

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

I.A (IBC) No.69 /KB/2021

In  
C.P. (IB) No. 932/KB/2018

In the Matter of:

*An application Under section 66 of the insolvency and Bankruptcy Code, 2016  
and read with Rule 11 of the National Company Law Tribunal Rules, 2016.*

And

**In the Matter of:**

State Bank of India

**....Financial Creditor**

Versus

M/s Madhusala Drinks Private Limited

**.... Corporate Debtor**

And

**In the Matter of:**

Mr. Jitendra Lohia

**... Applicant**

-Versus-

Sarbjit Singh Johal & Anr.

**....Respondents**

**Date of Hearing : 19/04/2022**

**Date of pronouncing the order: 18/07/2022**

**Coram:**

**Mr. Rohit Kapoor, Member (Judicial)**

**Mr. Harish Chander Suri, Member (Technical)**

**Counsel appeared physically/through video conference :**

For Corporate Debtor : Mr. Joy Saha ,Sr. Adv.  
Mr. Isshan Sahu, Adv.  
Mr. D.Basu, Adv.

**ORDER**

**PER: Harish Chander Suri, Member (Technical):**

1. This Court convened through video conferencing.
2. The Interlocutory Application(IBC)No. 69/KB/ 2021 has been filed by the Resolution Professional appointed in the CIRP of M/s Madhusala Drinks Private Limited vide order dated 26<sup>th</sup> August, 2019 and later on confirmed by the CoC on 25<sup>th</sup> September, 2019.
3. It is submitted that on the application being admitted by this Adjudicating Authority in the petition under Section 7 of IBC filed by the State Bank of India, one of the Financial Creditors, during the performance of duties by this Applicant/Resolution Professional, he contacted the erstwhile Directors of the Corporate Debtor and intimated them of the initiation of the CIRP and requested them to provide him necessary information and records of the Corporate Debtor.
4. The applicant, in the first meeting of the CoC held on 25<sup>th</sup> September, 2019, informed the CoC that he had not received much information from the Corporate Debtor and the Corporate Debtor had provided him with a copy of FIR, which he had filed earlier, wherein it was stated that a theft has taken place in the factory. The applicant further informed the CoC that the Corporate Debtor's business operations were suspended since 2015 and Annual Accounts of the company were filed till financial year 2013-14 with the RoC.
5. It is submitted by the applicant that since the applicant did not receive any cooperation from the officials of the Corporate Debtor, the applicant filed an application under Section 19(2) of the Code and vide order dated 16<sup>th</sup> December, 2019 the officials of the Corporate Debtor were directed to cooperate with the applicant. Thereafter, the suspended Board of Directors provided some documents and information but the same was incomplete and insufficient. The suspended Board of Directors submitted that all the records

of the Corporate Debtor have been destroyed in fire. The applicant appointed a Transaction Auditor being M/s P D Rungta & Co. to conduct transaction audit of the Corporate Debtor on the basis of the information and documents made available to the applicant from the Financial Creditors, debtors, suppliers of goods and services, customers or secured creditors of the Corporate Debtor. The transaction auditors submitted his report on 15<sup>th</sup> December, 2020 to the applicant. In the report, it was observed that the transaction auditor could not give any comment on preferential transaction under Section 43, Undervalued transaction under Section 45 and Extortionate Credit Transaction under Section 50 as no information and records were made available to the Corporate Debtor, by the suspended director of the Corporate Debtor.

6. The applicant further submits that the business of the Corporate Debtor had been carried out with the intent to defraud the creditors of the Corporate Debtor. The applicant, therefore, shared the Transaction Audit Report with Respondent No.1 and 2 and asked them to reply with their observations on the report.

7. In the 6<sup>th</sup> CoC meeting dated 29<sup>th</sup> December, 2020, the applicant informed the CoC that based on the findings of the Transaction Audit Report, he would make an application under Section 66 and, therefore, the present application has been filed by the applicant under Section 66 of the IBC, 2016 read with Rule 11 of the NCLT Rules, 2016.

8. The Applicant has submitted that on the perusal of the Transaction Audit Report along with its annexures, it is evident that an amount of Rs.72.45 crores has been identified as fraudulent transactions under section 66 of the IBC, 2016.

9. The Applicant has further submitted that following are the instances of fraudulent transactions as defined under section 66 of the IBC Code, which is supported by the transaction audit report.

i. **Fixed Assets**

*Fixed Assets shown as stolen in the FIR and declaring that there are no fixed assets except Land after the Fire was broken out, is inappropriate and not justified. The fixed assets are presumed to be sold may be intentionally done by the management without passing it through books of accounts. Even the management was reckless to leave the asset as is and where is basis without taking concern of the employees, financial institutions, lenders, outsiders etc. who may be directly or indirectly associated with the company.*

ii. **Inventories**

*Due to non submission of any evidence in support to the existence of inventories, the value of inventories as recorded in the books of account for the year ended 31-03-2014 seems to be inflated/fake. Since there are no records available or explanation, they are presumed to be taken away/sold by the management and the proceeds being taken away for their personal benefit.*

iii. **Trade Receivables**

*We were neither provided the list of debtors nor their outstanding balances. The management had not provided with Tally data for the relevant period under audit showing whether it had not existed or even if they had existed. It appears to the sham and bogus, the amount of Trade Receivables are being drained off by the management for their own benefit and identical to deceit. Sales, purchases and other financial transactions done by the Corporate Debtor including the quantum of the dues to the West Bengal Sales Tax Department, hints at huge siphoning of the funds to defraud the creditors.*

iv. **Cash and Bank statements**

*There are no evidences or information being available of what has been done with the Cash and Bank balances. As the operations were closed in the year 2015, there might have been transactions entered by the company with outsiders and the balances of cash as well as bank may have not affected. However, as no information is available, there are chances that the same is withdrawn by Directors of the Company for their personal advantage resulting in degrade of liquidity position of the company.*

v. **Loans and Advances**

*From the data available, it was observed that there was utilization of short term funds. But on the contrary, how, when and for what purpose these funds were utilized is not available. It cannot be ruled out, how and who has used it. Nevertheless, it cannot be adjudged that management is not involved in these transactions, but some way or the other it has led to eradication of funds of the company and indicates or accidental acts of the management.*

vi. **Dues under West Bengal Sales Tax Act**

*It will be apparent from a complaint lodged under section 88 of the West Bengal Sales Act, 1994 against the directors, namely, Sarbjit Singh Johal and Maninder Singh Johal by the Directorate of Commercial Taxes, Government of West Bengal dated 23<sup>rd</sup> December, 2015, that the said company had evaded tax to the tune of crores of rupees Corporate Debtor being aware of the facts that the said tax are due didn't disclose the same in their books of accounts and or balance sheet. Claim has also been filed by the West Bengal Sales Tax Department, running into cores of rupees.(Annexure-H)*

10. It is submitted that even though all relevant data and documents were not provided by the Corporate Debtor, it is clear that the transactions were fraudulent transactions to ensure that no funds were available with the corporate debtor which could be appropriated by the Creditors to satisfy their

outstanding dues and thus, it is humbly submitted that the transactions were carried out just to defraud creditors of the corporate debtor. The applicant submits that all these transactions ought to be reversed so as to reflect the correct balance in the corporate debtor's account as on the CIRP initiation date.

11. The applicant further submits that the aforesaid transactions are clearly fraudulent in terms of Section 66 of the IBC, 2016. In view of the above, it is submitted that these transactions are clearly within the definition of transactions to defraud creditors in terms of Section 66 of the IBC, 2016 and hence, the present application is being filed to reverse the effect of such transactions and seek orders in respect of the Respondents who knowingly carried on business in a fraudulent manner and are obliged to make such contribution to the assets of the Corporate Debtor as deemed fit and proper. Furthermore, the Directors of the Corporate Debtor are also obliged to make such contribution to the assets of the corporate debtor as deemed fit and proper.

12. It is further submitted that apart from the transactions being fraudulent, it is evident that the affairs of the corporate debtor were not being managed in a diligent manner and the conduct of the management of the corporate debtor reeks of siphoning off borrowed funds for a purpose other than the intended use. Additionally, the suspended board of directors are not cooperating with the Applicant and have not provided clear and complete books of accounts and other relevant information pertaining to the corporate debtor. It is also apparent from the vast variation in the stock statements submitted with the creditors and the audited financial statements that the affairs of the corporate debtor were being run with the intent to defraud the creditors and that persons concerned in the management of the corporate debtor are guilty of fraud. In such circumstances that necessary orders must be passed for investigation into the affairs of the corporate debtor in terms of

Section 213 of the Companies Act, 2013 or such other provision of law as this Adjudicating Authority may deem fit.

13. It is submitted that all the Bank accounts of the Corporate Debtor including the personal accounts of the Corporate Debtor may not have been disclosed to the Resolution Professional in the disguise of the fire, which may contain corroborative evidence of transactions done to defraud the creditors.

14. It is further submitted that the balance of convenience in favour of the Applicant. The applicant and the interests of creditors will be seriously prejudiced in case orders as prayed for are not granted.

15. The applicant has, therefore, prayed, as under:

i. *That this Adjudicating Authority be pleased to pass an order directing the suspended board of directors being Respondents No.1 and 2 to pay jointly or severally a sum of Rs.72.45 crores or any other amount including amount additionally found to be defrauded, as this Adjudicating Authority may deem fit on account of payments made to related parties from the accounts of the Corporate Debtor.*

ii. *That this Adjudicating Authority be pleased to pass an order directing the suspended board of directors being Respondents No. 1 to 5 make such contributions to the assets of the corporate debtor as this Adjudicating Authority may deem fit;*

iii. *That this Adjudicating Authority may be pleased to pass an order or orders as may be deemed necessary for investigation into the affairs of the corporate debtor.*

iv. *For such further and other reliefs as this Adjudicating Authority may deem fit and proper in the facts and circumstances of this case”.*

16. While going through the copy of the complaint stated to have been filed by the Corporate Debtor on 1<sup>st</sup> July ,2017 to the Inspector-In-charge Budge Budge Police Station, Budge Budge, South 24 Parganas, the subject is *“Complaint for theft and /or burglary at the IMFL plant of the company at Plot No.S-1 Budge Budge Industrial Estate, Pujali, Kolkata-700138 and fire caused at the plant on 27<sup>th</sup> June, 2017, causing huge loss to the stock and plant premises”.*

17. The complainant who is one of the employees of the group company of the Corporate Debtor has lodged this FIR and submitted that;

“..... ..”

*Due to certain reason the contract between the Madhusala Drinks (P)Ltd. and United Sprits Ltd. was terminated sometime in the year 2015 and as effect the production of the company was stopped and on 20<sup>th</sup> January 2016 the company issued the closure notice and informed all concerned authorities including the Police Station, Labour Commissioner, Officer of W.B. Commercial Taxes and others.*

*The huge stock of finished goods and raw materials and plant machinery were lying ideal in the closed plant. The considering the value of the stock and machinery at the closed plant the management also appointed one Bengal Protective Guards (P) Ltd., a security agency, to protect the valuable stock and machinery at the closed plant”.*

18. **It would be seen from the contents of the F.I.R., that due to the reason of the contract between the Corporate Debtor and the United Sprits Ltd. having been terminated sometime in the year 2015 and the production having been stopped, the company issued a closure notice and informed all concerned authorities including the Police Station, Labour Commissioner, Office of West Bengal Commercial Taxes and others on 20/01/2016. If the company had closed its production from 2015 onwards and even issued closure notice on 20/01/2016, how can the company claim “huge stock of finished goods and raw materials and plant and machinery lying idle in the closed plant”. The company also claims that considering the value of the stock and machinery at the closed plant, management had appointed one Bengal Protective Guards Private Limited, a security agency to protect the valuable stock and machinery at the closed plant. It is surprising that in spite of the guards of the security agency, allegedly posted there, the theft had taken place in the Corporate Debtor. On enquiry from the Ld. Counsel for the respondents as to whether there was any debit entry in the account books or payments made through bank to the aforesaid Bengal Protective Guards Private Limited, a security agency hired by the Corporate Debtor, it was informed that no such payment has been made by the Corporate Debtor. This information appears to have been wrongly written in the F.I.R. If there had been any such agency guarding the premises of the Corporate Debtor, this loss would not have been caused to the plant and machinery and other goods which are stated to have been destroyed. There is a clear cut misrepresentation and concealment of facts in**

the F.I.R., which gives rise to presumption that the suspended Board of Directors of the Corporate Debtor had intentionally lodged this false F.I.R. to place on record that everything has been destroyed by the fire in the premises which left only the vacant land belonging to the Corporate Debtor.

19. **Moreover, in the subject of the complaint, the respondents have tried to cover all types of points starting from theft and /or burglary and subsequently fire causing huge loss to the stock/plant and machinery.**

20. **It is strange that on the one hand, the suspended Directors have neither given any record, books of accounts or details of the bank accounts to enable the RP to get all the details verified, and on other, has tried to place a copy of the F.I.R. on record to wash their hands off all their faults and /or offenses under the law. The suspended directors have not been able to give any details as to how and when the security agency had been engaged and by whom, because there was no record to show any payment having been made to the security agency which was allegedly guarding the premises nor has any document been shown as to whether the premises, plant and machinery and the stocks stated to be lying in the premises were insured by the then Directors /respondents in the present application.**

21. It is not understood why the Corporate Debtor had not insured this premises which allegedly had its plant and machinery along with other finished goods and raw materials lying therein. There is no further report as to what happened after lodging the F.I.R.. Simply, intimating the Police Authority that everything has been spoiled and is destroyed in the fire is not a sufficient and justifiable response from the Corporate Debtor, and it is unbelievable.

22. **In the reply affidavit** filed by Respondent No.1 Sarbjit Singal Johal for himself and on behalf of Respondent No.2.

23. It is submitted that the application is filed in gross suppression of misrepresentation of material facts warranting its dismissal. It is submitted that the application has been filed beyond the time limits stipulated in Regulation 35A of the IBBI (Corporate Persons) Regulations, 2016.

24. It is submitted that the Transaction Audit Report is vague, ambiguous, inconclusive, arbitrary and disclaimer has been issued in the report by the Auditor that they are not engaged and did not conduct an audit examination.

25. It is submitted that not a single transaction carried out by the Corporate Debtor has been specifically impugned in the said application and the application merely proceeds to make roving, vague and unsubstantiated allegations against the Respondents without materials particulars.

26. With regard to the contents of the paragraphs 4(1) of the application, and the allegations pertaining to fixed assets of the Corporate Debtor, the respondents have stated that:-

i. *“ The facility of the Corporate Debtor situated at S-1 Budge Budge Industrial Estate, Pujali, Kolkata-700138 was subject to the control of the Excise Department. It is relevant to note that Deputy Excise Collector along with two constables were stationed at the said facility and that the Respondents did not have any access to the said facility without the say so of the Excise Department through its Deputy Excise Collector posted at the said premises. It is also relevant in this regard to note that while the applicant has raised allegations of siphoning off of fixed assets from the facility of the Corporate Debtor against the respondents herein, the applicant has failed and neglected to make any enquiries with the Excise Department in this regard despite being well and fully aware that the Excise Department through the Deputy Excise Collector, was at all material point of time exercising rights of supervision and control over the said facility. In this regard, it is relevant to notice that the corporate debtor duly made payment of the fees and charges of the Excise Department for posting it’s personal/ police authorities at the factory premises of the corporate debtor. The relevant documents with regard to payment to the Excise authorities for posting it’s personnel at the said premises were, at all times, reflected in the books of accounts of the corporate debtor.*

ii. *It will further appear from the claim that orders of attachment were issued by the Tax Recovery Officer in respect of the premises belonging to the corporate debtor over which the said facility is situated. By such order of attachment, the Commissioner of Commercial Taxes, Government of West Bengal had prohibited and restrained the Corporate Debtor for transferring or charging the property attached.*

iii. *In the light of the said order of attachment by the West Bengal Sales Tax Authority, the Respondent herein had no means of accessing the said facility and ensuring the safe keeping of the fixed assets situated thereat. In the light of the attachment of the said facility of the Corporate Debtor by the West Bengal Sales Tax Authority, the Corporate Debtor was compelled and constrained to declare a lockout of the said facility with effect from 20 January, 2016. A copy of the closure notice dated 20<sup>th</sup> January, 2016 is annexed as Annexure-B to the reply affidavit.*

iv. *As the Corporate Debtor had defaulted in its repayment obligations to the State Bank of India, the account of the Corporate Debtor with State Bank of India, the account of the Corporate Debtor with State Bank of India was declared an NPA (Non-Performing Asset) on 31<sup>st</sup> December, 2015, where after the State Bank of India enforced its secured interest in respect of the immovable property belonging to the Corporate Debtor whereupon the said facility was situated and took possession in exercise of its right under Section 13(4) of the SARFAESI Act, 2002 in or about 20<sup>th</sup> January, 2017. A copy of the said notice of possession issued by the Authorised Officer of the State Bank of India is annexed as Annexure-C to the reply affidavit.*

v. *It is submitted that a fire had broken out at the said facility on 28<sup>th</sup> June, 2017, subsequent to the lockout of the facility declared by the respondent and the attachment of the facility by the West Bengal Sales Authority. A complaint had been lodged with the Budge Budge, Police Station complaining of the incident of fire at the said facility on 28<sup>th</sup> June, 2017. A copy of the Police complaint is annexed as Annexure-D to the reply affidavit.*

vi. *From the seizure list dated 1<sup>st</sup> July 2017, prepared by the Budge Budge Police Station, the stock, raw materials and assets recovered from the said facility on 25<sup>th</sup> July, 2017 will be apparent. A copy of the said seizure list is annexed as Annexure-E to the reply affidavit”.*

27. *In reply to the allegations pertaining to Inventories, it is stated that in exercise of its rights under Section 13(4) of the SARFAESI Act, 2002, the symbolic possession was taken by the State Bank of India on 20<sup>th</sup> January, 2017, thereafter the Respondents ceased to have any access of control over the said premises or the facility situated thereat. The Respondents denied that the value of inventories as recorded in the books of account for the year*

ending 31<sup>st</sup> March, 2014 is untrue or fake. It is stated that the non-availability of records on account of incident of fire that occurred in the said premises on 27<sup>th</sup> July, 2016 as has been recorded in the police complaint and the closure report submitted by Budge Budge Police Station. It is stated that police has also made an arrest in connection with the said complaint and it is clearly apparent that no wrongdoing is suspected in connection with occurrence of fire and that electrical fault is attributed to because of fire.No wrongdoing has been suspected by the police on the part of the erstwhile management. It is further submitted by the respondents that the transaction audit report of P.D.Rungta & Co. has admitted that as per the FIR dated 1<sup>st</sup> July, 2017, the said premises under the possession of the State Bank of India since 20<sup>th</sup> January, 2017 which is prior to the incident of fire at the said premises.

28. Similarly, as regards the Trade Receivables, the Respondents submitted that pursuant to a garnishee order dated 9<sup>th</sup> November, 2015 issued by the West Bengal Sales Tax Authority, the Sales Tax Authority had attached the trade receivables of the Corporate Debtor and the said Authority had pursuant to said garnishee order recovered a sum of Rs.6,73,63,457/- from the Corporate Debtor (Annexure-G to the reply affidavit).

29. Pursuant to the garnishee order dated 9<sup>th</sup> November 2015, the bank account of the Corporate Debtor maintained with HDFC Bank was also attached by the West Bengal Sales Tax Authority, and all proceeds from the business of the Corporate Debtor credited in the said account were forfeited by the West Bengal Sales Tax Authority. The Respondents have, therefore, submitted that this application is not maintainable and harrassive in nature is liable to be dismissed.

30. In the **Rejoinder**, the applicant submitted that the allegations made in the reply affidavit are not correct and have been made to mislead the Adjudicating Authority. The reply of the respondents is ex-facie dishonest and

mala fide. It is submitted that the reply has been filed in gross suppression of material facts and contains concocted allegations that are contrary to the records and are merely an afterthought. The Respondents are trying to escape from its liability and avoid making payment of the amount alleged in the application. It is stated that the applicant formed his opinion before the 75<sup>th</sup> day of the commencement of CIRP, which can be evident from the minutes of the CoC meetings and based on the opinion formed, the applicant had appointed the transaction auditor on 10.02.2020 to look into the fraudulent activities carried out by the respondents to siphon off the funds of the corporate debtor for their undue gain.

31. It is submitted that the applicant has also determined the transactions under Section 66 as fraudulent and moreover upon observing the transaction audit report, the applicant further found several suspicious information which led the applicant to file the present application for the better interest of the stakeholders.

32. It is submitted that the applicant has given ample chance to the respondents to say their comments on the transactions alleged in the said application but no documents and justifiable reasons have ever been produced to the applicant.

33. It is imperative to note that the respondents have also not paid substantial amount of the dues relating to the West Bengal Sales Tax Department, which amounts to approx., Rs.1277,82,69,362/- which is the huge loss of the revenue and exchequer, and there is a possibility that the non-provision of all the documents and the records were done intentionally to escape from the fraudulent and avoidance transaction which was required to be filed as per the IBC. It is stated that the physical possession was also always with the respondents and the respondent was duty bound to maintain/safeguard their asset of the corporate debtor towards the beneficial interest of all the stakeholders.

34. It is stated that innumerable inventories were lying there and based on the last available financial statement, no document or record was ever produced to demonstrate the consumption of the said factory and in the reply itself the respondents had even admitted that factory was in their possession up to the financial year 2016, even if that the contention is accepted the movement of the inventories since the Financial year 2013 -2014 was intentionally never produced to the applicant. It is stated that no record relating to the receivable by the Corporate Debtor has never been produced. It is submitted that the accounts and records of tally data whether in the soft format or the hard copy has never been submitted with the applicant. The whole exercise for holding back the information has been done to defraud the creditor, which is detrimental to the interest of all the stakeholders. The applicant, therefore, submitted that the application should be admitted, and the respondents should be directed to contribute to the liquidation account and further orders be passed for investigation into the affairs of the Corporate Debtor.

35. We have seen the application and documents placed on record by the applicant, it appears that the respondents have sold out the fixed assets without passing it through the books of account. The Respondents have not provided any books of account, list of debtors and their outstanding balances.

36. We find that the whole story has been concocted by the suspended directors of the Corporate Debtor and the same is unbelievable and the liquidator is right in moving this application and claiming the relief as prayed in the present case.

37. **In view of all that has been discussed above, we are convinced that there has been due and independent application of mind by resolution professionals besides the transaction audit report while filing this application and thus prayer of the Resolution Professional must be allowed. We, therefore, direct the Respondents No.1 and 2 to jointly and/or severely pay a sum of Rs. 72.45 Crores on account of payments**

**made to the related parties from the account of the Corporate Debtor. In the event of their failure to pay the aforesaid amount, the Resolution Professional shall be free to initiate appropriate action against the Respondents.**

38. With the above directions I.A (IBC) No.69 /KB/2021 is disposed of.

39. List the Main C.P. (IB) No. 932/KB/2018 on **02/09/2022**.

40. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**(Harish Chander Suri)**  
**Member (Technical)**

**(Rohit Kapoor)**  
**Member (Judicial)**

Order signed on this, the 18<sup>th</sup> day of July, 2022

PJ.