The Hon'ble NCLT Chennai in *The Resolution Professional for M/s. Orchid Pharma Limited Vs. M/s. Hospira Healthcare India Pvt. Ltd & Others* [MA/87/IB/2018 in CP/540/IB/2017] held that:

“8. As per Section 66 of the Code, the applicant shall prove that the corporate debtor carried the business of it either to defraud the creditors or for any other fraudulent purpose. Whenever, allegation of fraud has been made against anybody, it goes without saying, the duty is cast upon the person making such allegation to prove that the answering Respondents are parties to carrying the business either for fraudulent purpose or to defraud creditors.”

In view of the aforementioned Judgments, we are of the opinion that in order to prove allegations under Section 66 of the Code, the Applicant has to prove that the Respondents were parties to carrying out the business either for a fraudulent purpose or to defraud creditors. The Applicant has failed to provide sufficient Material/Evidence to prove the allegation, as allegations under section 66 require a ‘high degree of proof’. At the same time, the very nature of the business and the casualties present therein cannot be ignored; thus, unless otherwise proved, subletting tender in the due course of business at a loss cannot be adjudicated as fraudulent transaction. Additionally, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Therefore, it can be concluded that the Applicant failed to prove the allegations levied, and thus, the same cannot be sustained.

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11.2 Continuous Losses in the business: The findings mentioned in the Transaction Audit (IBC) Report *qua* the business losses is reproduced hereunder:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

1. *...Further company has incurred losses amounting to Rs. 3,12,80,124.86/-, Rs. 1,30,80,758.58/-, Rs. 30,34,487.63/- and Rs. 1,18,875.20/- during the FY 2018-2019, 2019-2020, 2020-2021 and 01.04.2021 to 30.09.2021 respectively.*

As per the information given by the suspended management, they are not having any clear-cut strategy to meet out the losses.”

Further, *vide* email dated 24.11.2021, the Applicant asked the company’s strategy to meet the cash losses. The answering Respondents, *vide* email dated 27.11.2021, replied that as of now they don’t have any clear-cut strategy to meet out the cash losses.

In *Mr. Tenny Jose & Ors. Vs. Mr. Prathap Pillai Resolution Professional of M/s. Tenny Jose Limited (supra), Regen Powertech Pvt. Ltd. Vs. Wind Construction Private Limited and Ors. (supra) and the Resolution Professional for M/s. Orchid Pharma Limited Vs. M/s. Hospira Healthcare India Pvt. Ltd & Others (supra)*, it has been clearly specified that the burden of proof is on the Applicant to prove the allegations levied. The Applicant herein has failed to prove, how the continuous losses of the business amount to wrongful and fraudulent business transactions. Furthermore, unless otherwise proved, continuous losses in the business do

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not *prima facie* show that the transactions carried out by the Corporate Debtor were wrongful or fraudulent with the intent to defraud creditors.

Additionally, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Furthermore, emphasis can also be placed on the table depicting losses in the previous financial years which reflects that the financial records had improved year by year. Therefore, it can be concluded that the Applicant failed to prove the allegation, and thus, this allegation cannot be sustained.

11.3 Booking of Bed Debts and Loss on sale of Fixed Assets: In order to decide the present issue, we will first refer the findings mentioned in the Transaction Audit (IBC) Report. The Chartered Accountancy Firm in its report stated as follows:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

2. As per the audited Financial Statement for the FY 2020-2021, the Company has booked bad debts and loss on fixed assets. Sufficient information, explanation and documents have not been provided to us to verify the same.

Details of Bed debts booked as books of accounts provided to us are as under:

<i>S.No.</i>	<i>Date</i>	<i>Party Name</i>	<i>Amount</i>
1	10/06/2020	Sri Annaporeshwari Enterprises	10,00,000/-
2	12/06/2020	Allience Technologie	1,98,400/-
3	25/06/2020	Max Brain Infotech	11,02,227/-
		Total	23,00,627/-

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Details of Loss on sale of Fixed Assets as per books of accounts provided to us are as:

S.No.	Date	Name of Assets	Amount
1	16/07/2020	Cameras	6,068.57/-
2	16/07/2020	Air Conditioner	58,859.00/-
3	22/07/2020	Canopies	2,65,116.00/-
		Total	3,30,043.57/-

Further, the Applicant *vide* email dated 24.11.2021, asked the Respondents that on what basis bad debts is booked. The reply received *vide* email dated 27.11.2021, states that “Repeat follow-ups Since last 5-7 years. No chance of payment hence booked as bed debts.”

The Applicant levied the allegation that the Respondents have failed to provide sufficient information regarding the booking of bad debts, which indicates that the Respondents fall within the purview of carrying out wrongful transactions with the intention to defraud creditors of the Corporate Debtor. However, the Applicant has failed to provide sufficient material on record to prove the allegation. Furthermore, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Additionally, the event of booking bad debts by the Company *prima facie* will not fall within the ambit of Section 66 of the Code, unless otherwise proved. Therefore, it can be concluded that the Applicant failed to prove the allegation, and thus, this allegation cannot be sustained.

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11.4 Difference in opening balance on assets side of Balance Sheet: The findings mentioned in the Transaction Audit (IBC) Report concerning difference in the opening balance of assets is as follows:

“The following findings were noted in the books of accounts but because of lack of information and explanation provided to us we are unable to form an opinion on same:

3. We have observed from books of accounts for the financial year 2020-21 that the opening balance was not carry forward properly and it shows difference in opening balance of Rs. 20,21,147/- asset side. The said difference is due to wrong amount carry forwarded in reserve and surplus amount.”

In the light of *Mr. Tenny Jose & Ors. Vs. Mr. Prathap Pillai, Resolution Professional of M/s. Tenny Jose Limited (supra), Regen Powertech Pvt. Ltd. Vs. Wind Construction Private Limited and Ors. (supra), and the Resolution Professional for M/s. Orchid Pharma Limited Vs. M/s. Hospira Healthcare India Pvt. Ltd & Others (supra)*, it can be concluded that no material/evidence has been put on record indicating the *malafide* intention of the Respondents. Furthermore, the Transaction Audit (IBC) Report of the Chartered Accountancy Firm does not provide any adverse opinion against the Corporate Debtor. Therefore, it can be concluded that the said allegation cannot be sustained.

12. Considering the judgements referred above and the facts of the present case, we hold that the transactions in dispute cannot be called fraudulent/ wrongful transactions within the meaning of section 66 of the IBC, 2016. Further, the Transaction Audit (IBC) Report dated 02.02.2022 has only

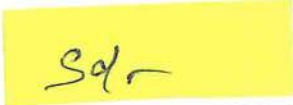
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highlighted that certain transactions may potentially be fraudulent/ wrongful transactions, however, the Report does not have any reference to transactions carried with an intent to defraud creditors in any manner. Therefore, due to dearth of material the Section 66 application cannot be entertained and application deserves to be dismissed.

13. With the above observation the I.A. 81/JPR/2022 in CP No. 158/9/JPR/2020 stands dismissed.


DEEP CHANDRA JOSHI
JUDICIAL MEMBER


RAJEEV MEHROTRA
TECHNICAL MEMBER