



**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH (COURT- I) CHENNAI**

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **25.09.2024** THROUGH VIDEO CONFERENCING

PRESENT: HON'BLE SHRI. SANJIV JAIN, MEMBER (JUDICIAL)
HON'BLE SHRI. VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

IN THE MATTER OF : Indian overseas bank
Vs
Shree Murugan Flour Mills Pvt Ltd

MAIN PETITION NUMBER : CP(IB)/233(CHE)/2021

(IA/MA) APPLICATION NUMBERS

IA/465(CHE)/2023

ORDER

Present: Ld. Counsel Shri. B. Dhanaraj along with Counsel Shri.

Mohammad Umar for the Applicant / Liquidator.

Ld. PCS Shri. K.S. Ravichandran for the Respondents.

Vide separate order pronounced in Open Court, the application is
dismissed with no orders as to cost.

Sd/-

(VENKATARAMAN SUBRAMANIAM)
MEMBER (TECHNICAL)

MG

Sd/-

(SANJIV JAIN)
MEMBER (JUDICIAL)



**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, CHENNAI**

IA/465(CHE)/2023 In CP(IB)/233(CHE)/2021

*(Filed under Section 35(1)(I) & 66 of Insolvency & Bankruptcy Code, 2016
r/w Rule 11 of NCLT Rules, 2016)*

In the matter of M/s. Shree Murugan Flour Mills Private Limited

Mr. P. Eswaramoorthy,

Liquidator of M/s.Shree Murugan Flour Mills Private Limited
44/1, 5th Street, Ramalinga Jothi Nagar,
Near Corporation Office, Nanjundapuram Road,
Ramanathapuram,
Coimbatore - 641045.

.....Applicant

Vs

1. Mr. Govindasamy Balasubramaniam

Ex-Director of
M/s. Shree Murugan Flour Mills Private Limited,
No.5, Vinayagar Kovil Street, Krishnasamy Nagar,
Ramanathapuram,
Coimbatore-641045.

2. Mr. Shanmuganchettiar Jeevarathinam,

Ex-Director of
M/s. Shree Murugan Flour Mills Private Limited
No.5, Vinayagar Kovil Street. Krishnasamy Nagar,
Ramanathapuram,
Coimbatore- 641045.

3. M/s. G B J Hotels Private Limited,

Represented by its Resolution Professional
Mr. Mahalingam Suresh Kumar,
M/s. S.P.P & Co., Chartered Accountants,
No. 27/9, Nivedh Vikas, Pankaja Mill Road,
Puliyakulam,
Coimbatore-641045.

..... Respondents



Order pronounced on 25th September, 2024

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

Applicant : Shri. B. Dhanaraj

Respondents : Dr.K.S.Ravichandran, PCS for R1 & R2

ORDER

(Hearing conducted through hybrid mode)

IA/465(CHE)/2023 has been filed by the Applicant/Liquidator

seeking the following reliefs:

a) Declare that the Respondent Nos. 1 and 2 have carried on business of the Corporate Debtor M/s. Shree Murugan Flour Mills Private Limited with an intent to defraud its Creditors.

b) Declare that the Respondent Nos. 1 and 2 have not taken any reasonable prospect of avoiding the commencement of CIRP of the Corporate Debtor and also not exercised due diligence in minimizing the potential loss to the Creditors of the Debtor.

c) Direct the Respondent Nos. 1 and 2 to make contributions to the tune of Rs.13,27,00,000/- (Rupees Thirteen Crores Twenty Seven Lakhs Only), into the account of the Corporate Debtor M/s. Shree Murugan Flour Mills Private Limited.

d) Pass such further or other orders which this Tribunal may deem fit and proper in the circumstance of this case and thus render justice.

2. SUBMISSIONS OF APPLICANT:

2.1. It is stated that Indian Overseas Bank had preferred an Application bearing No. CP(IB)/233/CHE/2021 under Section 7 of *Insolvency and*



Bankruptcy Code, 2016 ("I&B Code, 2016") for initiation of Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor M/s. Shree Murugan Flour Mills Private Limited. This Tribunal by its Order dated 21.04.2022 commenced the CIRP against the Corporate Debtor and appointed the Applicant as the Interim Resolution Professional ("IRP") of the Corporate Debtor.

2.2. It is stated that during the 1st CoC Meeting held on 16.05.2022, the Sole Financial Creditor resolved to appoint the Applicant herein as the Resolution Professional ("RP") of the Corporate Debtor.

2.3. It is stated that since there was no viable Resolution Plan, the Committee of Creditors in its 7th CoC Meeting dated 29.12.22 resolved to liquidate the Corporate Debtor and accordingly, an Application bearing *IA(IBC)/176 (CHE) 2023* was filed by the RP before the Tribunal. This Tribunal vide Order dated 06.03.2023 passed an Order of Liquidation of the Corporate Debtor and appointed the Applicant as the Liquidator of the Corporate Debtor.



2.4. It is stated that the Applicant / then RP/Liquidator verified the Audited Financial Statements ("AFS") for the Financial Years 2016-17, 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22 of the Corporate Debtor (Annexure II (4) to Annexure II (9)) and appointed M/s. Anbarasu & Jalapthi, Chartered Accountants, Coimbatore on 08.09.2022, in line with Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, to carry out the *Transaction Audit* of the Corporate Debtor and to form an opinion on whether the Corporate Debtor had been subjected to any Preferential Transactions, Undervalued Transactions, Extortionate Credit Transactions and Fraudulent Transactions. It is stated that the period taken into consideration for the purpose of the Transaction Audit was from 01.04.2016 till the date of CIRP commencement i.e., 21.04.2022.

2.5. It is stated that in the 7th CoC Meeting held on 29.12.2022, the Transaction Auditor submitted a draft Report to the Applicant and also sought certain clarifications from Indian Overseas Bank, the Sole Financial Creditor of the Corporate Debtor. It is stated that the



Transaction Auditor also informed the CoC that the Suspended Directors of the Corporate Debtor i.e., 1st and 2nd Respondent did not respond to the clarifications sought for by the Auditors.

2.6. It is stated that on 13.01.23, the Transaction Auditor furnished the Final Transaction Audit Report to the Applicant which records the following transactions amounting to Fraudulent Transactions under Section 66 of I&B Code, 2016.

Share Capital Advance to M/s. GBJ Hotels Private Limited:

a. The Corporate Debtor and M/s. G B J Hotels Private Limited, the 3rd Respondent are related parties and their Shareholders and Directors are common i.e. the 1st Respondent and the 2nd Respondent .

b. The Corporate Debtor is holding 6,81,438 Equity Shares in the above related party Company M/s. G B J Hotels Private Limited and also invested a sum of Rs.12,17,00,000/- (Rupees Twelve Crores Seventeen Lakhs Only) as per the Audited Financial Statement of M/s. G B J Hotels Private Limited for the year ended 31.03.2019 and 31.03.2020. Copy of the Audited Financial Statements of the 3rd Respondent downloaded from the Ministry of Corporate Affairs ("MCA") for the year ended 31.03.2019 and 31.03.2020 are attached.



c. The Company M/s. G B J Hotels Private Limited (3rd respondent) availed loans from Indian Overseas Bank, the Sole Financial Creditor of the Corporate Debtor and the Corporate Debtor extended its Corporate Guarantee to the loans availed by M/s. G B J Hotels Private Limited.

d. The Company M/s. G B J Hotels Private Limited was declared as Non-Performing Assets on 01.06.2019 and subsequently, the Financial Creditor Indian Overseas Bank filed an Application bearing *CP(IB)/279/CHE/2021* under Section 7 of I&B Code, 2016 and the same was admitted by the Tribunal on 19.04.2022.

e. The Corporate Debtor availed loans from Indian Overseas Bank and the above related party Company M/s. G B J Hotels Private Limited extended its Corporate Guarantee to the loans availed by the Corporate Debtor. The Corporate Debtor was declared as Non-Performing Assets on 31.03.2017.

f. Pursuant to the declaration of NPA of the Corporate Debtor on 31.03.2017 , despite declaration of the related party Company M/s. G B J Hotels Private Limited as NPA on 01.06.2019, the Respondents (1&2) without taking reasonable prospect of avoiding the commencement of CIRP of the Corporate Debtor, passed a resolution in the Extra-Ordinary General Meeting dated 22.07.2019, to invest Rs.11.64 Crores in M/s. G B J Hotels Private Limited for subscription of the equity. Accordingly, a sum of Rs.11,64,00,000/- (Rupees Eleven Crores



Sixty Four Lakhs Only) was paid as Share Capital Advance to M/s. G B J Hotels Private Limited.

g. The Corporate Debtor had already paid a sum of Rs.1,63,00,000/- (Rupees One Crore Sixty Three Lakhs Only) as Share Advance to M/s. G B J Hotels Private Limited earlier. In total, a sum of Rs.13,27,00,000/- (Rupees Thirteen Crores Twenty Seven Lakhs Only) was paid to M/s. G B J Hotels Private Limited as Share Capital Advance. However, M/s. G B J Hotels Private Limited did not allot any shares to the Corporate Debtor. The extract of disclosures that were made by M/s. G B J Hotels Private Limited, related party in FY 2018-19 and FY 2019-20 is extracted herewith for ready reference.

Description	As on 31.03.2020	As on 31.03.2019
Shree Murugan Flour Mills Private Limited		
Investment in Shares	12.17 Crores	12.17 Crores
Share Capital Advance	13.27 Crores	1.63 Crores

It is stated that the Respondents have knowingly paid the above amount as Share Capital Advance, in order to divert the amounts and to defraud the Creditors of the Corporate Debtor. The Net Worth of the Corporate Debtor since FY 2016-17 is as detailed below (In Crores):

Particulars	FY 21-22	FY 20-21	FY 19-20	FY 18-19	FY 17-18	FY 16-17
Net Worth	3.86	4.45	4.52	4.66	5.62	5.73
Total Liabilities	35.98	41.98	42.06	41.11	40.44	36.22



i. It is stated that despite the weak financial situation of the Corporate Debtor , instead of reviving the Corporate Debtor, the Respondents made significant investments and paid huge amounts to M/s. G B J Hotels Private Limited as Share Capital Advance which clearly shows that the Respondents have not exercised due diligence in minimizing the potential loss to the Creditors of the Corporate Debtor.

j. It is stated that the business of the Corporate Debtor was carried out with an intent to defraud the Creditors by diverting the funds to a tune of Rs.13,27,00,000/- (Rupees Thirteen Crores Twenty Seven Lakhs Only) to the related party M/s. G B J Hotels Private Limited as Fraudulent Trading/Wrongful Trading as per Section 66 of 1&B Code, 2016.

k. It is stated that the Applicant had submitted a Claim in Form-B dated 17.05.2022 for a sum of Rs.13,24,89,938/- to the 3rd Respondent under the head of Operational Creditors for the Share Advance amount paid to the 3rd Respondent, however, the 3rd Respondent partially admitted the claim to a tune of Rs.12,72,78,938/- under the Operational Creditor Category and rejected the balance amount of 0.52 Crores as there was no specific Agreement between the parties for payment of interest.



2.7. It is stated that the above narration establish that the business of the Corporate Debtor had been carried on by the Respondents with an intent to defraud the Creditors of the Corporate Debtor by diverting the amount of the Corporate Debtor to the related party M/s. G B J Hotels P. Ltd., as Share Capital Advance and further, the Respondents were well aware that there was no reasonable prospect of avoiding the commencement of a Corporate Insolvency Resolution Process in respect of the Corporate Debtor before the insolvency commencement date. It is stated that the Respondents had not exercised due diligence in minimizing the potential loss to the Creditors of the Corporate Debtor. Thus, the Respondents are liable under Section 66 of I&B Code, 2016.

2.8. It is stated that the Respondents No. 1 and 2 are jointly and severally liable to make such contributions to the assets of the Corporate Debtor to the tune of Rs.13,27,00,000/- (Rupees Thirteen Crores Twenty Seven Lakhs Only).

2.9. It is stated that in the above circumstances, the present Application has been filed, seeking intervention of this Tribunal, to direct the



Respondent 1 and 2 to make contributions of Rs.13,27,00,000/- (Rupees Thirteen Crores Twenty Seven Lakhs Only) to the account of the Corporate Debtor. It is stated that the said amount shall form an essential portion of the assets of the Corporate Debtor, which if recovered and credited to the account of the Corporate Debtor, shall serve for the benefits of all the Stakeholders of the Corporate Debtor.

3. COUNTER FILED ON BEHALF OF RESPONDENTS NO. 1 & 2

3.1. It is stated that 2nd Respondent has given Power of Attorney in favour of 1st respondent. Accordingly, the counter has been filed by 1st respondent on behalf of both the respondents. No reply or counter has been filed by 3rd respondent GBJ Hotels Pvt Ltd, which also was admitted to CIRP process.

3.2. The Respondents No 1 and 2 Suspended Directors (hereinafter referred to as the Respondents) in their reply to the Application made by the Applicant / Resolution Professional herein under *Section 35(1)(1)* read with *Section 66 of the Insolvency and Bankruptcy Code, 2016* ('the IBC/Code'), have submitted as under:



a) The entire Application is faux and frivolous in nature. It is stated that the Financial Creditor is same for the Corporate Debtor and M/s. GBJ Hotels Private Limited ('the Respondent No.3, a Related Party Company'). The Financial Creditor being the sole Creditor to the Corporate Debtor is well aware of the financial transactions, payments made to and from, both the Corporate Debtor as well as the Respondent No.3 Company.

b) It is stated that the amount involved in the transaction is not a small sum of money for the Financial Creditor to turn around today after years and state that the same is hit by Section 66 of the Code. Secondly, when the same Financial Creditor lent money to both the companies and all the properties of the companies and personal properties were mortgaged with the same Financial Creditor, the Financial Creditor had no problems at the relevant point of time.

c) It is stated that in hindsight, the Applicant / Liquidator (hereinafter referred to as the Liquidator) cannot bring out an allegation of Fraudulent / Wrongful Trading under Section 66 of the Code.



d) It is stated that the Application has been filed without any material evidence, out of thin air and holds no substance in order to establish the commission of a Fraudulent / Wrongful Trading as per the provisions of Section 66 of the Code. Except that so many papers have been enclosed running into 500-600 pages, there is nothing in the Application which would specifically prove the ingredients under Section 66 of the Code.

e) It is stated that the Liquidator neither applied his mind nor understood the meaning of requirements specified under Section 66 of the Code, to allege a commission of Fraudulent Trading or Wrongful Trading. The Liquidator simply relied upon Transaction Audit Report dated 13th January 2023 submitted by Mr Anbarasu and Mr Jalapathi, Chartered Accountants (Transaction Auditor), who made some imaginary analysis from the figures appearing in the Audited Financial Statements ('AFS') of the Corporate Debtor, alleging them to be Fraudulent and wrongful in nature falling within the meaning and meeting the requirements provided under Section 66 of the Code.



f) It is stated that the allegation of the Transaction Auditor that the moneys transferred by the Corporate Debtor to the Respondent No. 3 to the extent of Rs.13,27,00,000/- (Rupees Thirteen Crores Twenty Seven Lakhs Only) as 'Share Advance Money' does not fall within the meaning of fraudulent and wrongful trading as provided under Section 66 of the Code.

g) It is stated that the Applicant is well-aware that Respondent No. 3, is currently before the National Company Law Tribunal, Chennai Bench (the Adjudicating Authority). A Resolution Plan has been submitted under Section 30(6), Sec 31 read with the Rule 11, 14 and 15 of the National Company Law Tribunal Rules 2016 vide IA/349(CHE)/2023 in CP(IB)/279(CHE)/2021 for approval.

h) It is stated that the Liquidator already had submitted a claim for the same amount of Rs.13,24,89,938/- (Rupees Thirteen Crores Twenty Four Lakhs Eighty Nine Thousand Nine Hundred and Thirty Eight Only) with the Resolution Professional of Respondent No. 3 and the claim was also admitted by the Resolution Professional of Respondent No. 3 to the extent of Rs.12,72,78,846/- (Rupees Twelve Crores Seventy



Two Lakhs Seventy Eight Thousand Eight Hundred and Forty Six Only) and it also forms the part of the Resolution Plan submitted by the Successful Resolution Applicant (SRA) for Respondent No. 3.

i) It is stated that the amount alleged as 'Fraudulent/Wrongful' in nature by the Liquidator stands already claimed and admitted by the Resolution Professional of Respondent No. 3 to be paid in the form and mode as prescribed under the Resolution Plan, once the same is approved by the Adjudicating Authority. It is stated that no objection was raised by the Applicant/Liquidator with respect to the pay-out proposed by the SRA in its Resolution Plan, on behalf of and in the interest of the stakeholders of the Corporate Debtor. Thus, the 'Share Advance Money' claimed under the instant Application stands settled, included and extinguished and therefore no claim to this extent exists as on today. It is stated that on this ground alone, the instant Application is liable to be dismissed *in limine*.

j) It is stated that the Liquidator has to establish as to whether the alleged transfers fall under Section 66(1) or 66(2) of the Code, as both sub-sections are distinct provisions and require meeting of different set



of mandatory ingredients. Section 66(1) pertains to Fraudulent Trading and Section 66(2) of the Code pertains to Wrongful Trading and cannot be clubbed together as per their own discretion.

k) It is stated that no ingredient of Section 66(1) or 66(2) of the Code has been made out by the Liquidator. No such intention or 'fraud' as provided under Section 66 of the Code, could even be gleaned from the pleadings, not to speak about the Liquidator relying on any cogent evidence to substantiate his allegations against the answering Respondents.

l) It is stated that Section 66(1) of the Code specifically requires the Applicant to prove that the business of the Corporate Debtor has been carried on 'in a fraudulent manner' or 'for a fraudulent purpose'. It further requires the Applicant to prove that the Respondents have been "knowingly" parties to the carrying on the business in such manner. Under Section 66(2) of the Code, the Applicant ought to prove as to on what basis the Respondents have not exercised the due diligence in minimizing any loss to the Creditors of the Corporate Debtor.



m) As to the submission of the Liquidator under sub-para no. 6(f) of Para No. IV of its Application, the said Account of the Corporate Debtor was marked as a Non-Performing Asset ('NPA') with effect from 31st March 2017 and that transfers were made from the Corporate Debtor to Respondent No. 3, under the head 'Share Advance money' for Rs.1.63 Crores and Rs.11.64 Crores in the year 2018-19 and 2019-20, respectively. It is stated that the said classification of loan account of the Corporate Debtor as '*NPA*' *with a retrospective effect*, was in fact, brought to the notice of the Respondents, only upon issue of a Demand Notice to the Borrowers/Guarantors under sub-section (2) of the Section 13 of the SARFAESI Act, dated 06th August 2019 . The said classification is under challenge by the Respondents before the Hon'ble National Company Law Appellate Tribunal ('the NCLAT/Appellate Tribunal') vide Company Appeal (AT) No. 141 of 2022.

n) It is stated that the Liquidator cannot allege that transfers were made subsequent to classification in 2017 itself, without bringing on record any document or evidence to prove that the Respondents had any intention to 'defraud' or there was apparent failure on their part to exercise due diligence The said classification, in itself is under



challenge and nowhere in the said AFS there is any mention with respect to classification of the said accounts or status of the Corporate Debtor. It is stated that according to the Auditor, the transaction can be termed as “phoenixing”. Though a jargon has been invented, it would have been useful if the Auditor had relied on proper facts and supported his statements about the alleged insolvent financial position of the Corporate Debtor and further added evidence of the actual dates and amounts of investments made on or after the date of said resolution. The minimum expected of the Liquidator as an Insolvency Professional, is to first state the date from which the apparent insolvency situation prevailed in the Corporate Debtor and set out transactions that are allegedly hit by Section 66 of the Code. In the absence of specific particulars in the Application and the Transaction Audit Report, the Application is liable to be treated as malicious, filed in utter abuse of process of this Tribunal.

o) It is stated that the Application on the whole is baseless, empty and an utter abuse to the process of law. The Liquidator failed to establish how the transaction is said to be not in the ordinary course of business or financial affairs of the Corporate Debtor. The Application is nothing



but an empty shell blindly prepared on the basis of the so-called “Transaction Audit Report”. It is submitted that the Liquidator has neither formed an opinion nor verified the allegations made out as per provisions applicable thereto, on his own. It is stated that the Respondents never received any queries in relation to the allegations made out under the instant Application, neither from the Transaction Auditor nor the Liquidator and no such record is placed before this Tribunal along with the Application. It is stated that the Respondents, in their individual capacity, have not gained in any manner for them to reimburse any alleged amount to the Corporate Debtor. The alleged transfers have been made by the Corporate Debtor, pursuant to duly passed resolutions

p) It is stated that from the various representations, statements and observations made in the Transaction Audit Report, several inconsistencies and flaws are apparent on the face of those papers. There are several such infirmities which require detailed submissions and substantiation by the Liquidator herein. It is submitted that the instant Application fails on several grounds and is liable to be dismissed *in limine*.



4. REJOINDER FOR THE COUNTER OF THE RESPONDENT NOS. 1 & 2

4.1. It is stated that the contentions of the Respondent No. 1 and 2 are not supported with any documents. The Respondent No. 1 and 2 have not disputed the fact that a sum of Rs.13,27,00,000/- was paid to the 3rd Respondent Company as a Share Capital Advance during the FY 2019-2020, a Company which was declared as NPA on 01.06.2019.

4.2. The Applicant/Liquidator is setting forth the contentions in his defence to the Counter filed by the Respondent No. 1 and 2 of the Application, as follows:

- i. The Applicant verified the Audited Financial Statements ("AFS") of both the Corporate Debtor and the 3rd Respondent Company wherein, the Respondent No. 1 and 2 are the Common Directors. A bare perusal of the AFS of both the CD and the 3rd Respondent Company for the FY 2019-2020 reveal that a sum of Rs.13,27,00,000/- was paid as Share Capital advance to the 3rd Respondent after it was declared as NPA on 01.06.2019.



ii. The contentions of the Respondent No. 1 and 2 that the common Financial Creditor having the prior knowledge of the above transactions had no problems for the above transactions entered and the Applicant had simply relied upon the Transaction Audit Report is not maintainable both in facts and law.

iii. The Applicant as the custodian of the Corporate Debtor and in compliance of his duties as per the provisions of I&B Code, 2016, submitted a Claim before the RP of the 3rd Respondent Company on 17.05.2022 and the same was admitted to a tune of Rs.12,72,78,846/- under the head of "Operational Creditors".

iv. The admission of the claim amount and distribution of any amount as per the Resolution Plan of the 3rd Respondent Company approved by the Hon'ble Tribunal would not preclude the Respondent No. 1 and 2 from their casual, whimsical and negligent manner to transfer of huge amount of the Corporate Debtor to the 3rd Respondent Company.



v. During the FY 2019-20, the total liabilities of the Corporate Debtor stood at Rs.42.06 Crores and the Net Worth stood at Rs.4.52 Crores. Despite the above weak financial situation of the Corporate Debtor, the Respondent No. 1 and 2 being the common directors of the 3rd Respondent Company which was declared as NPA, knowingly paid the amount as Share Capital Advance, in order to divert the amount and to defraud the creditors of the Corporate Debtor.

vi. The language of Section 66 (2) of I&B Code, 2016 is very clear and requires no interpretation. The Respondent No. 1 and 2 being the common directors of both the Corporate Debtor and the 3rd Respondent, in a negligent manner transferred a huge amount from the Corporate Debtor to the 3rd Respondent Company without taking reasonable prospect for avoiding CIRP of the Corporate Debtor and not exercising the due diligence in minimizing the loss to the Creditors of the Corporate Debtor. Therefore, the vague allegations of the Respondent No. 1



and 2 are nothing but a futile attempt to evade the liability under Section 66 of I&B Code, 2016.

vii. Pursuant to the verification of the AFS of both the Corporate Debtor and the 3rd Respondent Company, the Applicant/Liquidator was given to understand about the wrongful transfer of the huge amount of the Corporate Debtor to the 3rd Respondent under the ruse of Advance Share Capital. Therefore, the contentions of the Respondent No. 1 and 2 that the Liquidator had not formed an opinion and verified the transaction on his own is factually incorrect.

viii. Section 42(6) of the Companies Act. 2013 mandates for allotment of shares within a period of 60 days from the date of receipt of Share Application Money and if the shares are not allowed, the money shall be refunded within a period of 15 days and on failure to refund the same, the interest @ 12% has to be paid by the Company.



ix. As regards the reliance to the proviso to Section 68 of the Code, 2016 the Corporate Debtor was in financial crises and a huge amount was diverted to the Group Company in which the directors are interested. Therefore, the conduct of the Respondent No. 1 and 2 establish that they failed to take any reasonable prospect for avoiding CIRP of the Corporate Debtor and negligent in minimizing the loss to the Creditors of the Corporate Debtor.

x. The 1st and 2nd Respondents have not justified their act of diverting the huge funds to the tune of Rs.13.27 crores to the Related Party 3rd Respondent as Share Capital Advance, despite the weak financial situation of the Corporate Debtor.

4.3. It is stated that the Corporate Debtor was declared as NPA on 31.03.2017 and during the financial crisis of the Corporate Debtor, the Respondent No.1 and 2 without taking reasonable prospect of avoiding the commencement of CIRP of the CD and not exercising the



due diligence in minimizing the potential loss to the Creditors of the CD had invested the above sum into the 3rd Respondent Company. Hence, the Respondent No. 1 and 2 have invited themselves to be rendered liable under Section 66 of 1&B Code, 2016.

5. ANALYSIS AND FINDINGS

5.1. Heard the submissions of the Ld. Counsels and perused the pleadings and written submissions placed on record.

5.2. It is stated by the applicant that the Corporate Debtor was declared as NPA on 31.03.2017 and the related party Company M/s. G B J Hotels Private Limited was declared as NPA on 01.06.2019. It is further stated that the Respondents without taking a reasonable prospect of avoiding the commencement of CIRP of the Corporate Debtor, passed a resolution in the *Extra-Ordinary General Meeting* dated 22.07.2019, to invest Rs.11.64 Crores in M/s. G B J Hotels Private Limited for subscription of the equity. Accordingly, a sum of Rs.11,64,00,000/- (Rupees Eleven Crores Sixty Four Lakhs Only) was paid as Share Capital Advance to M/s. G B J Hotels Private Limited in the financial year 2019-20.



5.3. It is stated by the respondent that Corporate Debtor was made aware of NPA status only on receipt of SARFAESI Notice dated 06th August 2019 issued by Indian Overseas Bank. It is stated that the account was made NPA with retrospective effect from 31.03.2017 post-audit and Corporate Debtor became aware of it only on 06th August 2019. Further, it is stated that the Corporate Debtor approved the share investment in 3rd respondent in Extraordinary General Meeting held on 22.07.2019 before 6th Aug 2019 and the act was done to save the 3rd respondent after it was declared as NPA on 01.06.2019.

5.4. It is stated by 1st and 2nd respondents that Indian Overseas Bank is the *sole financial creditor* for both the Corporate Debtor and 3rd respondent. Further, *Corporate Debtor and 3rd respondent have provided Corporate Guarantee to each other's loan facility.*

5.5. *The issues to be addressed by the tribunal are as under:*

a) NPA date – whether retrospective or not?

i) The applicant has stated the date of NPA of the Corporate Debtor as 31.03.2017, which was contested by respondents stating that NPA date was made retrospectively.



ii) While perusing the documents submitted by the Financial Creditor Indian Overseas Bank in the *CP IB 233 / 2021* against Corporate Debtor, we find that the submission of the 1st and 2nd respondent regarding the corporate debtor being made NPA with retrospective effect is corroborated. The financial creditor renewed the OCC limit of Rs. 2684 lakhs of Corporate Debtor on 11.10.2017. If the account had been declared as NPA on 31.03.2017, then renewal of limit would not have happened , as renewal of limit is carried out only for standard account and not for a NPA. The relevant portion of the petition is appended below:

11.05.2016	Adhoc limit of Rs.284 lakhs	Adhoc limit of Rs.284 lakhs	13.05.2016
21.11.2016	Sanction of Adhoc OCC limit of Rs.284 lakhs	Sanction of Adhoc OCC limit of Rs.284 lakhs	22.11.2016
11.10.2017	Renewal of OCC limit to the tune of Rs.2684 lakhs	Renewal of OCC limit to the tune of Rs.2684 lakhs	11.10.2017

3. The Financial Creditor respectfully submits that the Corporate Debtor and guarantors had duly executed the aforesaid loan security documents apart from confirmation of balance of outstanding loan amount on 11.10.2017, 28.11.2017. The CD company has also registered charge before ROC, Tamilnadu from time to time as evident from search report dated 04.03.2019.

iii) Further the fact that the account of Corporate Debtor was made NPA with retrospective effect is evident from Para 5 of the application in *CP IB 233 of 2021* wherein it is mentioned by financial creditor (Petitioner) that the loan accounts of the Corporate Debtor slipped to



NPA category on 31.03.2017 *based on RBI guidelines on 31.03.2019*, as under :

5. The Financial Creditor further submits that the loan accounts as per the books of accounts of financial creditor slipped into NPA category on 31.03.2017 and as per RBI guidelines on 31.03.2019.
6. The Financial Creditor further submits that they have caused demand notice under section 13 (2) of the SARFAESI Act on 06.08.2019 and possession notice on 24.02.2020 and 05.03.2020 but no response.

b) Whether Corporate Debtor's action of Diversion /Investment by way of share advance in 3rd respondent impacted the financial health of Corporate Debtor and resulted in the initiation of CIRP?

i) It is stated by the applicant Liquidator that the Corporate Debtor was declared as NPA on 31.03.2017 and during the financial crisis of the Corporate Debtor, the Respondent No.1 and 2 without taking reasonable prospect of avoiding the commencement of CIRP of the CD and not exercising the due diligence in minimizing the potential loss to the Creditors of the CD invested the share advance into the 3rd Respondent Company.



ii) In order to substantiate the claim , the applicant has furnished the Net Worth of the Corporate Debtor vis a vis its Total Liabilities for the five years period from Financial Year 2016-17 to Financial Year 2021-22 as detailed below (*In Crores*):

Particulars	FY 21-22	FY 20-21	FY 19-20	FY 18-19	FY 17-18	FY 16-17
Net Worth	3.86	4.45	4.52	4.66	5.62	5.73
Total Liabilities	35.98	41.98	42.06	41.11	40.44	36.22

iii) It is observed that the net worth of the Corporate Debtor was only Rs.4.52 cr in Financial Year 2019-20 but despite that an amount of Rs.13.27 cr was transferred by Corporate Debtor to the 3rd respondent, as share advance.

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The following is the listing of receivables and payables to related parties as on 31.03.2020.

		<u>Current Year</u> <u>31.03.2020</u>	<u>Previous Year</u> <u>31.03.2019</u>
1	Rajaram Flour Mill (P) Ltd., (Receivable)	Rs. 3,23,06,639	Rs. 12,97,23,228
2	Hindustan Flour Mill (Payable)	Rs. 4,15,54,799	Rs. 4,58,63,539
3	Emerald Associates (Payable)	Rs. 31,65,893	Rs. 28,35,893
4	Sri Sivasakthi Enterprises (Receivable)	Rs. 2,05,06,590	Rs. 2,35,44,980
5	GBJ Hotels Private Limited (Receivable)	Rs. 13,26,89,938	Rs. 1,63,04,350
6	Investment of Equity shares in GBJ Hotels Private Limited	Rs. 12,16,93,900	Rs. 12,16,93,900

Direction Remuneration

		<u>Current Year</u> <u>31.03.2020</u>	<u>Previous Year</u> <u>31.03.2019</u>
1	G.Balasubramaniam	Rs. NIL	Rs. NIL
2	B.Jeevarethinam	Rs. NIL	Rs. NIL



iv) However, if we analyse list of Related Party transactions and the *Audited Balance Sheet* of the Corporate Debtor for the year ending 31.03.2020 as furnished above, another new perspective emerges as under:

i) (Share Advance money) due from GBJ Hotels Private Limited went up to Rs.13,26,89,938/- in 31.03.20 from Rs. 1,63,04,350/- on 31.03.19 resulting in an increased investment / outflow of Rs. 11,63,85,588/- .

ii) Receivables due from Rajaram Flour Mills P Ltd (another related party) came down to Rs. 3,23,06,639/- as on 31.03.20 compared to Rs. 12,97,23,228/- in 2019, resulting in a reduction / inflow of Rs.9,74,16,589/- .

v) We find that this Rs.9.74 cr received from the related party is a source of fund for the Corporate Debtor to pay the Share Advance of Rs.11.64 cr to another related party GBJ Hotels Pvt Ltd.

vi) Further, respondents contend that the onslaught of Covid 19 from March 2020 which crippled the MSME units of the country had major



impact on the Corporate Debtor and it was forced to shut down the activities.

vii) Hence we do not find any reason to attribute that the share investment made by the Corporate Debtor was a major contributory factor for the account becoming NPA.

c) Whether Share Advance money made by Corporate Debtor will be an investment or an Operational Credit or Financial Credit?

i) The applicant liquidator has taken two different stands as under:

In the application, the applicant liquidator has quoted provisions of Section 42(6) of the Companies Act. 2013 which mandates that if the shares are not allotted, the money should be refunded within a period of 15 days and on failure to refund the same, the interest @ 12% has to be paid by the Company and treats the amount as financial debt.

However, it is seen that the applicant liquidator filed Claim Form B as Operational Creditor with 3rd respondent's RP for



the share advance made by the Corporate Debtor and treated the amount as Operational Credit.

ii) The reason for taking different stands by the applicant one as financial credit and another as Operational credit has not been explained.

d) Whether the admission of claim of the share advance money by liquidator of 3rd respondent precludes filing claim under Section 66 of IBC against 1st and 2nd respondents?

i) It is stated by the respondents that the amount alleged as 'Fraudulent/Wrongful' in nature by the Liquidator stands already claimed and admitted by the Resolution Professional of Respondent No. 3 and is to be paid in the form and mode as prescribed under the Resolution Plan, once the same is approved by the Adjudicating Authority. It is stated that no objection was raised by the Applicant/Liquidator with respect to the pay-out proposed by SRA in its Resolution Plan, on behalf of and in the interests of the stakeholders of the Corporate Debtor. Thus, 'Share Advance Money' claimed under



the instant Application stands settled, included and extinguished and therefore no claim to this extent exists as on today.

ii) In the present case, we observe that the claim has been admitted in the CIRP process of 3rd respondent, a resolution plan has already been submitted and the claim was made part of the resolution plan. However this does not preclude the applicant to pursue the Section 66 application and prove any fraudulent or wrongful transaction against the respondents.

Legal provisions:

5.6. SECTION 66: FRAUDULENT TRADING OR WRONGFUL TRADING.

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.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—



(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

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.

5.7. The Applicant has cited the Hon'ble NCLAT judgement in *Company Appeal (AT) (INS) No. 869 of 2022, in the matter of Prasat Chandra Rath (Suspended Director of the CD) & Anr. vs. Surya Kanta Satapathy (RP) & 1 Anr.*, to support his argument. The Para No. 19 and 20 are as follows:

“19. We begin with the issue of diversion of funds to the sister concern by the Corporate Debtor. We find that it is an undisputed fact that the Corporate Debtor had invested an amount of Rs.13.45 Crores in its sister concern MDTPCL. The Learned counsel for the Appellant has however, argued that it cannot be termed as a fraudulent act since it was a commercial decision taken by the Corporate Debtor with good intention. It has also been stated that the bonafide of the transaction is validated by the fact that the investment of funds in the sister concern



was done with the knowledge of the Financial Creditors and that it has been reflected in the audited balance sheet of the Corporate Debtor. On the other hand, the TA has furnished detailed reasoning for holding the above transaction to be a case of diversion of funds for the reason that the Corporate Debtor not having sufficient surplus funds of its own and having borrowed a loan along with interest, diverted such borrowed funds which is not permitted under the Companies Act and amounts to violation of bank lending norms. The TAR further mention that such diversion of funds is against prudent business practise as instead of yielding better returns, it saddled the Corporate Debtor with interest loss.

20. Given the above facts, on balance of consideration, we are inclined to agree with the Adjudicating Authority that the defence taken by the Appellants cannot detract from the plain truth that the Appellants had wrongfully diverted funds which in turn had aggravated the financial liability of the Corporate Debtor and thus an unethical act to defraud creditor tantamounting to fraudulent trade practice."

5.8. In *Venkatesan Sanakaranarayanan Vs Nitin Shambukumar Kasliwal and other* SCC Online NCLT 3171 , NCLT Mumbai on 29th Nov 2021 held as follows:

7. The Bench observes that it is a fact that management of company have taken certain decision which has not worked out as intended by the management and eventually loss occurred. However, such bad commercial business decision cannot be considered to be fraudulent or wrongful trading under provisions of Section 66 of the IBC.



5.9. In *Regen Powertech Private Limited Vs Wind Construction Private Limited* [Company Appeal AT CH Ins No. 349/2022] in the order dated 23rd Sep 2022 , Hon'ble NCLAT held that:

35. As a matter of fact, the 'aspect' of 'Fraudulent Trading' requires a very 'High Degree of proof', which is attached to the 'Fraudulent Intent'. To put it emphatically, a more compelling 'Material' / 'Evidence' is required to satisfy the conscience of this 'Tribunal', 'on a preponderance of probability'. Apart from that, an 'isolated' / 'solo fraud' case, against the person, then, action in 'tort' can be resorted to, as opined by this 'Tribunal'. No wonder, a 'Creditor', who was defrauded, will have 'recourse' to an 'alternative remedy', under 'Civil Law'."

5.10. In *Shibu Job Cheeran and Ors, vs. Ashok Velamur Seshadri, Liquidator of M/s. Archana Motors Limited* in Company Appeal (AT) (CH) (INS) No. 350 of 2021, the Hon'ble NCLAT observed as follows:

"42. It is seen from the above that Section 66 of the 1 & B Code, 2016, gives powers to the 'Adjudicating Authority' to pass suitable orders, if it is found that any person has carried on the business of the Corporate



Debtor with an intention to defraud its 'Creditors' or other 'stakeholders' Section 66 also give powers to the 'Adjudicating Authority' to give directions for making contribution to the assets of the Corporate Debtor This also includes Directors of the 'Corporate Debtor' and their personal liability towards contribution, provided such Directors did not exercise due diligence or failed to take reasonable possibility of avoiding the commencement of 'Corporate Insolvency Resolution Process'. However, a director can be deemed to have exercised due diligence, if such diligence was exercised as expected reasonably of a director carrying out a business in ordinary course of business."

5.11. In *Mr. Tenny Jose vs Mr. Prathap Pillai Resolution Professional of M/s. Tenny Jose Limited in Company Appeal (AT) (CH) (INS.) No. 95/2023*, the Hon'ble NCLAT explained fraudulent trading as under:

Fraudulent Trading: 21. The Offence of Fraudulent Trading', unlike 'Fraudulent Preference', involves an 'element of blame'. When whole 'business' of a 'Company', is being carried on, with an 'intend to Defraud', then, Section 66 of I& B Code, 2016, is breached, as opined



by this 'Tribunal'. 22. A pre-ponderance of probability, will suffice, in respect of an 'Offence of Fraudulent Trading', under Section 66 of the 'Code', is sufficient, but, the probability, must be such that, it must satisfy', the 'subjective conscience of the 'Adjudicating Authority' / 'Tribunal'

5.12. In *Svenska Handels Banken vs. Indian Charge Chrome and Ors.* [(1994) 1 SCC 504] and *Anil Rishi vs. Gurbaksh Singh* [(2006) SCC 558/ the Hon'ble Supreme Court of India held that the allegations of fraud are grave in nature and cannot be *ipsi dixit* of the person raising such allegations and such allegations of fraud cannot be merely on suspicion but need to be pleaded with strong evidence.

5.13. In *Union of India v. Chaturbhai M Patel & Co.*, reported in (1976) 1 SCC 747, Hon'ble Supreme Court observed that Fraud, must be established beyond reasonable doubt and the mere suspicion, however strange may be the circumstances, however strange the coincidences, and however grave the doubt, suspicion alone can never take the place of proof.



6. CONCLUSION:

6.1. Based on the above analysis and findings and the catena of judgements discussed above, it is found that in order to proceed under Section 66 of IBC a high degree of proof is required and the intent to defraud should be established beyond doubt.

6.2. It is a fact that:

- i) Respondents 1 and 2 were common directors of the Corporate Debtor and GBJ Hotels Pvt Ltd (3rd respondent) at the material time.
- ii) Indian Overseas Bank is the sole and common financial creditor for CD and 3rd Respondent.
- iii) The Corporate Debtor and 3rd respondent had provided Corporate Guarantees to the facilities granted by Indian Overseas Bank to each other.
- iv) The third respondent was declared as NPA on 01.06.2019. Corporate Debtor passed a resolution in the Extra-Ordinary General Meeting dated 22.07.2019, to invest Rs.11.64 Crores in M/s. G B J Hotels Private Limited for subscription of the equity.



V) The Corporate Debtor was declared as NPA with effect from 31.03/2017 based on Demand Notice dated 06th August 2019 issued by financial creditor under sub-section (2) of Section 13 of the SARFAESI Act.

vi) The amount of share advance was paid after the account of 3rd respondent was declared as NPA on 2019.

6.3. The question before the tribunal is

a) Whether subscription for share advance of GBJ Hotels Pvt Ltd by the Corporate Debtor was done with an intent to defraud its creditors?

b) Whether 1st and 2nd respondents have not taken any reasonable prospect of avoiding the commencement of CIRP of the corporate debtor and also not exercised due diligence in minimizing the potential loss to the creditors of the Corporate Debtor?

i) We find that share advance money was paid to 3rd respondent at a time when it was declared as NPA to save the 3rd respondent by coming out of the NPA status in the books of the financial creditor who has also financed the Corporate Debtor. However, despite the infusion of the money, the 3rd respondent could not



be saved from the clutches of CIRP. We find that no sufficient proof has been provided to prove that subscription of share advance by Corporate Debtor was done with the intent to defraud its creditors as there was a common financial creditor and further Corporate Debtor and 3rd respondent were the corporate guarantors for the advances sanctioned to the other.

ii) Regarding the issue of whether respondents had exercised sufficient due diligence or not, let us examine *the basic tenets of Company, Corporate Governance, Related Party Transactions*, etc:

A Company is an artificial, juristic and legal person registered under Companies Act having a distinctive identity separate from the promoters or shareholders who own it.

Corporate Governance is the system of rules, practices, and processes by which the company is directed and controlled. A good Corporate Governance takes care of interest of other stakeholders, integrity and ethical behaviour and disclosure and transparency, etc. While the



directors have authority to regulate the affairs of the company collectively as Board, their duties of good faith and fair dealings are owed by each other individually. Directors have a duty not to place themselves in a position when their fiduciary duties towards company are in conflict with their personal interests.

‘Related party Transactions ‘fall in this category. Details of transactions with Holding or Subsidiary or Associate companies should be transacted on arm’s length basis. Details of transactions not in a normal course of business should be placed before the Board with Management Justification. A summary of such transactions with each party should form part of the Annual Report of the company. Beyond a threshold limit the approval of shareholders by way of Special Resolution should be mandated.

iii) In the present case, the share advance of Rs. 11.64 cr by the Corporate Debtor to 3rd respondent is a related party transaction.

The transaction was approved by way of Special Resolution of the



shareholders in Extraordinary General meeting dated 22.07.2019.

So, we find that all statutory compliances like disclosures in Annual Report, passing of Special resolution in EGM, etc. were complied with.

iv) It is found from the information available in public domain that the 3rd respondent GBJ Hotels Pvt Ltd was owning a *five star 'Radisson Blu' hotel in Coimbatore with 135 rooms capacity* which was declared as NPA and to save the 3rd respondent , an amount of Rs. 11. 64 crore was remitted by Corporate Debtor as Share Advance. The 1st and 2nd respondents are common directors for both these companies and Indian Overseas Bank is the common sole financial creditor.

v) From the standalone point of the Corporate Debtor, the said share advance was definitely not in its interest and in the hindsight this could be one of the trigger point for the Corporate Debtor becoming NPA. However 1st and 2nd respondents were the promoters of Corporate Debtor and 3rd respondent. For them, protecting the group companies from falling into NPA



was paramount and the investment of share advance by Corporate Debtor in the 3rd respondent was one such act of indiscretion.

vi) We concur with the view of NCLT Mumbai in *Venkatesan Sanakaranarayanan Vs Nitin Shambukumar Kasliwal and other* SCC Online NCLT 3171 which held that

7. The Bench observes that it is a fact that management of company have taken certain decision which has not worked out as intended by the management and eventually loss occurred. However, such bad commercial business decision cannot be considered to be fraudulent or wrongful trading under provisions of Section 66 of the IBC.

vii) Taking a holistic view we find that the 1st and 2nd respondents, in order to protect the overall group interest and to save a larger asset from clutches of CIRP could have entered into the above transaction of share advance. We give the benefit of doubt to the respondents.



6.4. In view of the above, the present application IA/465/CHE/2023 is
disposed of as dismissed.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)