

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI

IB No.-302/(ND)/2017

In the matter of:

Punjab National Bank (Financial Creditor)

Versus

Carnation Auto India Private Limited (Corporate Debtor)

AND IN THE MATTER OF:

Arvind Garg (Liquidator of Carnation Auto India Private Limited)
.... APPLICANT

Versus

Jagdish Khattar & Others
...RESPONDENTS

MEMO OF PARTIES

Arvind GargLiquidator/Applicant

In the Liquidation process of Carnation Auto India Private Limited

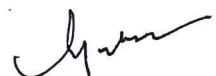
302-A, Pal Mohan Plaza,

Deshbandhu Gupta Road, Karol Bagh,

New Delhi 110 005.

Versus

.....Respondents



1. Mr. Jagdish Khattar (Promoter Director of Corporate Debtor)

Address: E-16 Sector 40, Gautam Budh Nagar, Noida, Uttar Pradesh, India- 201301

2. Mr. Kunal Khattar (Promoter and Erstwhile Director of Corporate Debtor)

Address: 3/16, 2nd Flr, Shanti Niketan, Chankya Puri, New Delhi-110021

3. Mr. Gautam Khattar (Promoter and Erstwhile Director of Corporate Debtor)

Address: N-128A, Panchsheel Park, New Delhi, India-110017

4. Mr. Prakash Parthasarthy (Erstwhile Nominee Director of Corporate Debtor)

Address: C1111, Windmills, 5b Epip Zone, Whitefield, Behind Sap Labs, Bangalore, North White, Bengaluru, Karnataka, India-560066

5. Mr. Sayed Parvez Mustafa (Erstwhile Nominee Director of Corporate Debtor)

Address: Flat No.251, Sobha Ivory, 7/Ist Johns Road, Bengaluru, Karnataka, India-560042

6. Mr. Prithvi Raj Khanna (Erstwhile Director of Corporate Debtor)

Address: House No. 70 Sunder Nagar, New Delhi, India-110003



7. Mr. Satya Sheel (Erstwhile Nominee Director of Corporate Debtor)

Address: Villa D, Empire Estate, Sultanpur, New Delhi, India- 11003

8. Mr. Sayed Habibur Rehman (Erstwhile Director of Corporate Debtor)

Address: N - 140, Panchsheel Park, New Delhi, India-110017

9. Mr. Ranjit Jayantilal Shah (Erstwhile Nominee Director of Corporate Debtor)

Address: 20, 2nd Flr, C.C.I. Chambers, Dinshaw Wachha Rd, Mumbai, Maharashtra, India-400020

10. Mr. Rajesh Ramaiah (Erstwhile Nominee Director of Corporate Debtor)

Address: Flat No 601 Embassy Tranquil, 22 8th Main Road, Koramangala 3rd Block, Bangalore, Karnataka, India- 560034

11. Mr. AchyutanandChoudhary (Director of Corporate Debtor)

Address: A-61, Ground Floor, South City-2, Gurgaon, Haryana-122001

12. Calabastas Ventures Private Limited

Address: 3/16, Shanti Niketan, 2nd Floor, New Delhi, South Delhi-110021



13. Lewis Trading Private Limited

Address: 11/3, 2 Floor, Park Read Diamoni,5 East Patel Nagar, Near Corp Bank ATM, New Delhi-110008

14. Carnation Realty Private Limited

Address: 11/3, 2 Floor, Park Read Diamoni,5 East Patel Nagar, Near Corp Bank ATM, New Delhi-110008

15. Carnation Variety Auto Private Limited

Address: 3/16, 2nd Floor, Shanti Niketan, New Delhi- 110021

16. Carnation Insurance Broking Company Private Limited

Address: 3/16, Shanti Niketan, 2nd Floor, New Delhi- 110021

17. Carnation Motors Private Limited

Address: 3/16, Shanti Niketan, 2nd Floor, New Delhi- 110021

Coram:

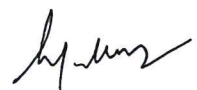
DR. P.S.N. PRASAD
Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ
Hon'ble Member (Technical)

Counsel for Financial Creditor: Mr. Saurabh Chawla and Mr. Pawan Sharma,
Advocate.

For Liquidator : Mr. Arvind

Order Delivered on: 24.07.2020



ORDER
PER DR. V.K SUBBURAJ, MEMBER(TECHNICAL)

1. This is a application filed by the Liquidator appointed by the Hon'ble NCLT to liquidate the Corporate Debtor M/s Carnation Auto India Private Limited under Section 43,45, 50 & 66 of the IBC, 2016 for avoidance of transactions in accordance with Chapter III of the IBC. He has submitted as follows on the basis of the Forensic Audit Report submitted by M/s K.G. Somani & Co., Chartered Accountants:-

- i. That the corporate debtor sold off fixed assets with an original cost of acquisition of ₹6,692.48 lakh during financial years 2009-10 to 2016-17, for a sale price of ₹455.89 Lakh, without prior permission from lender. These assets had been furnished as security to secured financial creditor, Punjab National Bank and any sale thereof require prior permission in writing from Punjab National Bank. Sale of fixed assets deprived the secured financial creditor of any means to recover the loan granted to corporate debtor and despite a charge having been created on them. Depreciation provided on sold fixed assets amounted to ₹4,367.40 Lakh.
- ii. That in their forensic audit report, forensic auditor has observed;
"Note that the term loan sanction letter states that the loan is



secured by hypothecation of plant and machinery, spares, stores, consumables, furniture and fixtures, leasehold improvements, loose tools, inventory of cars (old and new), other movable assets at the service centres/sales offices, book debts, insurance claim receivables etc. As the fixed assets held by the company covers the primary security of the loan, hence disposal of the same requires approval from lenders.”

iii. That Sale of fixed assets without written permission of secured financial creditor falls within the purview of Section 66 of IBC.

iv. That corporate debtor has given loans to Related Parties. The loans and advances given to related parties were in breach of terms of loan granted by Punjab National Bank. Following is the list of loans given to subsidiaries during the period January 2008 to September 2017;

Carnation Realty Private Limited	₹472.42 Lakh
Carnation Insurance Broking Company Private Limited	₹165.55 Lakh
Carnation Variety Auto Private Limited	₹259.45 Lakh
Carnation Motors Private Limited	₹125.10 Lakh

Loans given to subsidiary and other Related Parties is in violation of purpose of loan specified by the secured financial creditor falls within the purview of Section 66 of IBC.

v. That in their forensic audit report forensic auditors have observed;



“While reviewing details of Bad Debts written off and written back the following points has been observed:-

1. Partywise details of Bad Debts written off amounting to Rs.1139.02 Lacs and bad debts written back amounting to Rs 720.30 lacs were not identifiable.

2. The Total Bad Debts has been written off amount of Rs.2638.36 Lacs and Rs.892.17 Lacs has been written back. Hence the net balance bad debts written off is Rs.1746.19 Lacs.

3. The total amount of Bad Debts written is Rs.2638.36 Lacs out which Rs.992.41 Lacs approx. has been written off in case of Insurance companies.

4. Bad Debts amount of Rs.457.59 Lacs is pertaining to Related Parties.”

vi. That writing off bad debts amounting to ₹457.59 Lacs pertaining to Related Parties falls within the purview of section 66 of the Insolvency & Bankruptcy Code, 2016.

vii. That corporate debtor has made following provisions for loans and advances to related parties;

Carnation Variety Auto Private Limited	₹261.41 Lakh
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Carnation Motors Private Limited	₹123.38Lakh
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viii. That not recovering loans given to related parties/making provisions for doubtful debts falls within the purview of section 66 of IBC.

ix. That corporate debtor has made following investments in

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subsidiary companies;

Carnation Realty Private Limited	₹461.42 Lakh
Carnation Insurance Broking Company Private Limited	₹200.00 Lakh
Carnation Variety Auto Private Limited	₹0.51 Lakh

Subsequently provision for diminution of value in investments had been made for ₹182.51 Lakh. Despite appearing as assets in financial statements as at insolvency commencement date, these investments do not have realisable value.

Also the purpose of loans obtained by corporate debtor does not include making investments in subsidiary and other related parties. Making investments in related parties, in defiance of loan agreements falls within the purview of section 66 of IBC.

- x. That financial statements of corporate debtor as at insolvency commencement date, contain following loans and advances given to related parties in related parties disclosures;

Carnation Realty Private Limited	₹286.24 Lakh
Carnation Insurance Broking Company Private Limited	₹16.98 Lakh
Carnation Variety Auto Private Limited	₹261.41 Lakh

As the assets owned by these related parties are inadequate to recover these loans & advances and also these loans &

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advances initially had been given in defiance of terms of loans granted by financial creditors. These transactions fall within the purview of section 66 of the Insolvency & Bankruptcy Code, 2016.

- xi. That the corporate debtor, has written off inventory amounting to ₹604.17 lacs during the period January 2008 to September 2017. In their forensic audit report the forensic auditor has observed;

“The term loan sanction letter states that the loan is secured by hypothecation of plant and machinery, spares, stores, consumables, furniture and fixtures, leasehold improvements, loosetools, inventory of cars (old and new), other movable assets at the service centres/sales offices, book debts, insurance claim receivables etc.

As the primary security given by the company consisting of these type of inventories, hence writing off the same leads to the depletion in the value of security given to the PNB.

We have not been provided by the company, the spares wise detail of the written off amount and also the movements schedule of opening and closing spares, hence we are unable to comment on the reasons for writing off such inventory. Due to lack of information, we are unable to comment upon the end usage/treatment of the such physically available inventory.”

Writing off inventory amounting to ₹604.17 lacs falls within the purview of Section 66 of IBC.



- xii. That regarding transactions with Calabasas Ventures Pvt. Ltd., a related party, forensic auditor has observed;

“The company has availed services from Calabasas Ventures Pvt. Ltd. related to preparation of I&M, documentation charges with respect to seeking investment amounting to Rs 1,50,000 p.m. plus applicable taxes. Calabasas Ventures Pvt. Ltd. is a private company incorporated in 2015 and registered at 3/16, Shanti Niketan, 2nd Floor, New Delhi-110021. Mr. Kunal Khattar & his wife Ms. Sonalika Khattar are the directors of the company. Calabasas Ventures Pvt. Ltd. is a related party and details of services actually provided by it have not been furnished. As on 25.09.2017, the company has received services invoices of Rs 17,22,750/- from Calabasas Ventures Pvt. Ltd and payment for the same has also been made. Also agreement for the same has not been made available.”

Payment made to Calabasas Ventures Pvt. Ltd. falls within the purview of section 43 and 66 of IBC.

- xiii. That forensic auditor has observed regarding transactions with related parties;

“During the preceding two years, the company has incurred expenses on behalf of its group companies and also transferred funds to them. Later on, provision has been created in the books against these balances.



<i>Carnation Realty Private Limited</i>	<i>1,600,000</i>
<i>Lewis Trading Private Limited</i>	<i>2,800,000</i>
<i>Carnation Insurance Broking Company Private Limited</i>	<i>18,351</i>
	4,418,351

xiv. That incurring expenses on behalf of its group companies, transferring funds to them and later on creating provision in the books falls within the purview of section 66 of IBC.

xv. That the corporate debtor opened a large number of accounts with other banks, in violation to loan sanction agreement, thereby depriving secured financial creditor an opportunity to recover balance amount of loan. The forensic auditor has observed;

“Transactions routed through non-TRAaccounts

The term sheet with PNB states that, all the cash flows by way of proceeds from all

businesses to be routed through TRA account maintained with PNB.

However, there have been transactions through Non TRA accounts as well.”

xvi. That the forensic auditor further observed;

“Summary of Bank accounts operated during the period January 2008 to September 2017

Summary of bank accounts


<i>S.N.</i>	<i>Bank Name</i>	<i>No. of Accounts (CC / CA/ TRA)</i>
<i>1</i>	<i>City Corporation</i>	<i>1</i>
<i>2</i>	<i>HDFC Bank</i>	<i>50</i>
<i>3</i>	<i>ICICI Bank</i>	<i>2</i>
<i>4</i>	<i>Punjab National Bank</i>	<i>37</i>
<i>5</i>	<i>Standard Chartered Bank</i>	<i>1</i>
<i>6</i>	<i>State Bank of India</i>	<i>1</i>
<i>7</i>	<i>Yes Bank</i>	<i>1</i>
	<i>Total</i>	<i>93</i>

Source:-Management information

On analysing the transactions in the bank books of CAIPL which appears to be transacted from one bank account to other bank account of CAIPL we noted:

There were 254683 transactions aggregating to INR 4,17,768.09 Lacs which appears to be transferred within bank accounts other than TRA during the review period from January 2008 to September 2017.”

- xvii. That conducting transactions amounting to ₹4,17,768.09 Lacs within bank accounts other than TRA (Trust & Retention Account) with Punjab National Bank falls within the purview of section 66 of the Insolvency & Bankruptcy Code, 2016.



xviii. That the forensic auditor has observed;

“Substantial Cash Dealings

We have analyzed the cash ledger for the period April 01, 2010 to March 31, 2016 and observed substantial cash transactions related to collections, deposits and withdrawals.”

xix. That the corporate debtor indulged in substantial cash transactions, making it impossible to verify actual state of business operations. Making substantial cash transactions, making it impossible to verify actual state of business operations falls within the purview of section 66 of the Insolvency & Bankruptcy Code, 2016.

xx. That the corporate debtor assigned a brand valuation of ₹94.84 crore as security to Punjab National Bank. Corporate debtor had been incurring recurrent losses before and after furnishing unregistered brand as security with valuation purported to be for ₹94.84 crore. Book Losses incurred by corporate debtor till the financial year 2013-2014 amounted to ₹28,752.81 Lakh on a turnover of ₹43,736.70 Lakh. In percentage terms losses amounted to 65.74% of turnover. Corporate debtor had incurred losses for six consecutive financial years and revenues were not growing.



In aforementioned circumstances, furnishing an unregistered brand as security and valuing the brand at ₹94.84 Crore falls within the purview of section 66 of IBC.

- xxi. That Bad Debts amounting to of ₹457.59 Lacs, pertaining to Related Parties were written off. Despite continually writing off bad debts pertaining to related parties, CD continued to advance loans to related parties in violation of conditions stipulated in loan agreement.
- xxii. That Section 66 of the Code casts a duty upon the resolution professional/liquidator to file an application before the Adjudicating Authority for the transactions covered therein. In view of the above, the Applicant is filing the present Application seeking appropriate directions.

The instant application is being filed bonafide and in the interest of justice.

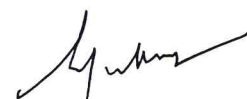
- xxiii. In the aforesaid facts and circumstances, it is most humbly and respectfully prayed:
- (a) That the Hon'ble National Company Law Tribunal may be pleased to allow this application.
- (b) That Hon'ble National Company Law Tribunal may be pleased to pass orders in accordance with section 66 & 67 of IBC.



- (c) That Hon'ble National Company Law Tribunal may be pleased to direct the erstwhile directors and persons related to them to make good the loss suffered by secured financial creditor, due to violation of loan agreement by CD.
- (d) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs. 6,692.48 lakh to the assets of the corporate debtor on account of selling the fixed assets of corporate debtor and depriving the secured financial creditor of availability security.
- (e) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs. 1022.52 lakh to the assets of the corporate debtor on account of Loans given to subsidiary and other Related Parties is in violation of purpose of loan specified by the secured financial creditor of corporate debtor.
- (f) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs. 457.59 Lacs to the assets of the corporate debtor for writing off bad debts pertaining to loans/advances given to Related Parties.



- (g) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs. 384.79 Lacs to the assets of the corporate debtor for not covering loans given to related parties/making provisions for doubtful debts.
- (h) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs.661.93 Lacs to the assets of the corporate debtor for making investments in related parties, in defiance of purpose of loans specified in loan agreements.
- (i) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs.564.63 Lacs to the assets of the corporate debtor for making loans & advances to related parties in defiance of terms/purpose of loans granted by financial creditor.
- (j) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs.604.17 Lacs to the assets of the corporate debtor for Writing off inventory of corporate debtor and depriving financial creditors of security available to them.
- (k) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of



Rs.17.23 lacs to the assets of the corporate debtor for making payments to elated party Calabasas Ventures Pvt Ltd.

- (l) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make contributions of Rs.44.18 lacs to the assets of the corporate debtor for incurring expenses on behalf of its group companies and also transferring funds to them and not recovering the amount.
- (m) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make appropriate contributions to the assets of the corporate debtor for conducting transactions amounting to Rs. 4,17,768.09 Lacs with bank accounts other than TRA (Trust & Retention Account) with Punjab National bank and for making substantial cash transactions.
- (n) That Hon'ble National Company Law Tribunal may be pleased to direct the Respondents to make appropriate contributions of Rs. 94.84 Crore to the assets of the corporate debtor for assigning brand valuation of Rs. 94.84 crore as security to Punjab National Bank.
- (o) That Hon'ble National Company Law Tribunal may be pleased to direct the erstwhile directors and persons related

to them for restitution of the amounts withdrawn by them by way of preferential payments.

(p) That the Hon'ble National Company Law Tribunal may be pleased to pass such other orders as may be deemed appropriate.

In the Liquidation Process of
Carnation Auto India Private Limited in liquidation
(Corporate Debtor)

2. Consequent to the issuing of notices by this Tribunal, the respondents no. 1,2,3,7,11,13,14&16, 4,5&10, 9&12 filed their replies and they are analysed as follows:-

i. Respondent No. 2: (Shri Kunal Khattar Erstwhile Director of the Company during 2008-2009 and 2014-15).

a) That the instant reply is being filed by Respondent No.2 (hereinafter referred to as 'Respondent'), who was a Director on the board of the Corporate Debtor way back during the period 2008-2009 and 2014-2015. That at the outset, all the allegations/ submissions / averments made in the instant application are denied in totality. It is most respectfully submitted that the Respondent was the erstwhile Director of the Corporate Debtor. It is relevant to mention that the Respondent herein had

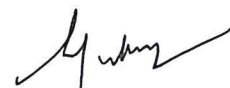
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demitted office way back in the year 07.01.2015. The insolvency resolution process in the case of the Corporate Debtor were initiated under the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) w.e.f. 25.09.2017 and since the Respondent in the instant case demitted office of Director long back no proceedings can be initiated against the Respondent since none of the transactions fall within the relevant period which is applicable in case of any proceedings under Section 43, 45 and 50 of IBC. Further as regards the applicability of provisions of Section 66 of IBC also no case has been made out against the Respondent in the instant case.

b) It is noteworthy that the Applicant has not made any specific averment as regards the knowledge if any and consent or connivance of the Respondent herein and thus the instant application against the Respondent herein is legally untenable.

c) Accordingly, it is humbly submitted that the transactions if any, which can be reviewed and /or looked into in the case of the Corporate Debtor herein can be only w.e.f. 01.12.2016. Accordingly, all the



transactions carried on prior to 01.12.2016, are outside the scope and purview of any jurisdiction and/ or review to be exercised by this Hon'ble Tribunal and liable to be rejected on this ground alone. Further since the Respondent herein had demitted office way back in 2015 no proceedings and/or relief can be sought against the Respondent in the instant case.

d) That it is pertinent to note that the Forensic Audit on which Applicant is solely relying upon is conducted by M/s K.G. Somani & Co. and under its Chapter "Observation on Section 43,45,50 & 60" the Forensic Auditor is of the view that the said transaction do not appear to be the transactions for misappropriation. The relevant portion of the observation of the Forensic Auditor reads as follows:

"On the basis of review of transactions mentioned in pages 40 to 41, on the basis of our discussion with management and our review of documents its appears to be in the nature of business transaction to run the business on a going concern basis and hence do not appear to be transactions for misappropriations."

Therefore, the Application is of feeble nature and should be out rightly rejected.



- e) Thus the relevant time for considering / taking into account the preferential transaction, if any carried out by Corporate Debtor with unrelated parties is 1 year i.e. between 25.09.2016 (to be read as 01.12.2106 i.e. the date when IBC came into force) to 25.09.2017 and in case of related parties is 2 years i.e. between 25.09.2015 (to be read as 01.12.2106 i.e. the date when IBC came into force) to 25.09.2017.
- f) Further from the analysis of the provisions of Section 43(4) it is clear that the `relevant time` for review/test of the transactions undertaken by Corporate Debtor with unrelated parties under Section 43 of the IBC is 1 year preceding from the insolvency commencement date and for related parties it is 2 years preceding the insolvency commencement date. As such the provisions of Section 43 of IBC encapsulate preferences accorded in transactions undertaken only during the relevant time and thus the transactions which fall beyond the relevant time, cannot be looked into as preferential in terms of the IBC. In the instant case the Respondent herein ceased to be Director with the Corporate Debtor prior to the relevant period and thus is not amenable to the



jurisdiction of this Hon'ble Tribunal in terms of the provisions of the IBC.

g) That it is submitted that the relevant period is also applicable in the case of Undervalued transaction as defined in Section 45 of IBC and Extortionate Transaction as defined under Section 50 and accordingly, the said provisions are also clearly not applicable in the instant case against the Answering Respondent in the present case.

h) That from the bare perusal of Section 66(1) of the IBC, it is clear that the provisions of Section 66 of IBC can be invoked in case 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. Under Section 66(2) an order can be passed by the Adjudicating Authority, if it is determined that before the insolvency commencement date, a Director or Partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of corporate insolvency resolution process in respect of such Corporate Debtor and such Director or Partner did not exercise due diligence in

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minimizing the potential loss to the creditors of the Corporate Debtor. In case it is demonstrated that the Director or Partner of the Corporate Debtor exercises due diligence and took reasonable care then any such transaction may not be eligible to be categorized as fraudulent or wrongful trading under Section 66 of IBC.

- i) That in the instant case the Applicant has not filed this application with any definite information or documentary evidence showing that the Corporate Debtor made a preferential payment or fraudulent trading at the given point of time. Therefore, in light of the judgment passed by the Hon'ble NCLT, Chennai Bench in the matter of *M/s. Orchid Pharma Limited*, this Application of the Applicant is liable to be rejected.
- ii. Respondent No.3: (Shri Gautam Khattar Erstwhile Director of the Company who demitted office way back in the year 31.12.2008).
 - a) He has also submitted that same views as expressed by the respondent no. 2.

iii. Respondent No.11: (Shri Achyutanand Choudhary, Chief Executive Officer of the Corporate Debtor from 01.04.2016 to 01.08.2018).

a) Opinion of the Liquidator that the Corporate Debtor has at a relevant time given preference in the transactions – In the present case from the pleadings of the instant application it is evident that Liquidator has not formed any opinion for the purposes of invoking Section 43 of the IBC. It is submitted that for the purposes of coming to an opinion the Liquidator is required to discharge his obligation and make averment and submission as regards the basis and the rationale for such an opinion.

b) Further, for the purposes of coming to the conclusion that preference has been given, it is incumbent to establish that there is a transfer of property or interest for the benefit of a creditor for an antecedent debt or other liabilities owed by the Corporate Debtor and such a transfer has the effect of putting such a creditor in a beneficial position than it would have been in the event of distribution of assets under Section 53 of the Code. In the present case, the Liquidator has failed to highlight any transaction which has resulted in preference being given to any creditor by virtue of

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transfer of any property or interest which has put such a creditor in a beneficial position than in terms of Section 53 of the Code.

In addition any transfers as contemplated under the said provisions made in ordinary course of business are outside the purview of preferential transactions in terms of Section 43 of the IBC.

- c) Determination by the Liquidator that transactions made during the relevant period were undervalued – In the instant case there is absolutely no determination of any nature by the Liquidator as regards transactions being entered during the relevant period as highlighted in the application under reply being undervalued. In absence of any such determination, no relief and / or order in terms of Chapter III of IBC can be granted in the present case.
- d) With respect to provision pertaining to Extortionate Credit Transactions, the Liquidator can make an application to the Adjudicating Authority only on a condition that if the terms of such transactions required exorbitant payments to be made by the Corporate Debtor. In the present case no proof of such exorbitant payment is to be made by the Corporate Debtor. Accordingly, no case can be made out under



Section 50 of the IBC in view of the facts and circumstances.

e) That from the bare perusal of Section 66(1) of the IBC, it is clear that the provisions of Section 66 of IBC can be invoked in case 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. Under Section 66(2) an order can be passed by the Adjudicating Authority, if it is determined that before the insolvency commencement date, a Director or Partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of corporate insolvency resolution process in respect of such Corporate Debtor and such Director or Partner did not exercise due diligence in minimizing the potential loss to the creditors of the Corporate Debtor. In case it is demonstrated that the Director or Partner of the Corporate Debtor exercises due diligence and took reasonable care then any such transaction may not be eligible to be categorized as fraudulent or wrongful trading under Section 66 of IBC.



f) That at the outset it is submitted that the Liquidator has no power to seek any directions from this Hon'ble Adjudicating Authority under Section 66 of IBC and accordingly the instant application is legally untenable. It is submitted that under Section 66 only the Resolution Professional can file an Application under Section 66 of the IBC, which is admittedly not the fact of the instant case.

iv. Respondent No.9: (Shri Ranjit Jayanti Lal Shah).

a) Pertinently, the Forensic Audit Report annexed at Annexure V of the Company Application, relied upon by the Liquidator, and based on which the present Company Application has been filed, itself does not conclude that there were any preferential, undervalued and extortionate credit transactions or transactions having been executed with the intention to defraud the creditors of the corporate debtor hereinabove or for other fraudulent purpose. On the contrary, the Forensic Audit Report, at page no. 116 of the Company Application, clearly states that, "... On the basis of our discussion with the management and our review of documents it appears to be in the nature of business



transactions to run the business on a going concern basis, and hence do not appear to be transactions for misappropriations". In the circumstances, the reliance upon the said Report and the Company Application based thereon is completely misplaced. Despite such a clear conclusion, the Liquidator has filed the present company application alleging that the case is covered by Section 66 IBC. Therefore, in any view of the matter, the Company Application is not maintainable vis-à-vis the Applicant.

b) Further, at paragraph 6 at page of 21 of the Company Application, the liquidator has himself set out that the said forensic audit report submitted by K.G.Somani & Co., Chartered Accountants, which is the basis of the Company Application, was deemed unsatisfactory by the Committee of Creditors.

v. Respondent No.12: (Shri P.C.Sharma, General Manager of Respondent No.12, M/s Calabaras Ventures Private Limited).

a) It is submitted that the respondent company is not a related party to the Corporate Debtor and the transaction as entered between the answering respondent and the

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corporate debtor does not fall within the ambit of Section 43,45 & 50 of IBC. Further as regards the applicability of provisions of Section 66 of IBC also no case has been made out against the respondent in the instant case.

- b) Therefore, by entering into this contract the corporate debtor saved a sum of Rs. 53 lacs. During this period the management of the corporate debtor were in talks with a number of potential investor. It meant working with advisors (the corporate debtor has given the mandate to one of the leading advisors BMR (now KPMG); following up with prospective parties; contact them and exchanging preliminaries; preparing IM and business plan etc. e.g. for Car Trade, MFC, Greaves Cotton, TVS Group, Ola, Droom, Autobacs, Motherson Sumi, etc.
- c) On the basis of review of transactions mentioned in pages 40 to 41, on the basis of our discussion with management and our review of documents its appears to be in the nature of business transaction to run the business on a going concern basis and hence do not appear to be transactions for misappropriations.



vi. Respondent No.4: (Shri Prakash Parthasarathy, Nominee Director of one of the investor company).

a) The Answering Respondent was appointed as a nominee director to the board of Carnation on 23rd October 2008 and ceased to be a director with effect from 20th August, 2014.

b) Under the terms of the SSSA, the Answering Respondent was a non-executive director of Carnation and was not involved in the day-to-day management of the Company.

c) The Liquidator has filed the Application primarily on the basis of findings contained in the Forensic Audit Report prepared by K.G.Somani & Co. on the instructions of PNB (the "Forensic Audit Report"). However, the Forensic Audit Report does not support the opinions formed by the Liquidator. The Forensic Audit Report inter alia analyses the transactions discussed therein to assess whether they fall within the scope of Sections 43, 45,50 or 66 of the IBC and concludes as follows:



“on the basis of review of transaction mentioned in pages 40 to 41, on the basis of our discussion with management and our review of documents it appears to be in the nature of business transaction to run the business on a going concern basis and hence do not appear to be transactions for misappropriations”.

d) Further, the Forensic Audit Report also records the responses of the management which have not been taken into account by the Liquidator for the purposes of the Application. For example, as regards the sale of assets, the Forensic Audit Report notes that according to the management, they were in “constant touch” with PNB and the sale took place with the knowledge of, and on the advice of, PNB. The Forensic Audit Report states that the management’s communications with the bank in this regard are annexed to the report (see page 103 of the Application). These communications have not been produced by the Resolution Professional/Liquidator with the Application before this Hon’ble Tribunal. Further, the Application contains no explanation as to why these communications between the management and the bank were disregarded.



- e) To the extent the Forensic Audit Report contains any adverse findings against the Company and its management, it is submitted that the Application prima facie discloses that the findings of the Forensic Audit Report may have been influenced by PNB. It notes that the initial version of the Forensic Audit Report was found to be “unsatisfactory” by the Committee of Creditor, which comprises of only PNB and IFCI Ventures Capital Funds Ltd. with PNB holding 66.36% of the voting rights. Thereafter, the resolution professional was instructed by the Committee of Creditors to hold a meeting with the auditor to reach “conclusive findings”.
- f) Neither the Application, nor the Forensic Audit Report on which the Application seeks to rely upon contains material particulars such as the date of the impugned transactions. The Application has been filed inter alia under Section 43 and 45 of the Code, both of which specify limitation periods up to which transactions can be re-examined. The Application does not disclose whether the impugned transactions fall within the time periods specified in Sections 43 (4) and 46 of the Code.



- g) The fact that PNB did not raise any concerns regarding sale of assets earlier suggests that the transactions took place with the knowledge and/or concurrence of PNB (as has also been recorded in the Forensic Audit Report), or that PNB was negligent in taking prompt action against Carnation. Insofar as the impugned transactions allegedly constitute breaches of the loan agreement between the company and PNB, it is submitted that these allegations of breaches should be analysed (if at all this Hon'ble Tribunal has jurisdiction to consider pure contractual breaches for the purpose of Section 43,45,50 and 66 of the Code, which is denied) by reference to the law of limitation. The purported breaches which took place more than three years prior to the submission of the Application ought not to be considered by this Hon'ble Tribunal.
- h) The Application does not contain any analysis as to whether the impugned transactions were carried out in the normal course of business; whether they were for the benefit of the Company etc. On the contrary, the contents of the Forensic Audit Report show that most of the impugned transactions (e.g. Sale of fixed assets)



were carried out in the normal course of business without any intent to defraud the creditors, or for any wrongful gain or fraudulent purpose.

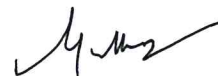
i) The application also fails to show any personal involvement of the Answering Respondent in any of the transactions on the basis of which directions have been sought against the Respondents for making contributions to the assets of the Company.

vii. Respondent No.5: (Shri Sayed Parvez Mustafa, Nominee Director of one of the investor companies) has substantiate that:

a) The Answering respondent was a nominee director of one of the investors of Carnation, Regal Investments and Trading Company Private Limited ("RITCL"), which later merged into Hasham Investment and Trading Company Private Limited ("Hasham") pursuant to a scheme of amalgamation sanctioned by the Hon'ble High Court of Karnataka through its order dated 26th March, 2015.

b) On the basis of review of the transactions mentioned in pages 40 to 41, on the basis of our discussion with management and our review of documents it appears to

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be in the nature of business transaction to run the business on a going concern basis and hence do not appear to be transactions for misappropriations.

c) To the extent the Forensic Audit Report contains any adverse findings against the company and its management, it is submitted that the Application prima facie discloses that the findings of the Forensic Audit Report may have been influenced by PNB. It notes that initial version of the Forensic Audit Report was found to be “unsatisfactory” by the Committee of Creditors, which comprises of only PNB and IFCI Ventures Capital Funds Ltd., with PNB holding 66.36% of the voting rights (see para 6 of the application). Thereafter, the resolution professional was instructed by the Committee of Creditors to hold a meeting with the auditor to reach “conclusive findings” (see page 75 of the Application).

d) The application and the Forensic Audit Report contain opinions and findings for the period January 2008 to September 2017 based inter alia on the financial statements of Carnation. These financial statements were available in the public domain for several years

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prior to the commencement of the insolvency process. To the extent the impugned transactions are addressed in the financial statements of Carnation, PNB should be deemed to have knowledge of such transactions since the financial statements were available in the public domain.

- e) That fact that PNB did not raise any concerns regarding sale of assets earlier suggests that the transaction took place with the knowledge and/or concurrence of PNB (as has also been recorded in the Forensic Audit Report), or that PNB was negligent in taking prompt action against Carnation. Insofar as the impugned transactions allegedly constitute breaches should be analysed (if at all this Hon'ble Tribunal has jurisdiction to consider pure contractual breaches for the purposes of Sections 43,45,50 & 66 of the Code, which is denied) by reference to the law of limitation. The purported breaches which took place more than three years prior to the submission of the Application ought not to be considered by this Hon'ble Tribunal.
- f) The impugned transactions have been questioned on the basis that they were contrary to the terms of the loan



agreement between PNB and the Company. It is submitted that mere breaches of the terms of the loan agreement do not provide an inference of intent to defraud, especially when there was no actual knowledge of any breach on the part of the Answering Respondent. Moreover, remedies for breach of contractual obligations cannot be sought in the present proceedings.

viii. Respondent No.10: (Shri Rajesh Ramaiah, Nominee Director of one of the investor companies).

a) This respondent has mentioned the same points as those of the respondents 4 & 5.

3. We have gone through the responses made by the respondents to the contents of the application made by the petitioner viz, the Liquidator and heard the arguments made by the counsels of both sides. Apart from individual defenses on specific raised by the petitioner, the respondents have relied on the following points:-

a) The Forensic Auditor has observed as follows:

“On the basis of review of transactions mentioned in page 40 to 41, on the basis of our discussion with management and our review of documents it appears to be in the nature of business

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transaction to run the business on a going concern basis and hence do not appear to be transactions for misappropriations ”

Moreover the CoC had expressed dissatisfaction over the findings of the audit report.

- b) The Forensic Auditor has not taken into account the relevant period of transaction under Section 43,45 & 50 of IBC 2016 viz., one year from the date of commencement of IRP for unrelated parties and 2 years for the related parties.
- c) Provisions of Section 66 of IBC can be invoked only if the business is transacted with an intent to defraud the company which has not been established in this case. Moreover it could be filed only by the RP and not the Liquidator.

Saying so they have pleaded for rejecting the claims of the applicant.

4. We have gone through the Audit Report submitted by the Forensic Auditor in detail. Perusal of the report indicates the following points:-

- a) The Forensic Auditor has covered related party payments and balances written off for the period from January, 2008 to September, 2017 and details of fixed assets sold by the company for the period from January, 2008 to September, 2017.

- b) He has analyzed the related parties transactions for the preceding 02 years and other transactions for the period preceding 01 year from initiation of CIRP and concludes that they appear to be in the nature of transaction to run the business as a going concern basis and hence do not appear to be transactions for misappropriations.
5. We find that the Forensic Auditor has not conducted the audit as per the procedures and he has not come to proper conclusions. This fact is confirmed by the fact that the CoC in its meeting on 22nd June, 2018 expressed their displeasure at the form and contents of the forensic audit report.
6. Hence we come to the conclusion that taking action based on the findings of an improperly conducted and weak Forensic Audit Report may not be proper in the eyes of law coupled with other legal points raised by the respondents in their individual affidavits.

For reasons stated above, the application filed by the

Liquidator is dismissed.

- Sd -

(Dr. V.K. SUBBURAJ)
MEMBER (TECHNICAL)

- Sd -

(Dr. P.S.N. PRASAD)
MEMBER (JUDICIAL)

Deepak