

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH (COURT-II)**

**IA. NO. 2536/ND/2022**

**IN**

**Company Petition No. (IB)-637(PB)/2020**

**IN THE MATTER OF:**

**M/s Guardian Finance Private Limited ... Applicant/Financial Creditor**

**Versus**

**M/s Temple Leasing and Finance Limited**

**... Respondent**

**AND IN THE MATTER OF IA. NO. 2536/ND/2022:**

**Mr. Arvind Mittal**

Resolution Professional of  
Temple Leasing and Finance Limited

Address at:

1900, JJ Colony, Phase-3, Madanpur Khadar,  
Sarita Vihar, New Delhi – 110076

**... Applicant**

**VERSUS**

**1. Mr. Nalinesh Kumar Paurush**

Member of Suspended Board of Directors of CD  
H. No. 70B, Street No. 8,  
Balbir Nagar Extension  
Shahdra, Delhi - 110032

**... Respondent No. 1**

**2. Mr. Prince Kumar Mishra**

Member of Suspended Board of Directors of CD  
Jogdiha, Karail Shukla,  
Uttar Pradesh - 274603

**... Respondent No. 2**

**3. Mr. Bhagat Singh**

Member of Suspended Board of Directors of CD  
House No. 1341, Near Shiv Shakti School,  
Parwatia Colony, Sector-22  
Faridabad, Haryana - 121005

**... Respondent No. 3**

**Order Delivered on: 09.05.2023**

**SECTION:      **Section 66 of IBC 2016****

**CORAM:**

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)**

**SH. L. N. GUPTA, HON'BLE MEMBER (T)**

**PRESENT:**

**For the Applicant** : Adv. Arvind Mittal

**For the Liquidator** : Adv. Avinash Bhati

**ORDER**

**PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)**

The captioned application is preferred by the Resolution Professional qua the CD, espousing that the Suspended Directors of CD could make an investment in equity shares of Unno Industries Limited and Jayant Mercantile Company Limited without exercising due diligence, thus they are liable to contribute Rs.28,50,000/-. As has been stated in the IA, the Resolution Professional appointed M/s APT & Co. LLP as Transaction Auditor to nab any preferential, undervalued, fraudulent transaction qua the affairs of the CD, and the Transaction Auditor could audit the Financial Statements, Bank Statements, Loan Facility Agreements, Invoices for purchase, Sale Agreement, Income Tax returns and other records of the CD for the period from 01.04.2016 to 25.06.2021. The Transaction Auditor found that the Suspended Directors made investment in the equity shares (ibid) which were not

actively traded in the market. In terms of the averment made in the IA, the equity shares of Unno Industries were last traded on 29.02.2016 @ 0.49/- per share and for Jayant Mercantile Co. Limited on 03.02.2015 @ Rs.2.08/- per share. The further averments made in the IA are that no Demat account was involved for the aforementioned transaction of the shares, and the shares were directly purchased from Shree Vishwamurte Trade Invest Private Limited qua which no sale/purchase agreement was made available to the Transaction Auditor, the part of the consideration for shares amounting to Rs. 15 Lakh was paid by the Corporate Debtor, the aforementioned two transactions were the only transaction/investment made by the CD in stock trade, and no due diligence or valuation of shares was done by the Suspended Directors/Respondents before taking the decision to make the investment.

2. The Ld. Counsel appearing for the Applicant/RP contended that the Suspended Directors had deliberately made some investment of the funds of CD in order to divert the same, and thus did not act prudently. According to him, Unno Industries Limited and Jayant Mercantile Limited had not complied with the relevant Rules, Regulations, Guidelines or Instructions either issued by RBI or SEBI, in any manner. In his submission, the Suspended Directors did not exercise due diligence to minimize the potential loss to the Creditors of the Corporate Debtor, thus they are liable to contribute Rs.28,50,000/- to the assets of the CD, in terms of the provision of Section 66 of IBC, 2016.

3. Per contra, the Ld. Counsel appearing for Respondent Nos. 1, 2 & 3 (hereinafter, referred to as Respondents) submitted that in filing the application, the Applicant has failed to understand and appreciate the legislative intent, scope, and purpose of IBC, 2016. According to the Respondents, there is a difference between day-to-day transactions and fraudulent transactions, which the Applicant has failed to understand and the transactions canvassed by the Applicant as fraudulent transactions were in fact undertaken in the ordinary course of business and not even a single transaction can be defined as fraudulent one. In para 7 of the reply filed by them, the Respondents described the business carried by the CD and outline the same as the business of undertaking investments, leasing, and financing activities. The description of the business as mentioned in para 7 of the reply filed by the Respondents reads thus: -

*“a) The Corporate Debtor was desirous to undertake investments and was scouting for companies whose share purchase price at the time of buying would be low.*

*b) The Corporate Debtor came across two such companies, named above i.e., Unno Industries Limited and Jayant Mercantile Co. Ltd., whose share price was around Rs.0.50/- and Rs.1.50/- per share in 2019. From the diligence that had been conducted at that time, the Corporate Debtor was made aware that although the said companies were not actively trading their shares and that there were some compliances yet to be fulfilled, it was a good time to invest in the same and shortly after the companies shall become compliant and active on the stock exchange.*

c) *Having regard to the same, the Corporate Debtor made investment in the said companies based on the information that the companies would start trading on the stock exchange and would soon be able to compete all compliances and resultantly the share price of the same would increase and thereby resulting in profits to the Corporate Debtor.*

d) *The Depository of the Corporate Debtor had confirmed receipt of the equity shares in the Demat Account of the Corporate Debtor on 07.08.2019. A copy of the same was also provided to the Resolution Professional and is annexed with the captioned application at page 57.*

e) *Further, the Debit Notes were duly issued by Shree Vishwamurte Tradeinvest Pvt. Ltd. for purchase of the aforesaid shares which were duly paid on 02.08.2019 and 06.08.2019.*

f) *However, for one reason or the other, best known to the aforesaid companies wherein the investment was undertaken, the anticipated profits could not be made.*

g) *The audited balance sheet for the year ending 31.03.2021 has also been provided to the Resolution Professional and the same has been annexed with the captioned Application at page no. 68 – 76. Although the said investment is duly reflected in the aforesaid balance sheet however, the Applicant has incorrectly stated in the Application that the same has been written off. Therefore, suffice to say that the Applicant has not conducted the due diligence in ascertaining the financials of the Corporate Debtor.*

h) *With respect to the Demand Draft for Rs. 1,13,192/-, it is submitted that the same was drawn on Axis Bank in favour of Income Tax Office Ward – 25(2), New Delhi on 25.02.2020 which was encashed as on 03.03.2020. It is stated that the same was adjusted against a demand of the Income Tax Dept. and as such the same*

*cannot be said to the fraudulent transaction in any case. It is further submitted that in the Transaction Audit Report, the auditors are of the opinion that the said Demand Draft is a fraudulent transaction as no information and explanation was provided in respect of its releasability ad the purpose for which the said Demand Draft was issued. Pertinently, the email from Axis Bank was received on 27.02.2022 i.e., way after the Transaction Audit Report was prepared. Therefore, to opine that the said Demand Draft is a fraudulent transaction is absolutely baseless and misconceived.”*

4. In the reply filed by them, the Respondents have tried to espouse that fraudulent or wrongful trading needs to satisfy two necessary ingredients viz. intent to defraud and transaction for any fraudulent purpose, which are not satisfied in the present case. The Respondents have also tried to draw a parallel between the culpable fraud and the fraud inviting Civil liability under Section 66 of IBC, 2016. For this purpose, they have reproduced 447 of the Companies, Act in para 12 of the reply filed by them. It is also the plea raised by the Respondents in the reply that the present application is barred by Regulations 35A of IBBI (Insolvency Resolution of Corporate Person) Regulation, 2016, and the application being not filed by 08.11.2021 is not maintainable. Nevertheless, in para 19 of the reply, the Respondents have themselves admitted that the timeline prescribed under Regulation 35A of IBBI (Insolvency of Corporate Person) Regulations, 2016 are directory and not mandatory.

5. We have heard the Counsels for the parties and perused the record. As far as the plea regarding the steps taken by the Respondents

to purchase the equity shares in question in the ordinary course of business is concerned, it is not so that the Suspended Directors can be held liable for any bona fide steps taken by them in the ordinary course of business. To hold the director or partner of the Corporate Debtor liable to make a contribution to the assets of the Corporate Debtor, the two pre-conditions need to be satisfied viz, the director or partner should know or have known that there was no reasonable prospect of avoiding the commencement of an Insolvency Resolution Process in respect of the Corporate Debtor, and (ii) such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the Corporate Debtor. Thus, what needs to be seen while forming an opinion regarding the liability of ex-directors of CD, in terms of the provisions of Section 66 of IBC, 2016 is, “whether having an impression that the CD could be admitted to the insolvency resolution process, the director or partner failed to exercise due diligence in minimizing the potential loss to the creditors.” In the present case, as can be seen from the report of the transaction auditor, the notes on Financial Statements for the year ended 31.03.2021 qua the CD could reflect the payment of Rs.15,00,000 and Rs.13,50,000/- by CD to Unno Industries Limited and Jayant Mercantile Company Limited respectively. The said amount was paid for purchasing 30,00,000 shares of Unno Industries Limited @ Re. 0.50 per share and 9,00,000 shares of Jayant Mercantile Company Limited @ Rs. 1.50 per share. The rates/price at which the shares were purchased on 02.08.2019 and 06.08.2019 respectively cannot lead to any suspicion towards the lack of due diligence on the part of the Respondents with the

precipitations that the CD could be admitted to insolvency and there was no reasonable perspective to avoid the same. The basis by the Transaction Auditor to allege lack of due diligence against the Respondents are: (i) No Demat account was involved in the transaction qua the purchase of shares, (ii) the shares were directly purchased from Shree Vishwamurte Trade Invest Private Limited regarding which no sale/purchase agreement was provided to Transaction Auditor, (iii) the aforementioned was only investment, made in stock in trade qua two shares by the CD, (iv) the investment was made qua the equity shares which were not actively traded in the market and the same was last traded on 29.02.2016 and 03.02.2015 only. The relevant excerpts of the report of Transaction Auditor read thus:

## 1. INVESTMENT IN QUOTED EQUITY SHARE

As per the review of the Books of Accounts (in Tally Software) of CD, it is observed that investment in following equity share have been made by the suspended directors.

Name of Security	Amount	Date	Number of share	Purchased from
<b>Unno Industries Limited</b>	15,00,000	02.08.2019	30,00,000/-	Shree Vishwamurte Trade Invest Pvt. Ltd.
<b>Jayant Mercantile Co. Ltd.</b>	13,50,000	06.08.2019	9,00,000/-	Shree Vishwamurte Trade Invest Pvt. Ltd.
<b>Total</b>	<b>28,50,000</b>			

As per the review of the Books of Accounts (in Tally Software) of CD, following facts were observed were made:

**XXXX**

**XXXX**

**XXXX**

**XXXX**

- The investment were made in quoted equity shares which were not actively traded in the market. The Equity share of Unno Industries was last traded on 29.02.2016 at 0.49/- and for Jayant Mercantile Co Ltd at Rs. 2.08/- on 03.02.2015.
- No Demat account was involved for such transaction.
- These shares were directly purchased from Shree Vishvamurte Trade Invest Pvt. Ltd. for which no sale /purchase agreement furnished to us. Further the part consideration amounting to Rs. 15 Lakh was paid in respect of shares by the corporate debtor.
- These two shares were only the Investment in stock in trade held by the company.
- No due diligence or valuation of shares (which were not actively traded) was done before the investment decision was exercised by the suspended management.
- The status of said stock on stock exchange are highlighted as under:

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**XXXX**

**XXXX**

- The investment were made in quoted equity shares which were not actively traded in the market. The Equity share of Unno Industries was last traded on 29.02.2016 at 0.49/- and for Jayant Mercantile Co Ltd at Rs. 2.08/- on 03.02.2015.
- No Demat account was involved for such transaction.
- These shares were directly purchased from Shree Vishvamurte Trade Invest Pvt. Ltd. for which no sale /purchase agreement furnished to us. Further the part consideration amounting to Rs. 15 Lakh was paid in respect of shares by the corporate debtor.
- These two shares were only the Investment in stock in trade held by the company.
- No due diligence or valuation of shares (which were not actively traded) was done before the investment decision was exercised by the suspended management.

6. The salient plea raised by the Applicant inter alia is that the Respondents were not diligent enough in checking that the equity shares, in purchasing which the funds of the CD were invested, were not traded for long. A share can be described as not traded when no buying or selling qua the same is taking place. The non-traded securities which are also

called as non-marketable securities are those which are difficult to buy and sell, as they cannot be traded on any measure secondary market. These are the securities that can usually be transacted via “over-the-counter market (through a broker-dealer network) or by way of a private transaction”. The shares which are not traded on any exchange are not usually required to fulfill the requirement of being listed. There is a possibility of lack of transparency about pricing, trading volume, liquidity and other details regarding the issuer of such shares/securities. The other risks involved in purchasing non-traded/unlisted shares include the likelihood of illiquidity, which can contribute to volatility which makes it hard to sell the shares/securities/investment. There are greater risks of securities fraud and market manipulation in investment in non-traded securities. These securities are typically unsuitable for investors. May be one can think of giving the benefit of doubt to Respondents regarding the transaction with a view that there could be a thought regarding appreciation of the value of the equity shares in the future. But the fact which may not be ignored is that the funds of the CD were utilized to purchase the equity shares which were not actively traded in the market, on 02.08.2019 and 06.08.2019, while the petition for admitting the CD to insolvency was filed on 19.02.2020. Thus, it would not be gainsaid that the transaction was made by the Respondents when there was no reasonable prospective to escape the admission of CD into CIRP. When it is a known factor that the investment in non-traded shares is not advisable, as it is difficult to sell such shares and illiquidity is created, one may not say that the Respondents were duly diligent in

utilizing the funds of CD in purchasing the non-traded shares. The Respondents have tried to confuse the ingredient of fraud under Section 66 of IBC, 2016 with culpable fraud under Section 421 to 424 of IPC. When required ingredients of fraud under the aforementioned provisions of IPC are dishonesty and knowledge of the likelihood of preventing the creditors/entitled persons from the due benefit/property etc., which invite punishment including imprisonment, the ingredient of Section 66(2) of IBC, 2016 is the knowledge by the Suspended Directors of the fact that there was no reasonable prospect of avoiding the Corporate Insolvency and the Resultant lack of exercise of due diligence, inviting civil consequences. Sections 421 to 424 of IPC as also 447 of the Companies Act talk of positive and intentional acts of the culprit to defraud a person dishonestly and intentionally. Such is also the tenor of Section 66(1) of IBC, 2016. Nevertheless, the requirement of Section 66(2) of IBC is only that the Directors/Partners are found not exercising due diligence only because they could precipitate that there was no reasonable prospect of avoiding the commencement of CIRP in respect of the Corporate Debtor. Thus, the submission put forth on behalf of the Respondents that the act of the Respondents was not covered under Section 447 of the Companies Act is misconceived. As far as the reference to Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is concerned, the mandate of the Regulation is that the RP should adhere to the timeline prescribed for completion of the Insolvency Process. The provision is not incorporated to allow the Suspended Directors to get away with preferential,

undervalued, extortionate, or fraudulent transactions. We may not be oblivious to the fact that the avoidance application can be pursued even after the culmination of the Insolvency Resolution Process/Liquidation. Regulation 44A of IBBI (Liquidation Process) categorically provides that the avoidance applications can be pursued even after the dissolution or closure of the liquidation process. It is nowhere provided in Regulation 35A (ibid), relied upon by the Respondents that if the timeline referred to in the Regulation is not followed, the application under Section 66 cannot be filed. The timeline is for RP and is guiding and not binding.

7. In view of the aforementioned, we are convinced that within 7 months of the purchase of the non-traded equity shares out of the funds of the CD, the application for admitting the CD into CIRP was filed, thus, the Respondents were quite aware that the avoidance of commencement of Insolvency Resolution Process in respect of the CD had no reasonable prospect and they did not exercise due diligence while investing the funds of CD in such equity shares, which could not be further sold.

In the wake, the application is disposed of with the direction that the Respondents would collectively contribute Rs. 28,50,000/- to the assets of CD spent towards purchase of the 30,00,000 equity shares of Unno Industries Limited on 02.08.2019 and 9,00,000 shares of Jayant Mercantile Co. Limited purchased on 06.08.2019 out of funds of the CD. The said amount will be deposited within a period of 30 days in the account of the CD to be specified by RP/Liquidator. On deposit of the

amount, the Liquidator shall transfer the aforementioned shares in the joint name of the Respondents. IA stands disposed of. No cost.

**Sd/-**  
**(L. N. GUPTA)**  
**MEMBER (T)**

**Sd/-**  
**(ASHOK KUMAR BHARDWAJ)**  
**MEMBER (J)**