THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I

I.A. 2097 of 2023

Under Section 66 of the Insolvency & Bankruptcy Code, 2016

Ms. Vaishali Patrikar,
Liquidator of M/s. Gourmet Renaissance Private Limited
… Applicant

Vs.

Shri Suniel Hiroo Bharwani & Anr.
…Respondents

IN THE MATTER OF

C.P.(IB) No. 1661/MB/2018

Deepak Advertisement and Marketing

…Petitioner

Vs.

M/s. Gourmet Renaissance Private Limited

…Corporate Debtor

Order delivered on: 11.03.2025

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Applicant	:	Ritu Aggarwal a/w Sushma Gupta, Advocates
For Respondent Nos. 1 & 2	:	Mr. Ishvendra Tiwari, Advocate i/b Sonal Doshi & Co.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Interlocutory Application was filed by the Liquidator on 16.5.2023 seeking following reliefs:

   i. Admit and Allow the Present Application.

   ii. Condone delay, if any, for filing this Application.

   iii. Direct Respondents, jointly and severally, to make contribution of diverted funds totally amounting to Rs. 31,09,13,997/- to the Liquidation Estate of the Corporate Debtor.

2. This rights under this Application were assigned to M/s VRSA Consulting LLP vide assignment agreement dated 27.1.2024 executed in terms of decision taken by the Liquidator in consultation with Stakeholders Consultation Committee on 23.11.2023 to sell the rights and benefits under the Avoidance Appplication(s) i.e. IA 2097 of 2023 and IA 2638 of 2023 as "Not Readily Reliasable Assets (NRRA)', accordingly M/s VRSA Consulting LLP was substituted as Applicant in the present application in terms of Order passed by this Tribunal on 17.5.2024 in IA 2473 of 2024 seeking such substitution.

3. Shri Suniel Hiroo Bharwani, Respondent No. 1 & Shri. Richard Vernon Dias, Respondent No. 2 are suspended Board of Directors of the Corporate Debtor.

4. The facts leading to the case in hand are as follows:

   i. The Corporate Debtor was admitted to the Corporate Insolvency Resolution Process (CIRP) vide an Order dated 11.03.2019 passed by this Tribunal, and the Corporate Debtor was admitted to Liquidation Process thereafter in terms of Order dated 05.08.2021, appointing the Applicant herein as the Liquidator.

   ii. It is submitted that the Balance Sheet of the Corporate Debtor records that the Corporate Debtor owned some assets in nature of Kitchen Equipment worth ₹6,56,36,549/-. However, the Applicant could not locate the said Asset in any premises of the Corporate Debtor. It is further submitted that the Applicant wrote letters to the Respondent No. 1 asking the position of the Assets. However, the Respondent No. 1 finally replied to the Applicant on 13.10.2022 giving status of the Assets of the Corporate Debtor stating that the Kitchen Equipment of the Corporate Debtor, worth of ₹ 3.80 Crores were confiscated by 3 Operational Creditors of the Corporate Debtor, to whom the Corporate Debtor owed certain amounts. The examination of the books of accounts by the Applicant revealed that these assets were written off vide Journal Entry dated 30.09.2017 without any justification thereto. Therefore, as admitted by the R1, the act of keeping the Assets worth ₹

3,80,00,000/- purposefully in custody and control of the Operational Creditors against their dues is nothing but a fraud played over the other Creditors of the Corporate Debtor and therefore, the Respondents are liable to make contribution to the Liquidation Estate of the Corporate Debtor for such amount.

iii. During this Liquidation Process, the examination of the books of accounts of the Corporate Debtor further revealed certain transactions, whose nature appears to be doubtful / fraudulent, and the Applicant is of the view that these transactions have been carried out either to divert the funds of the Corporate Debtor or to keep the Assets of the Corporate Debtor out of reach of the Stakeholders of the Corporate Debtor. These transactions are as follows:

a. An Advance of ₹ 16,71,72,679/- was outstanding as on 31.03.2018 in the name of M/s. Passion for Lifestyle Private Limited, however, the said amount also written off by Journal Entry in Ledger dated 31.03.2018 on ground of failure of the Corporate Debtor to full-fill its obligations under the Agreement dated 9.10.2014 between the Corporate Debtor and M/s. Passion for Lifestyle Private Limited. It is pertinent to note that the Respondent No. 2 is also director of M/s. Passion for Lifestyle Private Limited; M/s. Passion for Lifestyle Private Limited was operating from the office of the Corporate Debtor, and has been struck off from the Registrar of Companies on account of its failure to file its Annual Returns for the year ended 31.3.2015 onwards; and is currently in CIRP. However, since M/s. Passion For Lifestyle Private Limited has not filed any annual returns with the MCA beyond 31.03.2014 it is presumed that after 31st March 2014 there were no business operations which were carried out by M/s. Passion For Lifestyle Private Limited. And therefore, in opinion of the Applicant the said purported Agreement is merely sham and bogus and the same is created only for name's sake purpose. More interestingly the said document is not even registered.

b. There were certain debts recoverable by the Corporate Debtor in the name of (i) Gaia Dairy Foods Private Limited amounting to ₹ 1,20,00,000/- and (ii) Marigold Retails and Merchandizing private Limited amounting to ₹ 4,65,00,000/-; totalling to ₹ 5,85,00,000, which were charged to profit and loss account as reimbursement of commitment charges to these parties.

c. Certain sundry debtors amounting to ₹ 4,72,41,318 were written off as bad debts.

iv. The Applicant has not come across any document on record which can prove that the Corporate Debtor (which was being managed by the Respondents) has taken any positive steps for the recovery of said receivables. Therefore, there are strong reasons to believe that the said amounts which were to be received have been diverted through these parties for their personal benefits and the Creditors of the Corporate Debtor have been betrayed. It is also submitted that there is no contrary document on record to show *bona-fide* of the Respondents behind the said transactions or any benefit having accrued to the Corporate Debtor and / or its creditors from the transactions in question.

5. The Respondent No. 1 filed limited Reply dated 23.11.2023 stating that he was decapacitated and impeded by various health challenges including a life disabling brain stroke; also, there was fire in his house in month of June 2023 in which most of the records pertaining to the Corporate Debtor was destroyed; and sought liberty to file a detailed reply as and when the destroyed documents are retrieved. However, no reply was filed thereafter. Nonetheless, the Respondent No. 1 & 2 filed written submissions after conclusion of oral arguments in terms of liberty granted by this Bench to both sides of the parties. The Respondents have submitted as follows:

a. The present application was filed with inexplicable delay beyond the time lines stipulated in Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations 2016;
b. The Applicant has not rendered any finding to support its opinion / determination of existence of intention to defraud and has also failed to substantiate the trail of suspicious / fraudulent transaction. The Hon'ble National Company Law Appellate Tribunal **("NCLAT")** has, in the case ***Shri Baiju Trading and Investment Private · Limited through* its *Authorized Representative v. Arihant Nenawati (Liquidator for Royal Refinery Private Limited) and Others*** *[2023 sec OnLine NCLAT 845], laid down* three pre-requisites required to be met before admitting an application under S. 66 of the Code which include- (i) Existence of an 'opinion' (ii) Opinion ought to be followed by 'determination' and (iii)

There should be a concrete finding supported by existence of 'mens rea to defraud'. Accordingly, mere assertion of 'suspicious transaction' or 'fraudulent transaction' is not sufficient to establish the ingredients required for holding an application under S. 66 of the Code to be maintainable under the law.

c. The Applicant has completely ignored the detailed reply dated 13.10.2022 given by these Respondents which evidently demonstrates absence of any intent to defraud. It was clarified that the said kitchen equipment of the Corporate Debtor could be found at - (i) Seasons Mall, Magarpatta, Pune (ii) Pride Hotel Shivajinagar, Pune (iii) Ratan Manzil, Colaba, Mumbai and (iv) Warehouse of Erstwhile Resolution Applicant & Fellow CoC Member of the Corporate Debtor, the Applicant, in order to harass these Respondents, has filed the present Application merely on an opinion that these assets have been purposely kept in custody of these operational creditors at the behest of the Respondents. It is germane to note that there is no evidence on record to substantiate this contention of the Applicant which is based on mere speculations and conjectures.

d. It is the duty of the Applicant to gather relevant documents, evidence and such other relevant material required to substantiate its stand regarding presence of fraudulent transactions. The Applicant cannot hold these Respondents responsible for not being able to provide enough documents to support the opinion formed by the Applicant, especially when these Respondents have extended their unwavering cooperation to the Applicant every time when the Applicant has raised any query in respect of the business of the Corporate Debtor.

6. Heard the learned counsel for the both sides and perused the material on records.

7. In this case, an Application u/s 9 of the I B Code was filed on 29.10.2018 seeking initiation of CIRP in case of Corporate Debtor, which was admitted on 11.3.2019 initiating CIRP process.

8. The primary defence of the Respondents is (i) the illness of the Respondent no. 1 coupled with fire in his house in June 2023 disabling him from laying hands over the records of the corporate debtor to respond to the allegations in this Application; and (ii) the loss of some records of the Corporate Debtor before March 2020 as evidenced in the Police Report; and (iii) explanation submitted to the Applicant vide his letter dated 13.10.2022. It is relevant to note that illness of Respondent and fire in his house occurred in 2023, while he was under obligation to hand over all the records of the Corporate Debtor at the commencement of CIRP i.e. 11.3.2019, hence these two aspects do not have any relevance to the issue(s) raised in the application, more so Respondent No. 2, the other director is not stated to be in such medical emergency and the explanation was sought much prior to these two events. Further, the Police certificate dated 15.8.2020 lists documents i.e. (i) Purchase N.C.L. Register, (ii) Mandate & Agreements Contracts; (iii) Passport; (iv) Bills & Receipts & bank Statements of ICICI, HSBC, HDFC etc., claimed to have been lost in office shifting before March 2020 i.e. much after the commencement of CIRP. Nonetheless, the transactions in question does not necessitate these documents to explain when the audited financial statements for the relevant years were in custody & possession of the Respondents. The Respondents have placed on record some pages of these financial statements to explain bona-fide of these transactions, stating that

they have some amounts receivable from the Corporate Debtor, hence there could not have been any reason to siphon off the money, as claimed by the applicant, to keep away from the Creditors through other related parties. However, in our considered view this explanation does not address the issue raised by the Applicant.

9. Section 66 of Insolvency & Bankruptcy Code, 2016 provides that:

> ***"66.** (1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.*
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> *(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—*
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> *(a) before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and*
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> *(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.*
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> *[1][(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.]*

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

10. The timelines under Regulation 35A of CIRP Regulations have been held directory in nature, hence the contention that the application is in contravention of Regulation 35A has no merit.

11. The reliance placed by the Applicant on the decision of Hon'ble National Company Law Appellate Tribunal **("NCLAT")** in the case ***Shri Baiju Trading and Investment Private · Limited through* its *Authorized Representative v. Arihant Nenawati (Liquidator for Royal Refinery Private Limited) and Others*** *[2023 sec OnLine NCLAT 845],* also does not have any merit as the Applicant has formed an opinion in relation to diversion of funds/assets to keep them out of reach of stakeholders of the Corporate Debtor and has made a determination of the quantum thereof by identification of specific transactions. The applicant has also placed on record relevant facts, to the extent available with him, and these documents clearly supports existence of 'mens rea to defraud'.

12. The Respondent Applicant cannot cast obligation upon the Applicant to gather relevant documents, evidence and such other relevant material required to substantiate its stand regarding presence of fraudulent transactions, while it is primary obligation of the Respondents in terms of Section 17(1)© of the Code mandating that "*the officers and managers of the corporate debtor shall report to the* ***interim resolution professional*** *and*

provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional". The Applicant has attempted to hide behind the loss of documents in fire occurred on 16.6.2023 in his house, but the records of the Corporate Debtor had to be handed over to the Resolution Professional in the year 2019 itself after commencement of CIRP. The explanations tendered by the Respondents clearly evidence that they had complete knowledge of the transactions and have caused loss to the Corporate Debtor by frittering away its assets/funds.

Write off of Kitchen Equipment

13. In the reply dated 13.10.2022 sent by the Counsel for Respondents to the Applicant, it has been explained that (i) Seasons Mall Magarpatta took over the possession of all Equipment in their possession, for which a formal litigation for retrieval and recovery of the same have to be initiated; (ii) Pride Hotel Shivajinagar Pune had retained/confiscated some equipment against unpaid outstanding to range from INR 6-9 lakh rupees; (iii) Ratan manizil-2-C, Woodehouse Road, Colaba Mumbai had withheld third lot of kitchen equipment against outstanding of INR 2-6 lakhs; and (iv) Lots of equipment were kept in warehouse of Erstwhile Resolution Applicant and Fellow CoC member Mr Atul Kumar Gupta and could be retrieved against payment of their warehousing charges of INR 12,00,000/-. We do not find any force in the arguments of the Respondents, as (i) no action was ever taken by them against Seasons Mall Magarpatta, (ii) they allowed the operational creditors to keep the equipment worth more than their dues even while Corporate Debtor is reported to had cash balance of Rs. 49,33,554/- as on 31.3.2017. (iii) Atul Kumar Gupta ought to have filed his claim and his dues does not

give him right to retain the assets of the Corporate Debtor, which in any case vests in Liquidator upon commencement of liquidation process. Accordingly, we hold that the Respondents are liable to contribute to the Corporate Debtor/its assignee a sum of Rs. 3,80,00,000/-.

Transaction with Passion

14. It has been explained in letter dated 13.10.2022 that due to non payment of Overdues and failure to comply with terms of commitments by Corporate Debtor led to colossal financial losses to M/s Passion for lifestyle Pvt. Ltd which has opened Corporate Debtor to contingent liability possibly amounting to Rs. 10,00,00,000/- which is evident from the qualified opinion of the Auditors in their Report to the Financial Statements for the year ended 31.3.2016.

15. It is relevant to note here the contents of the Agreement dated 9.10.2014 entered into between M/s Passion for lifestyle Pvt. Ltd and the Corporate Debtor. The said agreement enlists two projects for which the services of the Passion were obtained by the Corporate Debtor. As per Article 1 -Scope of work of the said agreement, Project 1 required Passion to planning, designing, food & beverage license liasoning and approval solicitation, plumbing, mechanical, electrical, ……………… as required by Corporate Debtor in and around 50,000 square fee of built up area; and the Project 2 required Passion to procure, plan, design, liaise with town planning authorities, obtain licenses, engage multiple consultants, demarcate and procure relevant parcels of agricultural lands-converted into NA status, which adds to the contiguity of lands in Dindori-Taluka, Nashik………….. for Mega food production and logistics park, Food Theme Park, Hospitality and wellness sections in a land area admeasuring 50 acres. Article 2 states

the Consideration payable to Passion was agreed at INR 3000/- per square fee, plus applicable taxes for Project 1, while consideration for Project 2 was INR 25 crores, which included purchase of 50 acre of designated NA lands. Article 3.1 states that "Gourmet (Corporate Debtor) owing to the nature and scope of work agrees to *provide a deposit for the works and shall replenish the deposit monies, once Passion submits a Progress report found acceptable by Gourmet*". Further Article 3.2 requires Gourmet to make good payments as advance deposits as and when requested by Passion. Clause 4.1 of the Agreement states that "*Both Parties agree that till the completion of both the projects, the advances and receivables will be treated as capital work in progress in the books of Gourmet and contingent assets in the books of Passion"*. The Respondents have failed to place on record the progress report shared by Passion before seeking further money from the Gourmet. None of such records were provided to the Applicant to justify the release of further payment after verification of progress report.

16. The total consideration in relation to Project 1 amounts to Rs. 15.00 crores plus taxes and for Project 2 Rs. 25.00 crores. The Project 1 entailed only consultancy and supervision services on part of the Passion, however, the financial statements placed by the Respondents does not demonstrate where the capital expenditure incurred on Project 1, which the Corporate Debtor would have spent so as to require Passion to deliver consultancy and supervisory services. Further, Project 2 primarily contemplated acquisition of land and development thereof by Passion, though the Corporate Debtor also paid a sum of Rs. 35.75 Crores as Advance for Food Park Land and no details were provided in relation to such land. This advance is over and above the acquisition of land contemplated as Project 2 where Passion was to do so. The reply of the Respondent does not aver any fact in relation

thereto, and if any such land was acquired, whether the Corporate Debtor at any time asserted its right over such land, having been acquired from the money advanced by it. It is relevant here to note that Passion has been struck off from the Register of Companies on account of its failure to file financial statements/annual returns for the year ended 31.3.2015 onwards i.e. the year in which said agreement was entered and the Corporate Debtor started payment; Passion shares its registered office with the Corporate Debtor; Respondent No. 2 is also director of Passion appointed in place of Respondent no. 1, while Respondent No. 1 ceased to be director on 11.8.2014 (just 2 months prior to said agreement); Mr. Atul Kumar Gupta, the erstwhile successful resolution applicant was one of initial director of Passion and ceased to be so on 16.6.2014; Passion was incorporated on 1.11.2013 just 11 months prior to Agreement; and Passion underwent into CIRP. It is also relevant to note that the ledger account of Passion in the books of Corporate Debtor for the year 2017-18 reflects transactions of payment of VAT or salary and some payments made till 19.2.2018 while the whole of debit balance was written off on 31.3.2018. These facts clearly establishes that the transactions with Passion is not bona-fide and was undertaken to defraud the creditors of the Corporate Debtor. Accordingly, we hold that the Respondents are liable to contribute to the Corporate Debtor/its assignee a sum of Rs. 16,71,72,769/-.

Reimbursement of Commitment Charges

17. The sum of Rs. 5,85,00,000/- recoverable by the Corporate Debtor from (i) Gaia Dairy Foods Private Limited amounting to ₹ 1,20,00,000/- and (ii) Marigold Retails and Merchandizing private Limited amounting to ₹ 4,65,00,000/- has been adjusted on 30.4.2017 and 1.5.2017 towards

reimbursement of commitment charges to these parties, however the ledger accounts reveal that neither tds was deducted at source nor any GST was levied by these parties. No explanation as to its nature was offered by the Respondents in their letter dated 13.10.2022 nor in their reply or written submissions. The total revenue from operations for the year ended on 31.3.2018 reported in audited financial statements is Rs. 52,72,824/-, and no document has been placed on record by the Respondents demonstrating any capital commitment disclosed in their audited financial statement for the year ended on 31.3.2017 or prior to that. Both of these companies are related parties having director in common with the Corporate Debtor. These facts clearly establishes that the commitment charges are claimed to be paid to these two parties in order to settle the balances receivable from them and are not genuine. Accordingly, these transactions are not bona-fide and was undertaken to defraud the creditors of the Corporate Debtor. Hence, we hold that the Respondents are liable to contribute to the Corporate Debtor/its assignee a sum of Rs. 5,85,00,000/-.

Write off of Sundry Debtors as Bad-debts

18. Certain sundry debtors amounting to ₹ 4,72,41,318 were written off as bad debts. On perusal of ledger account placed in the application, it is noted that this balance is made of several entries i.e. (i) Rs. 16,05,000/- on account of License cost; (ii) Rs. 1,53,11,257/- on account of reversal of loss claimed from Kavita Behl Designs considered irrecoverable; and (iii) Rs. 3,02,79,853.25 -Other debtors (no party wise details available). Rest are minor transactions of debit and credit. The Applicant has sought order in relation to net balance of Rs. 4,72,41,318/-. The Respondents have not

provided any explanation in the letter dated13.10.2022 and in their reply or written submissions filed in this proceeding.

19. The write off of License Cost cannot be held to be fraudulent transaction, as an advance of Rs. 35.75 Crores is stated to be paid as Advance for Food Park and shown under Land. It follows therefrom that the License Cost was paid towards the intended business of the Corporate Debtor. Accordingly, write off of License cost consequent upon inability of Corporate Debtor to proceed further with the project cannot be held to be Fraudulent Transaction.

20. Write off of Rs. 1,53,11,257/- on account of reversal of loss claimed from Kavita Behl Designs considered irrecoverable also can be said to be a business transaction in the normal course of business. There is no pleading as if such loss, incurred by the Corporate Debtor and recoverable from Kavita Behl Designs, arose out of ingenuine transaction of payment to Kavita Behl Designs, and whether such loss was recoverable as such from it in terms of understanding with Kavita Behl Designs. Nonetheless, the Applicant is not barred from taking appropriate legal proceedings to recover such loss if such loss is in fact recoverable in terms of understanding. Accordingly, no order for contribution in this relation is called for.

21. As regards write off of Rs. 3,02,79,853.25, representing Other debtors in relation to which party wise details is not available, it is relevant to note that the Respondents have not provided any explanation in the letter dated 13.10.2022 and in their reply or written submissions filed in this proceeding. It is the duty of the Respondents under the Code to provide complete details of transactions reflecting in the books of accounts. This amount as single entry has been written off on 31.12.2017. It is not clear as to how the Respondents decided to write off these amounts as irrecoverable in the

absence of party wise details thereof, and the statutory auditor's certified the same. Accordingly, these transactions are not bona-fide and was undertaken to defraud the creditors of the Corporate Debtor. Hence, we hold that the Respondents are liable to contribute to the Corporate Debtor/its assignee a sum of Rs. 3,02,79,853.25/-.

22. Accordingly, we direct the Respondent Nos. 1 and 2, jointly or severally, to contribute to the assets of the Corporate Debtor by remitting a sum of Rs. 29,39,52,622/- (Rs. 3,80,00,000/-, Rs. 16,71,72,769/-, Rs. 5,85,00,000/- and Rs. Rs. 3,02,79,853.25/-, within 30 days from the communication of this Order. The said amounts or unpaid part thereof shall carry interest @ 12% p.a. from the date of this Order till the date of its payment, after expiry of 30 days of communication of this Order.

23. In view of aforesaid, **IA 2097 of 2023** is **partly allowed** and disposed of accordingly.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Virendrasingh G. Bisht
Member (Judicial)

11.03.2025