

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Ins) No. 1500 of 2024

[Arising out of the Order dated 04.06.2024, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench), in I.A. No. 1319 of 2020 in CP (IB) No. 1545/MB/2019]

IN THE MATTER OF:

- 1. FINVIN Investor Private Limited,**
Sunteck Crest 602, 6th Floor,
Plot No.3, Mukund Nagar Road,
Andheri Kurla Road, Andheri (E),
Marol Naka, Mumbai, 400059

...Appellant

Versus

- 1. Orix Leasing and Financial Services Limited**

Having registered address at Plot No. 94,
Marol Co-operative Industrial Estate,
Andheri-Kurla Road, Andheri East,
Mumbai - 400059

...Respondent No. 1

- 2. Pratiksha Tradelinks,**

Through proprietor Deepak Vijay Sawant
B-002, Mauli Darshan Building,
Dombivali East, Thane, Mumbai - 421201

...Respondent No. 2

- 3. Kunal Jiwarajka**

162-C, Grand Paradi, Dady Seth Hill,
Kemps Corner, Mumbai - 400026

...Respondent No. 3

- 4. Laxmidevi Jiwarajka**

161-C, Grand Paradi, Dady Seth Hill,
Kemps Corner, Mumbai - 400026

...Respondent No. 4

- 5. Sakshi Jiwarajka**

162-C, Grand Paradi, Dady Seth Hill,
Kemps Corner, Mumbai - 400026

...Respondent No. 5

- 6. Ms. Palak S. Desai**

(Liquidator of JSK Marketing Limited)
31/E, BKC Centre, Laxmi Industrial
Estate,
New Link Road, Andheri (W),
Mumbai - 400053

...Respondent No. 6

Present:

For Appellant : Mr. Biswajit Dubey, Mr. Akhil Awasthi, Mr. Prakhar Tandon & Mr. Agam H Maloo, Advocates
For Respondent : Mr. Namit Suri, Mr. Ravi & Ms. Surabhi Sinha,

Advocates for R-1.

With
Company Appeal (AT) (Ins) No. 1581 of 2024

[Arising out of the Order dated 04.06.2024, passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Mumbai Bench), in I.A. No. 1319 of 2020 in CP (IB) No. 1545/MB/2019]

IN THE MATTER OF:

Orix Leasing and Financial Services

1. India Limited

Office at: Plot No. 94, Marol Co-operative Industrial Estate,
Andheri-Kurla Road, Andheri (East),
Mumbai, Maharashtra-400059
Email: gandharv.makker@orixindia.com

...Appellant

Versus

1. Palak S. Desai

Liquidator of JSK Marketing Limited
Office at:
31/E, BKC Centre, Laxmi Industrial Estate,
New Link Road, Andheri (W),
Mumbai-400053
Email Id: jskliquidation@gmail.com;
palakdesai77@gmail.com

...Respondent No. 1

2. Pratiksha Tradelinks

Office at:
B-002, Mauli Darshan Building,
Dombivali East, Thane, Mumbai-421201
Email Id: info@pratikshatradelink.com;
pratikshatradelink@gmail.com

...Respondent No. 2

3. Kunal Jiwarajka

Address at:
62-C, Grand Paradi,
Dadi Seth Hill, Kemps Corner, Mumbai-400026
E-mail: kunal@jskindia.com

...Respondent No. 3

4. Laxmidevi Jiwarajka

Address at: 62-C, Grand Paradi,
Dadi Seth Hill, Kemps Corner, Mumbai-400026
E-mail: laxmi@jskindia.com

...Respondent No. 4

5. Sakshi Jiwarajka

Address at: 62-C, Grand Paradi,

Dadi Seth Hill, Kemps Corner,
Mumbai-400026

...Respondent No. 5

6. FINVIN Investor Private Limited

Office at: Sunteck Crest 602, 6th Floor,
Plot No.3, Mukund Nagar Road,
Andheri Kurla Road, Andheri (E),
Marol Naka, Mumbai-400059
E-mail:mohit.agarwal@finvin.co.in;
mayank.agarwal@finvin.co.in

...Respondent No. 6

Present:

For Appellant : Mr. Namit Suri, Mr. Ravi & Ms. Surabhi Sinha,
Advocates.
For Respondent : Mr. Biswajit Dubey, Mr. Akhil Awasthi, Mr.
Prakhar Tandon & Mr. Agam H Maloo, Advocates
for R-6.

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

Aforesaid both appeals have been filed against the same impugned order dated 04.06.2024 passed by the National Company Law Tribunal, Mumbai Bench, Court-II (Adjudicating Authority) and for the sake of convenience are being disposed of by passing this common judgment.

2. CA (AT) (Ins) No. 1500 of 2024 has been preferred by the FINVIN Investor Pvt. Ltd., which is an assignee of the CD vide assignment deed dated 03.06.2024, challenging the impugned order dated 04.06.2024 passed by the Ld. Adjudicating Authority with regard to IA No. 1319 of 2020 moved under Section 43, 66, 67 and 70 of the Insolvency and Bankruptcy Code, 2016 (Code) in CP (IB) No. 1545 of 2019 whereby the application moved by the IRP has been rejected however the Resolution Professional has been directed to ascertain the amount paid to Orix Leasing and Financial Service India Ltd. (Appellant) of CA (AT) (Ins) No. 1581 of 2024 under Master Lease

Agreement (MLA) from the records of the CD and take appropriate steps in accordance with law to recover the said amount from the Orix Leasing and Financial Service India Ltd. and from Kunal Jiwarajka, Laxmi Devi Jiwarajka, Sakshi Jiwarajka and Pratiksha Tradelinks.

It is pertinent to mention here that the liquidator of the CD and the appellant FINVIN Investor Pvt. Ltd. (FINVIN) entered into an assignment agreement on 03.06.2024 whereby the PUFÉ applications as well as assets of the CD were assigned to the appellant FINVIN by the liquidator under Regulation 37A of IBBI (Liquidation Process) Regulations, 2016 and an amendment application was filed by the appellant to incorporate its name on record in place of the liquidator in all PUFÉ applications including IA No. 1319 of 2020 and by virtue of the assignment agreement dated 03.06.2024 the appellant FINVIN has entered into the shoes of liquidator.

3. CA (AT) (Ins) No. 1581 of 2024 has been filed by the Appellant- Orix Leasing and Financial Service India Ltd. against the same impugned order of date 04.06.2024, passed by National Company Law Tribunal, Mumbai Bench, Court-II (Adjudicating Authority) with regard to IA No. 1319 of 2020 in CP (IB) No. 1545 of 2019 whereby, though the application filed by the RP of the CD under Section 43, 66, 67 and 70 of the Insolvency and Bankruptcy Code, 2016 (Code) has been rejected but findings have been returned against the appellant on merits.

4. The brief facts necessary for the disposal of the aforesaid appeals are that Appellant of CA (AT) (Ins) No. 1581 of 2024 -Orix Leasing and Financial Service India Ltd. (Orix Leasing) executed a Master Lease Agreement (MLA) with the CD, JSK Marketing Ltd. on 07.09.2018 financing the purchase of

equipment by CD on lease and an amount of Rs. 74,49,947/- was deposited as the Security deposit in the account of the Orix Leasing. The CD appears to have defaulted in making lease payments and the Orix Leasing issued demand notice dated 06.08.2019 demanding an amount of Rs. 34,26,479/- from the CD and in default of the payment the financial creditor filed a petition under Section 7 of the Code against the CD and the CIRP of the CD was initiated vide order dated 23.09.2019 passed by the Ld. Adjudicating Authority.

5. It is also reflected that Orix Leasing has filed its claim for an amount of Rs. 43,473,004/-. The IRP of the CD through an email dated 07.12.2019 requested the Orix Leasing to submit few documents with regards to the claims submitted by it and also enquired whether the Orix Leasing had invoked personal guarantee given by Mr. Kunal Jiwarajka and Ms. Laxmi Devi Jiwarajka. The Orix Leasing vide its email dated 07.12.2019 sent a reply stating that the guarantee given by the aforesaid guarantors has not been invoked.

6. It is also reflected that the IRP of the CD also enquired with the Suspended Board of Directors regarding the whereabouts of the machineries vide her emails dated 26.12.2019, 10.02.2020 and 02.06.2020 and also enquired the whereabouts of the machineries from Pratiksha Tradelinks vide emails dated 15.05.2020 and 05.08.2020.

7. It is also reflected that Pratiksha Tradelinks did not sent any reply to the IRP while the Orix Leasing in its email dated 29.06.2020 stated that security deposit amount of Rs. 74,49,947/- was adjusted against the lease

rental as outstanding on 31.10.2019 in the books of accounts on 31.03.2019.

8. An application being IA No. 1319 of 2020 was moved by the IRP of the CD before the Ld. Adjudicating Authority under Section 43,66, 67 and 70 of the Code contending that the IRP undertook all the efforts to take the custody and control of all the assets of the CD including the equipment's, however the equipment's were found missing and the IRP apprised all the CoC members about it in the 2nd meeting of the CoC held on 17.12.2019 informing that the machineries belonging to the CD including the equipment's are not traceable.

9. It is also contended that IRP enquired from the Suspended Board of Directors regarding the whereabouts of the machineries by sending various emails and it was informed by Respondent No. 3 –Kunal Jiwarajka that the machinery of about Rs. 40 Crores were purchased and capitalised and most of the said machineries were having technical faults and were returned to the suppliers.

10. It is further contended by the IRP in its application that Orix Leasing did not foreclose the finance facility under the master lease agreement but also adjusted the security deposit amount of Rs. 74,49,947/- on 15.10.2019 and 31.10.2019 much after 23.09.2019 (the CIRP initiation date).

11. It is further contended that the foreclosure statement dated 15.10.2019 shows adjustment of security deposit and the Orix Leasing in its email dated 29.06.2020 has accepted that Security deposit amount of Rs. 74,49,947/- was available as per their books on March, 2019 which was adjusted against rental outstanding on 31.10.2019. According to the IRP the

action of foreclosure and consequent adjustment of security deposit amount is against the provisions of master lease agreement and also is in violation of the moratorium commenced on the initiation of the CIRP against the CD. Thus, the IRP was of the opinion that such illegal foreclosure and subsequent adjustment of the security deposit amount is a preferential transaction made in favour of Orix Leasing and have resulted in putting the Orix Leasing in a beneficial position then it would have been under Section 53 of the Code.

12. It is further stated by the IRP in the application that after her appointment as IRP she is constantly following up with the Suspended Board of Directors to know the whereabouts of the machineries and equipment's, however no trace of the same was provided and an evasive reply was given by Kunal Jiwarajka who was a Director of the CD that the machineries were either at the Bhilwandi godown or sent back to the respective suppliers as they had some technical faults and were required to be repaired and that the machineries are in possession of the supplier. According to the IRP the members of the Suspended Board of Directors have deliberately not provided any replies to the emails sent by the IRP and no documentation has been provided apart from sending a solitary email.

13. It is further stated by the IRP in the application that despite her email dated 15.05.2020 and 05.08.2020 the whereabouts of the machineries were not provided and upon analysis of the E-way bills and vehicle details there is a suspicion pertaining to the actual delivery of the equipment's to the CD as the vehicles shown to be used in transporting the equipment's were either

not capable of transporting the equipment's or the E-way details could not be procured.

14. The IRP further stated that the entire exercise of purchasing the equipment's by way of lease mechanism and increasing the liability of the CD without there being any evidence of the supply of the machineries appears to be a transaction designed to de-fraud the creditors of the CD by the members of the Suspended Board of Directors in concerned with each other in collaboration with Orix Leasing with the intent that the machineries would stay with the Pratiksha Tradelinks and could not be used by the CD and thereafter would be declared untraceable and these transactions have been carried out in a pre-planned manner without any documentation with the purpose to de-fraud secured creditors and no due diligence has been exercised by the Suspended Board of Directors in minimising the potential losses to its creditors.

15. It is also evident that in the aforesaid IA No. 1319 of 2020 moved by the IRP following prayers were sought:

"Prayers

In view of the above facts and circumstances, the Applicant humbly prays for the following reliefs that the Hon'ble Tribunal may be pleased to:

a) That this Hon'ble Tribunal be pleased to allow the present Application;

b) That this Hon'ble Tribunal be pleased to order that the act of Respondent No.1 in foreclosing and adjusting the security deposit is covered under section 43 of the Code and Respondent No.1 be directed to make a contribution of an amount equivalent to the Security Deposit of Rs. 74,49,947/- along with interest thereon, to the Corporate Debtor

1.	Towards rental, interest, and processing fees	95,50,853
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c) That this Hon'ble Tribunal be pleased to order that the Equipment be submitted to the Applicant under Section 25(2)(a) for taking custody and charge over the assets of the Corporate Debtor;

d) That this Hon'ble Tribunal be pleased to order and direct that Respondent No.1 to 5, jointly and severally, be directed to make a contribution of an amount equivalent to the amounts already paid by the Corporate Debtor to Respondent No. 1 along with interest thereon;

e) pass such other or further orders as may be deemed fit and proper in the facts and circumstances of the instant case”.

16. As stated earlier Ld. Adjudicating Authority after hearing all the parties has rejected the aforesaid IA No. 1319 of 2020 by passing the impugned order of dated 04.06.2024 the relevant part of the impugned order is reproduced as under:

“22. This application has been filed under Section 43, 66 read with Section 67 and 70 of the IB Code, 2016. There are allegations of fraud. However, the Hon'ble Supreme Court in the matter of Gluckrich Investment Private Limited vs. State of West Bengal has held that third parties cannot be proceeded against under Section 66 of the IB Code, 2016 and the proceedings under Section 66 of the IB Code, 2016 can be initiated only against the Promoters/Directors of the Corporate Debtor or any person responsible for running the business of the Corporate Debtor, in case there has been a wrongful or fraudulent trading to defraud the Creditors of the Corporate Debtor. Therefore, in our considered view, since Respondent No. 1 is a third party, prima fade an application under Section 66 of the IB Code, 2016 is not maintainable against it and, therefore, in our considered view no order of recovery can be passed as against Respondent No. 1. As the transaction does not fall within the four corners of Section 43 either, no order of

recovery can be passed even by us in violation of the provisions of Section 43 of the Code.

23. So far as Respondent Nos. 2 to 5 are concerned, they are the suspended Board of Directors of the Corporate Debtor. Perusal of the record reveals that several notices were issued to them but they have not put an appearance nor filed any reply in this IA. It has been categorically stated by the Applicant in the application that the machinery allegedly lease financed by the Respondent No. 1 to the Corporate Debtor is not traceable. In a response to the query raised by the Liquidator, Respondent No.3 has stated in its reply vide email dated 10.01.2020, which is part of Exhibit (J), that since the machinery was defective in nature, it was returned to the supplier. From these circumstances, it is evident that Respondent Nos. 1 to 4 have not provided any sufficient proof of the fact that the machinery were actually received by the Corporate Debtor or that it was subsequently returned to the supplier being defective in nature. Coupled with the fact that the Respondents have not chosen to appear contest this application, we are of the considered view that the transaction of execution of Master Lease Agreement is a fraudulent one, which appeared to have been entered into to defraud the Creditors and to siphon off funds from the Corporate Debtor. Therefore, in our considered view that the Respondent Nos, 2 to 5 are liable to be directed to make contribution of the entire money paid under the Master Lease Agreement to Respondent No. 1 to the Corporate Debtor. Since the amount paid under Master Lease Agreement to Respondent No. 1 has not been specified in the application, we deem it appropriate to direct the Resolution Professional to ascertain the same from the record of the Corporate Debtor and take appropriate steps in accordance with law to recover the said amount from Respondent No. 1 as well as Respondent Nos. 2 to 5.

24. As a result of the above discussion, IA No. 1319/2020 is hereby rejected at this stage. However, the Resolution Professional/Applicant is directed to ascertain the amount paid to Respondent No. 1 under Master Lease Agreement from the records of the Corporate Debtor and take appropriate steps in accordance with law to recover the said amount from Respondent No. 1 as well as Respondent Nos. 2 to 5 by filing fresh applications/proceedings in accordance with law”.

17. Ld. Counsel for the Appellant- Orix Leasing in CA (AT) (Ins) No. 1581 of 2024 and Respondent No. 1 in CA (AT) (Ins) No. 1500 of 2024, submits that the CD- JSK Marketing Ltd. had approached it for leasing of certain equipment for business purposes and in pursuance of the same Master Lease Agreement (MLA) was executed on 07.09.2018 and under this agreement equipment's were leased by it to the CD and for due performance of this agreement personal guarantees of Rs. 5 Crores were given by Respondent No. 3 and 4 and also a security deposit amount of Rs. 74,49,947/-.

18. It is further submitted that when the CD defaulted in honouring its obligations, a demand notice was issued to the CD on 06.08.2019 and on failure of the CD to comply with the notice, the MLA was terminated in August, 2019 and the security deposit amount was adjusted on 28.08.2019 strictly in terms of the lease agreement.

19. It is further submitted that the impugned order has been passed without jurisdiction and is self-contradictory more so under Section 66 the proceedings are not maintainable against the third party and the impugned transaction does not fall within the ambit of Section 43.

20. It is further submitted that the adjustment of the security deposit has been done prior to the CIRP in pursuance of the demand notice dated 06.08.2019 on 28.08.2019 and upon termination of the lease a foreclosure statement was generated on 28.08.2019.

21. It is further submitted that although the foreclosure statement reflects termination date of 01.10.2019 the actual termination and appropriation of the security money has occurred on 28.08.2019 and it is only due to the

automated system generating foreclosure statement on quarterly basis, in accordance with the MLA the foreclosure statement reflects a date of 01.10.2019 and therefore the adjustment has been made prior to the initiation of moratorium.

22. It is next submitted that the MLA is a genuine, valid and legally executed document and is substantiated by various communications/documents executed and exchanged between the Orix Leasing and the CD and mere inability of the IRP to trace assets does not render the transaction fraudulent.

23. It is further submitted that the Appellant Orix Leasing also initiated Section 9 proceedings under Arbitration Act by filing OMP (I) (Comm.) No. 9773 of 2019 and the receiver was appointed therein by Ld. Additional District Judge, Patiala House Courts, New Delhi vide order dated 09.09.2019 and the Appellant has also approached Police Authorities for enforcement of the said order and in addition proceedings under Section 138 of the Negotiable Instrument Act, was also initiated before CMM, South West, Dwarka Courts, Delhi and Section 95 proceedings against the Respondent no. 3 initiated vide CP IB No. 210 of 2021 is also pending. Therefore, there was genuine dispute between the appellant and the CD and therefore the transaction may not be titled as Sham transaction. While drawing the attention of this appellate tribunal towards the law laid down by the Hon'ble Supreme Court in **Gluckrich Capital Pvt. Ltd. vs. State of West Bengal, MANU/SC/0996/2023, Usha Ananthsubramanian vs. Union of India, MANU/SC/0202/2020 and Sudipa Nath vs. Union of India, MANU/TR, 0036/2023 and Sangeeta Jatinder Mehta and Anr.**

vs. Kailash Shah, RP of New Empire Textile Processor Pvt. Ltd., CA (AT)

(Ins) No. 104 of 2024. It is vehemently submitted that the proceedings of Section 66 of the Code could not be invoked against the appellant who is a third party and not associated with the CD in any way and the transaction entered into by the appellant and the CD by any stretch of imagination could not be termed as fraudulent therefore the impugned order is liable to be set aside.

24. Ld. Counsel for the Appellant FINVIN in CA (AT) (Ins) No. 1500 of 2024 and for Respondent No. 1 in CA (AT) (Ins) No. 1581 of 2024 submits that pursuant to the deed of assignment dated 03.06.2024, in favour of the FINVIN, it stepped into the shoes of liquidator by which a not readily realisable asset was validly assigned to FINVIN in consultation with the stakeholder Committee Stakeholder Consultation Committee(SCC).

25. It is further submitted that the impugned order is contradictory as even after recording categorical findings that the MLA dated 07.09.2018 is sham document and the chain of transactions between the parties are fraudulent and were entered into to de-fraud the creditors to siphon off funds of the CD including the appropriation of security deposit of Rs. 74,49,947/- during the commencement of moratorium, the application has been rejected, which cannot be sustained in the eyes of law and Ld. Adjudicating Authority for no reason has rejected the application filed by the appellant FINVIN.

26. It is further submitted that once a finding of fraudulent business is recorded, the duty of the Ld. Adjudicating Authority was to order for the recovery of the same. In this regard the law laid down by the Hon'ble

Supreme Court in ***Phoenix Arc Pvt. Ltd. vs. Spade Financial Services Ltd. (2021) 3 SCC 475*** and the law passed by this Appellate Tribunal in ***Tridhaatu Kirti Developers LLP vs. Arihant and Nenawati, liquidator of Royal Refinery Pvt. Ltd., (2023) SCC Online NCLAT 1583*** has been placed.

27. It is further submitted that the expression any person occurred in Section 66 (1) of the Code covers the Orix Leasing which is the principle beneficiary of the fraudulent transaction and therefore is liable to contribute to the CD along with Other defaulters. In this regard the law laid by this Appellate Tribunal in ***Royal India Corporation Ltd. vs. Nandkishor Vishnupant Deshpande, RP, CA (AT) (Ins) No. 137 of 2021 decided on 06.05.2024*** and in ***Shri Baiju Trading and Investment Pvt. Ltd. vs. Arihant Nenawati, CA (AT) (Ins) No. 699 of 2021 decided on 29.03.2023*** has been placed, in order to emphasise that fraud for the purpose of Section 66 of the Code includes debts which a debtor has no intention to repay or does not expect to be able to pay and the expression any person occurring in Section 66 (1) of the Code is wide enough to cover a knowing party to the fraudulent conduct.

28. It is further submitted that the reliance placed by the Orix Leasing on Glukrich Capital (supra) is misplaced and this Tribunal in Royal India Corporation (supra) has expressly distinguished the said order on the ground that the said judgment is pertaining to the transit anticipatory bail in a criminal case.

29. It is further submitted that apart from the fraudulent transaction attracting Section 66 of the Code the appropriation of the security deposit

on 15.10.2019 is per se void and requires a reversal under Section 14 of the Code in this regard the law laid by the Hon'ble Supreme Court in ***Central Transmission Utility of India Ltd. vs. Sumit Binani, (2026) INSC 284*** has been placed.

30. It is further submitted that the Respondents No. 1 to 5 have acted in a concerted manner to defraud the creditors of the CD and thus are jointly and severely liable to contribute the loss suffered by the CD

31. We have heard Ld. Counsel for the parties and have perused the record.

32. Perusal of the record would reveal that the crux of the application moved by the RP before Ld. Adjudicating Authority is that earlier IRP, after the public announcement collated the claims of the creditors and in the first meeting of the CoC was appointed as the RP and after being appointed as such she re-verified the claims filed by the creditors. The appellant Orix Leasing had filed the claim in Form C claiming an amount of Rs. 43,473,004/- which was based on a MLA dated 07.09.2018 whereby the appellant Orix Leasing has financed the equipment's by way of lease scheme which were ultimately stated to be delivered to the CD under the MLA.

33. Perusal of this MLA dated 07.09.2018 would reveal that under this agreement Orix Leasing was obliged to pay the Supplier-Respondent No. 2/ Pratiksha Tradelinks the entire amount of machines and equipment's which were to be delivered to the CD-JSK Marketing Ltd. and the CD was obliged to make rental payments to the appellant Orix Leasing.

34. It is also reflected that from the facts mentioned in the application filed by the RP that the Orix Leasing appears to have made payment to the supplier and get the equipment's procured as per the following details:

Sr. No.	Schedule	Supplier	Invoice No.	Total Amount including GST	E-Way Bill No.
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1.	F/DISB01 3712	Pratiksha Tradelink	GST/11/001	25,96,227	2410 5759 0643
2.	F/DISB01 3711	Pratiksha Tradelink	GST/11/002	1,27,46,572	2810 5759 2162
3.	F/DISBO/ 3713 AND F/DISB01 3711	Pratiksha Tradelink	GST/11/003	95,47,519	2410 5759 3709
4.	F/DISB01 3714	Pratiksha Tradelink	GST/11/004	43,82,842	2110 5774 3334
5.	F/DISB01 3711	Pratiksha Tradelink	GST/11/005	1,27,46,572	2910 5774 4245
6.	F/DISB01 3712 AND F/DISBO/ 3713	Pratiksha Tradelink	GST/12/001	76,45,579	No E-way provided by vendor

35. It is further reflected that Orix Leasing thereafter raised various invoices against lease finance assistance provided by it to the CD in respect of aforesaid equipment's/ machines, towards the lease rent and it is claimed by the Orix that till 1st April, 2019 the CD had paid regular lease rental payments on quarterly basis to the Appellant and thereafter committed a default and an amount of Rs. 34,26,479/- remains pending as outstanding lease rent on the CD.

36. The Orix Leasing is also shown to have issued demand notice dated 06.08.2019 to the CD demanding the above amount and thereafter stated to have foreclosed the facility by way of foreclosure statements each of date 15.10.2019 and also appropriated the security deposit amount of Rs. 74,49,947/-.

37. It is also to be recalled that Mr. Kunal Jiwarajka and Ms. Laxmi Devi Jiwarajka have given their personal guarantee for performance of this agreement and in response to a communication written by the RP the appellant Orix Leasing replied that the personal guarantee of above guarantors was never invoked.

38. In nutshell it is the case of the RP that she made all efforts to take charge of the above equipment's/machineries but these were not found and were missing. At this juncture, the minutes of the 2nd CoC meeting held on 17.12.2019 are also relevant wherein the RP informed the CoC that the machines of the CD along with equipment's are not traceable. No information pertaining to these equipment's/ machineries appears to have been provided by the Suspended Board of Directors of the CD except Kunal Jiwarajka who replied that most of the aforesaid machinery was having technical faults and were returned to the suppliers and the other members of the Suspended Board of Directors did not provide any reply to the emails sent by the RP and it is claimed by the RP that no documentation has been provided whatsoever to support the contention that the machineries/equipment's were in fact sent back to the supplier on account of some default and none of the machinery/equipment was found in the Bhiwandi godown. The RP stated to have also enquired from the supplier- Pratiksha Tradelinks about the machineries and equipment's by sending emails dated 15.05.2020 and 05.08.2020 however Pratiksha Tradelinks also did not provide any answer regarding the same.

39. The RP in his application has stated that upon analysis of E- way bills and vehicle details a reasonable apprehension appears on the actual

delivery of the equipment's and machineries to the CD as the vehicle shown to have been used in transporting the equipment's were either not capable of transporting the relevant equipment or the E-way details could not be procured and came to a conclusion that entire exercise of purchasing the equipment by way of lease mechanism is with regard to increasing the liability of the CD without any evidence of actual supply of the machineries or equipment's and the transaction has been designed to de-fraud the creditors of the CD working in consult with Respondent No. 2 to 5.

40. The RP also appears to have considered, as is apparent from the application moved by her, that the CD under the MLA effects the Orix Leasing to purchase the equipment's with the intention that machineries/equipment's would stay with Pratiksha Tradelinks and not to be used by the CD only to be declared untraceable, thereafter and the transactions have been carried out in a pre-planned manner without proper documentation with the purpose to de-fraud secured creditors of the CD and despite being repeatedly asked no valid explanation of the missing of the machineries/equipment's was furnished and therefore these transactions were not genuine transactions and in fact wrongful/fraudulent trading.

41. Perusal of the impugned order would reveal that at first the Ld. Adjudicating Authority in paragraph no. 19 of the impugned order noticed an email dated 29.06.2020 whereby it has been admitted by the appellant Orix Leasing that the security deposit of Rs. 74,49,947/- was adjusted against the lease rent outstanding as on 31.10.2019 i.e. during the moratorium commenced by the initiation of CIRP against the CD on 23.09.2019 and goes on to hold that the said security deposit amount has

been appropriated during moratorium period and the appellant Orix is liable to remit the said amount to the CD but significantly observed that since the application has been filed under Section 43, 66, 67 and 70 of the Code the transaction will not fall within the ambit of Section 43 of the Code.

42. Secondly, with regard to the MLA dated 07.09.2018 and supply of machinery and equipment's thereunder to the CD by Pratiksha Tradelinks and with regard to the refund of the rentals paid by the CD to the Orix Leasing the Ld. Adjudicating Authority hold that the Orix Leasing being a third party and in view of the judgment of the Hon'ble Supreme Court in Glukrich (supra) the application under Section 66 of the Code is not maintainable against Orix Leasing and no order of recovery can be passed against Orix Leasing. Thereafter Ld. Adjudicating Authority noticed that the Suspended Board of Directors of the CD have informed vide email dated 10.01.2020 that the machinery supplied by the Pratiksha Tradelinks was defective in nature and thus was returned to the supplier and goes on to hold that there is no sufficient proof of the actual delivery of the machines and equipment's to the CD by the Pratiksha Tradelinks and is subsequent return to the supplier by the CD and hold that in view of this the MLA appears to be a fraudulent one and has been entered into to de-fraud the creditors and further hold that the Respondent No. 2 to 5 are liable to contribute the entire money paid under the MLA but the amount paid under MLA has not been specified and direction was issued to the RP to ascertain the same and take appropriate steps to recover the said amount by moving fresh applications from all the Respondents and ultimately the application filed by the RP was rejected.

43. The appeal filed by the Orix Leasing is on the score that despite the Ld. Adjudicating Authority has stated in the body of the judgment that no direction for recovery of any amount could be passed against the Orix Leasing (Third party) but thereafter direction was given to the RP to move appropriate application to recover the amount of rental from the appellant Orix Leasing and other Respondents. While the appeal filed by the appellant FINVIN is on the score that despite holding that the MLA is a sham and fraudulent agreement no direction has been given to the Orix Leasing or any other Respondent to contribute the amount to the CD despite acknowledging that the security deposit has been appropriated during the commencement of moratorium.

44. We notice that Ld. Adjudicating Authority has recorded a finding that since Orix Leasing is a third party no direction could be passed against it to contribute to the assets of the CD.

45. It has been submitted by Ld. Counsel for the FINVIN that in the proceedings initiated under Section 66 of the Code the Orix Leasing could very well be directed to contribute to the assets of the CD as he was found involved in the fraudulent transaction and in this regard the law laid down by this Appellate Tribunal in **Royal India Corporation Ltd. (supra)** has been relied, while Ld. Counsel for the Orix Leasing submits that in view of the law laid down by the Hon'ble Supreme Court in **Glukrich and Ananth Subramanian** (Supra) the third party could not be directed to contribute to the assets of the CD under Section 66 of the Code.

46. Section 66 of the Code is important for our consideration and the same is reproduced as under:

“66. *Fraudulent trading or wrongful trading.*

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.

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.*

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”.

47. The requirement of Section 66 (1) is that if during the Corporate Insolvency Resolution Process or in liquidation process it is found that any business of the CD has been carried on with the intent to defraud creditors of the CD or for any fraudulent purpose the adjudicating authority, on an application by the RP may pass an order that any persons who were

knowingly parties to the carrying on the business in such manner would make such contributions to the assets of the CD as it may deem fit. Sub-section 2 of this section also provides that on an application by a resolution professional during the Corporate Insolvency Resolution Process (CIRP) the adjudicating authority may direct the director or partner of the CD to make such contribution to the assets of the CD if before the Insolvency Commencement date such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the insolvency process in respect of the CD and such director or partner did not exercise due diligence in minimizing the potential loss to the creditors. Thus the necessary ingredients of invoking Sub Section (1) appears to be that the business of the CD has been carried on with intent to defraud creditors of the CD or for any fraudulent purpose. and for Sub Section (2) that 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 CIRP and such director or partner did not exercise due diligence in minimizing the potential loss to the creditors. Thus both these Sub Sections take care of two different factual situations.

48. In **Piramal Capital and Housing Finance Limited v. Moons Technologies Ltd. & Ors. [(2025) ibclaw.in 120 SC]: [2025 SCC Online SC 690]**, observations made by the Hon'ble Supreme Court are reproduced as under: –

“56. Thus, there is a clear distinction between the Avoidance Applications that may be filed by the Resolution Professional in view of Section 25(2)(j), for avoidance of

transactions in accordance with Chapter III of the Code, and the Applications that may be filed by the Resolution Professional in respect of the Fraudulent trading or Wrongful trading under Section 66, which falls under Chapter VI of the Code. The legislature has consciously kept the Applications in respect of Fraudulent trading or Wrongful trading falling in Chapter VI, outside the purview of Section 25(2), which requires the Resolution Professional to undertake the actions and file applications for the avoidance of transactions in accordance with Chapter III. Both, the Avoidance Applications under Chapter III and the Applications in respect of Fraudulent trading or Wrongful trading under Chapter VI, operate in different situations. The powers of the Adjudicating Authority in respect of the Avoidance Applications filed under Chapter III and the powers of the Adjudicating Authority in respect of the Applications pertaining to the Fraudulent and Wrongful trading filed under Chapter VI, have also been separately circumscribed.

60. However, in cases of “Fraudulent or Wrongful trading” in respect of the business of the CD as contemplated Civil Appeal Nos. 1632-1634 of 2022 Page 94 of 145 in Section 66, the properties and the persons involved may or may not be ascertainable and therefore the Adjudicating Authority is not empowered to pass orders to avoid or set aside such transactions, but is empowered to pass orders to the effect that any persons, who were knowingly parties to the carrying on of business in such manner, shall be liable to make such contributions to the assets of the CD, as it may deem fit. The Adjudicating Authority in such applications may also direct that the Director of the CD shall be liable to make such contribution to the assets of the CD as it may deem fit, as contemplated in Section

66(2). In case of Fraudulent trading or Wrongful trading, it would be a matter of inquiry to be made by the Adjudicating Authority as to whether the business of CD was carried on with intent to defraud creditors of the CD or was carried on for any fraudulent purpose.

61. In view of the above, the Applications filed in respect of “Fraudulent and Wrongful trading” carried on by the CD, could not be termed as “Avoidance Applications” used for the Applications filed under Sections 43, 45 and 50 to avoid or set aside the Preferential, Undervalued or Extortionate Civil Appeal Nos. 1632-1634 of 2022 Page 95 of 145 transactions, as the case may be. There is clear demarcation of powers of the Adjudicating Authority to pass orders in the Avoidance Applications filed by the Resolution Professional under Section 43, 45 and 50 falling under Chapter III and the Applications filed by the Resolution Professional in respect of the Fraudulent and Wrongful trading of CD, under Section 66 falling under Chapter VI of the IBC. If the Resolution Professional has filed common applications under Sections 43, 45, 50 and also under Section 66, the Adjudicating Authority shall have to distinguish the same and decide as to which provision would be attracted to which of the Applications, and then shall exercise the powers and pass the orders in terms of the provisions of IBC.”

49. This Appellate Tribunal in **Swapan Kumar Saha v. Ashok Kumar Agarwal, (2025) ibclaw.in 911 NCLAT**, while considering various cases on the subject held as under:

“28.....b. Can Section 66(1) of the Code be interpreted or invoked or made operational without recourse to Section 66(2) of the Code? Do they operate independent of each other or jointly?”

44. We further note that the next subsection 66(2) relates to specific provisions for a Director or partner of the CD for which CIRP is going on. This subsection provides that if before the insolvency commencement date, a director or partner knew or ought to have known that CIRP could not have been avoided and failed to exercise due diligence in minimising potential loss to the creditors, AA may direct the erring director or partner to be liable and make such contributions to the assets of the CD as it may deem fit. We observe that the first provision (section 66(1)) is very broad but not the second one (Section 66(2))

45. From a bare reading of Section 66(1) and Section 66(2) of the IBC we find that both have self-contained provisions, with clear mechanisms for their invocation during a CIRP. Further, a perfunctory glance at Section 67 of the IBC will make it abundantly clear that the draftsmen and legislators clearly intended for Sec 66(1) and Section 66(2) to operate independently, as the opening line of Section 67(1) and 67(2) of the IBC would reflect,

52. Thus the above placed cases would sufficiently lay down the proposition that Section 66 of the IBC, 2016 deals with two different situations. Section 66(1) of IBC, 2016 deals with 'Fraudulent Trading' and Section 66(2) of IBC, 2016 deals with 'Wrongful Trading'. Section 66(1) of IBC, 2016 imposes liability on 'any person' who were knowingly parties to the carrying on the business with a dishonest intention to defraud the creditors, to make contribution to the assets of the Corporate Debtor. Therefore to qualify under Section 66(1) of IBC, 2016, the transaction should be knowingly transacted with a dishonest intention to defraud the creditors of the CD, while under Section 66(2) of IBC, 2016, which deals with 'Wrongful Trading', Liability can only be fixed upon only 'Director' or 'Partner' and for a transaction to qualify under this Sub Section it must be shown that the parties to such transaction knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvency proceedings and they did not take due diligence with a view to minimizing the potential loss to the creditors of the company. Thus both these sub sections of Section 66 of the Code takes care of two different situations and also the scope of sub – section (1) and (2) of Section 66 of IBC, 2016 is different. No need to say that the facts alleged and evidence produced must satisfy the ingredients of this section and the facts from which the intention to defraud may be deduced must be proved to satisfy the conscience of the 'Tribunal' certainly on the scale of 'preponderance of probability'. However, no strait jacket formula can be

formulated to fit in all factual situations and it will depend on the facts and evidence placed in each case to assess as to whether the particular transaction may be treated as fraudulent or not.

50. In **Royal India Corporation Limited vs Mr NandKishor Vishnupant Deshpande (RP of RRPL) [(2024) ibclaw.in 304 NCLAT]**, dated **06.05.2024** passed in **Company Appeal (AT) (Insolvency) No. 137/2021**, wherein the same set of CD and Directors were parties and the transaction was similar, a coordinate Bench of this Appellate Tribunal opined as under:

—

*“10.3 The Appellant had relied on the judgment of the Hon’ble Supreme Court in the matter of **Gluckrich Capital Pvt. Ltd. vs. State of West Bengal & Ors.- 2023 SCC OnLine SC 1187** and in the case **Usha Ananthasubramanian vs. Union of India- (2020) 4 SCC 132**. On perusal of the judgment of the Hon’ble Supreme Court in the case of **Gluckrich Capital Pvt. Ltd. vs. State of West Bengal & Ors.- 2023 SCC OnLine SC 1187** quoted by the Appellant it is seen that the application seeking clarification of Judgment and order dated 24.02.2023 passed by the Hon’ble Supreme Court in SLP (Crl.), diary no. 6723/23, filed by Applicant was dismissed and the said judgment related to transit anticipatory bail in a criminal case.*

*10.4 The judgment of the Hon’ble Supreme Court, relied upon by the Appellant in the case **Usha Ananthasubramanian vs. Union of India; (2020) 4 SCC 132** the facts were entirely different. The said appeal was filed by Usha Ananthasubramanian, former MD & CEO, Punjab National Bank wherein the judgment of NCLT and NCLAT was set aside. In this case, the allegation was that the Appellant had failed to take preventive steps to prevent fraud perpetuated by Mr. Nirav Modi and thereby committed mischief and conspiracy with the other accused person.*

10.5 The facts of the present case are different and distinguishable from the cases cited by the Appellant. In the present case, there is a finding that Manoj Punamia was running several companies in its business of gold refinery. The finding of the Customs Department was that both the Appellant Company (RICL) and Corporate Debtor (RRPL) were being managed by Mr. Manoj Punamia. Mr. Manoj Punamia and his wife were said to be shareholders of the Appellant Company. In these circumstances, the appellant cannot be said to be a third party, as both RICL and RRPL are under the control of same person. “

51. This Appellate Tribunal in **Company Appeal (AT) (Insolvency) No.104 of 2024, Sangeeta Jatinder Mehta & Anr. vs Kailash Shah RP of New Empire Textile Processor Pvt. Ltd., [(2025) ibclaw.in 284 NCLAT]** : **2025 SCC OnLine NCLAT 795** held as under: –

“8. The judgment, which has been relied by learned Counsel for the Respondent in Royal India Corporation Ltd. (supra) of this Tribunal supports the submission of Respondent that action under Section 66, sub section (1) can be taken against any person. The judgment of this Tribunal in Tridhaatu Kirti Developers LLP also supports the submission of learned Counsel for the Respondent. We, thus, do not find any error in the judgment of Adjudicating Authority insofar as it has held that transaction of payment of consultancy charges to Appellant Nos.1 and 2 were not bona-fide transaction.

9. The judgment of Tripura High Court in Smt. Sudipa Nath vs Union of India, 2023, SCC OnLine Tri 79 has been relied by the Appellant. In paragraph 19 of the judgment, following was laid down: “(19) Therefore, in legislature wisdom and as apparent from the text of 66(1) it is clear that firstly it confers no jurisdiction but declaring any transaction as void, even if fraudulent, but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of corporate debtor which is fraudulent or wrongful. Secondly section 66(1) contemplates an application thereunder only by the resolution professional and by none other. Thirdly section

66 (1) also restricts the power of NCLT subject to being satisfied with pre-requisite that any business of the corporate debtor has been carried on with intent to defraud creditors or the corporate debtors or for any fraudulent purpose and if satisfied it powers to pass an order is only against such person who are responsible for the conduct of such fraudulent business of the corporate debtor with mens rea to make them personally liable to make such contributions to the assets of the corporate debtor as it may deem fit.”

10. learned Counsel for the Appellants has also relied on the judgment of Hon’ble Supreme Court in **Gluckrich Capital Pvt. Ltd. (supra)**, which proceedings arose out of interim order dated 30.11.2022 passed by Delhi High Court in Criminal M.C. No.6408 of 2022 extending the transit anticipatory bail granted to the Respondent, who were stated to be Suspended Directors of CD. Vide judgment dated 24.02.2023, Special Leave Petition (Criminal) filed by the Applicant was rejected holding that it has no locus, it being neither the informant nor a party to the proceedings. Subsequently, an Application for clarification was filed, which ultimately was rejected. In paragraph-7 of the judgment, the Hon’ble Supreme Court in *Gluckrich Capital Pvt. Ltd.* laid down following:

“7. In our considered opinion, in the name of seeking a clarification, the endeavour of the applicant herein is to indirectly get over with the judgment and order dated 18.01.2023 in WP(C) (PIL) 04 of 2023 passed by Tripura High Court. Such an endeavour, in the guise of a clarification, cannot be permitted.”

In result, we partly allow the Appeal and set-aside the direction of the Adjudicating Authority in the impugned order, insofar as it declared the transfer of Flats by CD in favour of the Appellants, void. We, however, uphold the direction of the Adjudicating Authority with respect to consultancy charges of Rs.13.74 lakhs with respect to Appellant No.1 and Rs.13.80 lakhs with respect to Appellant No.2. We direct Appellant Nos.1 and 2 to deposit the aforesaid amount in the account of CD within a period of 30 days from today. "

We also notice that on identical facts in the case of **Baiju Trading and Investment Pvt. Ltd. vs. Mr. Arihant Nenawati (liquidator for RRPL & Ors.) [(2023) ibclaw.in 216 NCLAT]** the order passed by the Ld. NCLT under Section 66 of the IBC, was upheld by this Appellate Tribunal vide order dated 29.03.2023, and similarly in case of **Tridhaatu Kirti Developers LLP vs. Arihant Nenawati (liquidator for RRPL & Ors.) [(2023) ibclaw.in 27 NCLAT]: (2023) SCC online NCLAT 1583** order of NCLT passed under Section 66 of the Code was affirmed and the order of this Appellate Tribunal was challenged before the Hon'ble Supreme Court by filing Civil Appeal No. 914 of 2023 and the order of this Appellate Tribunal was also upheld by the Hon'ble Supreme Court.

52. In **Aaj Ka Anand Publications LLP & Ors. vs. Vineeta Maheshwari & Ors., (2025) ibclaw.in 1102 NCLAT** this Appellate Tribunal noticed the facts of the case, as were reflected in para no. 16, 17 and 22 of the impugned judgment as under:

“16. As noted above, in I.A. No.908 of 2023, reply, rejoinder affidavit, sur-rejoinder, affidavit and additional affidavits were filed. The Adjudicating Authority in the detailed order noticed the case of the Resolution Professional as well as the Respondents. The Adjudicating Authority has clearly noticed that by Section 13(2) notice the Corporate Debtor was prohibited from transferring, by way of sale, lease or otherwise, any of the Secured Assets and possession of the assets were taken on 29.08.2018 which observation has been returned in Para 22 of the order, which is as follows:

“22. In the present case, the account of Corporate Debtor was classified as NPA on 27.09.2014 and the proceedings under SARFAESI Act were initiated on 8.9.2017 prohibiting the Corporate Debtor from transferring, by way of sale, lease or otherwise, any of

the secured assets i.e. the assets/properties owned by the Corporate Debtor, the subject matter of the present IA. Further, symbolic possession of the secured asset was taken on 29.08.2018 and the Corporate Debtor and Guarantors (Respondents. 1, 5 and 6 and others) were informed of the same by SBICAP Trustee Company Ltd. on 10.09.2018. An Application u/s 7 of the Code was filed on 12.4.2021, which was admitted on 31.3.2002 commencing the CIRP in case of Corporate Debtor. The assignment agreement was executed on 3.8.2021 transferring the business of Corporate Debtor to Respondent no. 4, who was incorporated on 12.5.2021, and a Leave & license agreement in relation one of premises of corporate debtor was executed 30.6.2021 in favor of Respondent no. 4. The assignment agreement dated 3.8.2021 and the Leave & license agreement dated 30.6.2021 were executed by Respondent No. 3, the son of Respondent No. 5, on behalf of Corporate Debtor and by Respondent No. 5 on behalf of Respondent no. 4.”

17. The Adjudicating Authority has also noticed the Respondent Nos. 5 and 6, who were Directors resigned from the Board of Directors on 02.09.2020 and appointed their immediate relatives as Directors on 07.09.2020. The Adjudicating Authority has returned finding that events clearly demonstrated that Respondent No. 5 and 6 has taken all actions to fraudulently transfer the assets of the Corporate Debtor and LLP has been only constituted on 12.05.2021, after filing of Section 7 application. The sequence of events clearly indicates and prove the fraudulent design of constituting LLP to take over the business of the Corporate Debtor. As noted above, notice under Section 13(2) was issued to the Corporate Debtor and its Promoters and Guarantors pm 08.09.2017. A copy of the notice has been brought on the record, which notice is addressed to the Corporate Debtor, the Guarantors and Mortgagers. It is useful to notice the initial part of the notice including subject, which is as follows:

“BY REGISTERED POST WITH A.D.

Ref No.:2095/SBILTOL/LEGAL/RRB/ST/2017-18

08thSeptember, 2017

To,

1. Aaj Ka Anand Papers Limited 365/6 Shivaji Nagar, Aaj Ka Anand Building, Pune 411005	2. Mr. Shyam Gyaniram Agarwal (Guarantor and Mortgagor) H-501, 1 Modi Baug Co-operative Housing Society, Ganeshkhind Road. Pune 411016
3. Mr. Anand Shyam Agarwal, (Guarantor and Mortgagor) B-501, 1 Modi Baug Co- operative Housing Society. Ganeshkhind Road, Pune 411016	4. Mr. Navin Shyam Agarwal (Guarantor) B-501, 1 Modi Baug Co-operative Housing Society, Ganeshkhind Road, Pune-411016
5. Mrs. Vidya Shyam Agarwal (Guarantor and Mortgagor) B-501, Modi Baug Co-operative Housing Society, Ganeshkhind Road, Pune - 411016	6. Mrs. Ritu Anand Agarwal (Guarantor) B-501, 1 Modi Baug Co-operative Housing Society, Ganeshkhind Road, Pune 411016

Sir(s),

Sub.: Demand Notice under sub-section 2 of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act") read along with Rule 3 of the Security Interest (Enforcement) Rules, 2002 ("Rules").

“22. The submissions which has been much pressed by learned counsel for the LLP and learned counsel for the Suspended Director is that there being no pleading in I.A. No.908 of 2023 within meaning of Section 45 of I&B Code, the Adjudicating Authority could not have exercised jurisdiction under Section 49 to cancel the agreement dated 30.06.2021 and 03.08.2021. Learned counsel for the Appellant has placed reliance on judgment of Hon’ble Supreme Court in **“Anuj Jain, Resolution Professional for Jaypee Infratech Ltd. vs. Axis Bank Limited, (2020) 8 SCC 401”**. Hon’ble Supreme Court in Para 32.1 laid down following:

“32.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of undervaluation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the adjudicating authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the adjudicating authority.”

Thereafter with regard to applicability of Section 66 (1) of the Code this

Appellate Tribunal in para no. 33, 34, 38 and 39 held as under:

“33. The sequence of the events and facts, as noted above, clearly indicate that although the Corporate Debtor was

strictly restrained form dealing with the assets of the Corporate Debtor by notice under Section 13(2), the Directors of the Corporate Debtor resigned on 03.09.2020 and appointed their wives and son of one Director as new Director of the Corporate Debtor and the two Directors i.e. Respondent No. 5 and 6, Anand Shyam Agrawal and Navin Shyam Agrawal, constituted Aaj Ka Anand LLP on 12.05.2021. The execution of Leave and License Agreement by Corporate Debtor to the LLP was done so as to keep assets of the Corporate Debtor away from creditors. The Resolution Professional in application under Section 66 has clearly pleaded that business of the Corporate Debtor has been carried out with intent to defraud the creditors of the Corporate Debtor. Execution of Leave and License Agreement and the Usage Agreement, dated 30.06.2021 and 03.08.2021, respectively was with intent to defraud the creditors of the Corporate Debtor. The said course was adopted to keep the assets out of the reach of the creditors and vested in LLP, which was constituted on 12.05.2021 by two Ex-Directors who resigned. There has been categorical pleading in the application under Section 66 and sufficient materials have been brought by the Resolution Professional to prove the ingredients under Section 66(1), in transferring the assets by executing Leave and License Agreement and Usage Agreement. We, thus, are satisfied that the Adjudicating Authority has rightly returned the finding that ingredients of Section 66(1) were fully proved. In Para 36 of the judgment, the Adjudicating Authority made following observation:

"36. The Applicant has pleaded in the Rejoinder that "the intent of Respondents is to divert the revenue generated from the business of the Corporate Debtor and also to acquire back the business / assets of the Corporate Debtor by making them disputed properties / assets and thereby lowering their valuation under the IBC". It has further been pleaded that "the Liquidator vide email dated 16 June 2023 made an enquiry from the statutory auditor of the Corporate Debtor about the Deed and its impact for the financial year 2021-22 and the statutory auditor inter-alia replied that 'However, the mentioned Usage Agreement, which you have stated is under investigation, was not provided to us during the time of our audit and therefore was not subject to our inspection. As auditors, we rely on the information provided to us by our clients and cannot audit what has not been made available to us.'" These pleadings clearly make out a case of putting assets of Corporate Debtor beyond reach of its creditors illegally. Though, in

the present case, the heading of the application reads as "Application u/s 66 R/W 67 of Insolvency and Bankruptcy Code, 2016", it becomes pertinent to take note of fact that relief in terms of prayer (b) and (c) are not sought in terms of Section 66 of the Code in contradiction of prayer (d) where the relief has specifically been sought under section 66 leading to conclusion that the present application is a composite application seeking avoidance of transaction as well contribution u/s 66 of the Code."

34. We are in full agreement with the findings of the Adjudicating Authority that ingredients of Section 66(1) was fully proved and both the transactions were fraudulent transactions.

*38. Learned counsel for the LLP challenging the order passed by the Adjudicating Authority directing for contribution has contradicted that in view of the order of the Hon'ble Supreme Court in **"Gluckrich Capital P. Ltd. vs. State of West Bengal & Ors., 2023 SCC OnLine SC 1187"**, direction for contribution cannot be made to the third party. In Para 10 of the judgment following has been laid down:*

"10. We are of the considered opinion that in such circumstances, it is for the resolution professional or the successful resolution applicant, as the case may be, to take such civil remedies against third party, for recovery of dues payable to the corporate debtor, which may be available in law. The remedy against third party, however, is not available under section 66 of the IBC, and the civil remedies which may be available in law, are independent of the said section."

39. The present is a case where direction for contribution has not been made against the third party. The Suspended Director as well as both the Members of LLP were also Directors of the Corporate Debtor and direction for contribution in the impugned order has been made against all Respondent Nos. 1 to 6 to the application, individually or jointly. We, thus, do not find any error in direction of contribution on this account".

Thus the direction to contribute to the assets of the CD were passed against those persons, who at the relevant time were not the directors of the CD and have resigned in September 2020 and their relatives were inducted as new

directors of the CD and impugned leave and licence agreement and deed of usage was executed on 30.06.2021 and 03.08.2021 and it was opined by Ld. Adjudicating Authority that Respondent Nos. 5 and 6, erstwhile directors of the CD has taken all actions to fraudulently transfer the assets of the CD and LLP has been constituted on 12.05.2021 after filing of Section 7 application and that the LLP was constituted to take over the business of the CD and in these circumstances held them liable to contribute to the CD who were not the directors of the CD at the time of the impugned transactions and this direction was upheld by this Appellate Tribunal, in the facts and circumstances of the case and erstwhile directors of the CD were not treated as the third party, so as to avoid liability. Therefore, it depends on the facts and circumstances of each case as to whether a particular person or entity is a third party to avoid liability under Section 66 (1) of the Code, however no straight jacket formula for the same could be formulated in this regard. In the instant case though the Orix Leasing, prima facie, appears to be a third party but as we are intending to remand the matter for the reasons given herein after and also giving liberty to the parties to tender further evidence before Ld. Adjudicating Authority, we keep this issue open for the determination of the Ld. Adjudicating Authority.

53. We further notice that a notice of date 06.08.2019 is claimed to have been issued by the Orix Leasing to the CD for the payment of the outstanding lease rental to the tune of Rs. 3,480,552/- and soon thereafter the security deposit of Rs. 74,49,947/- deposited by the CD was forfeited. The CIRP against the CD was initiated on 23.09.2019 and the Orix Leasing vide sending an email of date 29.06.2020 has categorically admitted that the

security deposit was adjusted against the lease rent outstanding as on 31.10.2019. Thus it was admitted by the Orix Leasing that the security deposit of the CD was adjusted as on 31.10.2019 (during the commencement of moratorium). Therefore, the security amount was forfeited by the Orix Leasing after the commencement of moratorium w.e.f. 23.09.2019. Thus we do not find any error in the observation of the Ld. Adjudicating Authority that the amount of security deposit was appropriated after the commencement of moratorium. However, as has been correctly opined by the Ld. Adjudicating Authority, the restitution of the security deposit in the assets of the CD cannot be ordered in these proceedings and for the said purpose an appropriate application is required to be moved by the RP before Adjudicating Authority.

54. It is also reflected that at the stage of filing of written submissions it was stated therein by the Orix Leasing that on account of non-payment of rentals the agreement was prematurely terminated in the month of August 2019 and foreclosure statements dated 28.08.2019 were prepared. However, the foreclosure statements could only be filed with the written submissions, before the Ld. Adjudicating Authority. Significantly, it is also reflected from the reply filed by the Orix Leasing precisely in paragraph 6 (j) that it has been stated therein that the security deposit made by the CD will be restated back to the position as it was on the date of passing of the order of CIRP, in the books of accounts of the Orix Leasing and the same is not required to be returned to the CD.

55. We have also perused the documents which have been enclosed by the appellant Orix Leasing (Respondent No.1) along with the reply and Appeal

before this Appellate Tribunal with regard to supply of the equipment's and machinery by the Pratiksha Tradelinks to the CD. In the Appeal paper book of Company Appeal No. 1581 Of 2024 from paper No. 208 onwards the written request/purchase orders made by the CD to supply the machines/ Equipment's have been placed. Perusal of these requests would reveal that by writing these communications request has been made to the Orix leasing for payment/Disbursement of the payment pertaining to these machineries to Pratiksha Tradelink (Supplier). It is to be recalled that under the Master Lease Agreement the machinery was to be supplied by Pratiksha Links at the instance of Orix Leasing directly to the CD and payment of such finance was to be made by Orix Leasing subject to the conditions mentioned in the Agreement. The payment schedule of rentals has also been separately placed on record with regard to all the machines separately.

56. The record further reflects that at the Appellate stage the Orix Leasing in his Appeal has also placed invoices issued by the Pratiksha Links with regard to the supply of each machine separately of various dates enclosing therewith an annexure (with each invoice separately) which shows that each of the machine has been received by Director Shri Kunal Jwarajika on behalf of the CD by putting his signatures on it along with the signature of representative of the Orix Leasing. These invoices also reflect the GST Nos. The E Way bills pertaining to the transportation of these machines to the CD have also been placed on record.

57. We notice that Ld. Adjudicating Authority is guided by the fact that that the supplier Pratiksha Links and Directors of the CD did not appear before it and false statements have been given by Directors of the CD in

terms that the machines supplied were defective and were returned to the supplier and also by the fact the machines have not been found with the CD. Admittedly these documents were not filed before the Ld. Adjudicating Authority and in our considered opinion these documents would certainly have bearing on the defence of the appellant Orix Leasing, in terms that these equipment's and machineries were in fact supplied to the CD and only on the basis of the fact these machineries and equipment's were not given by the Suspended Board of Directors in the custody of the RP, it was presumed that these machineries and equipment's were not supplied by the Pratiksha Tradelinks to the CD.

58. At this juncture, we also notice that despite the Orix Leasing in its written submissions filed before this Appellate Tribunal have categorically stated that on account of dispute occurred with the CD, the Orix Leasing has filed a petition under Section 9 of the Arbitration Act for possession of the machinery and equipment's before appropriate court and obtained an order on 09.09.2019 for appointment of a receiver and also approached the Police authorities for enforcement of the said order and have also initiated proceedings under Section 138 of the Negotiable Instrument Act before CMM South West Dwarka and proceeding under Section 95 of the IBC against Kunal Jiwarajka (Personal Guarantor) by filing petition CP IB No. 210 of 2021 and other relevant facts in para no. 2, 3 and 4 of their written submissions filed before Ld. Adjudicating Authority, however, these facts were not at all discussed by the Ld. Adjudicating Authority in the impugned judgment. It reflects that either some of these documents were not filed before Ld. Adjudicating Authority or were not noticed.

59. We also notice that by passing impugned Judgment Ld. Adjudicating Authority, even after recording the finding that the Master Lease Agreement was Sham and has been entered into to de-fraud the creditors and further hold that the Respondent No. 2 to 5 are liable to contribute the entire money paid under MLA. However, as the amount paid under MLA has not been specified by the RP in the application, direction was issued to the RP to ascertain the same and take appropriate steps to recover the said amount by moving fresh applications from all the Respondents and rejected the application of the RP.

60. We are of the considered view that the fact whether the Master Lease Agreement is a sham document and whether the machines were in fact supplied by Pratiksha Links to the CD, could effectively be adjudicated after considering the fresh documents which have been placed by the CD before this Appellate Tribunal. Thus in our considered opinion the matter is required to be remanded back to the Ld. Adjudicating Authority for considering it afresh after providing opportunity to the parties to file any document in support of their claim or defence.

61. Considering all the facts and circumstances of the case and for the reasons given herein above the impugned order is **set aside**.

62. The matter is remanded back to the Ld. Adjudicating Authority for considering it afresh after providing opportunity to the parties to file any document in support of their claim or defence.

63. Since we are remanding the matter back to the Ld. Adjudicating Authority, the issue as to whether the third party may be directed to contribute to the assets of the CD under section 66 of the Code is also kept

open for reconsideration of the Ld. Adjudicating Authority. The IA No. 1319 of 2020 is revived on the board of the Ld. Adjudicating Authority.

64. Both above appeals are **disposed of** in above terms.

65. There is no order as to costs. Pending IA's if any stands disposed.

66. The parties shall appear before the Ld. Adjudicating Authority on 01.07.2026.

67. We request Ld. Adjudicating Authority to make all sincere efforts to dispose of the above IA No. 1319 of 2020 within 2 months from appearance of the parties before it.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Indevar Pandey]
Member (Technical)

New Delhi.
27.05.2026.
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