

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 629 of 2025

[Arising out of the Order dated 12.03.2025, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench-I), in IA No. 110 of 2023 in C.P.(IB) No. 3863/MB/2019]

IN THE MATTER OF:

1. Shantilal Javerchand Jain

(Suspended Director of Varsha Corporation Ltd.)

Having residence at:

2nd Floor, Varsha Building 13 Adarsh Society,
Ramchandra Lane Extension, Malad – West,
Mumbai – 400064

...Appellant No.1

2. Indra Shantilal Jain

(Suspended Director of Varsha Corporation Ltd.)

Having residence at:

2ndFloor, Varsha Building 13 Adarsh Society,
Ramchandra Lane Extension, Malad – West,
Mumbai – 400064

...Appellant No.2

3. Shirish Shantilal Jain

(Suspended Director of Varsha Corporation Ltd.)

Having residence at:

2ndFloor, Varsha Building 13 Adarsh Society,
Ramchandra Lane Extension, Malad – West,
Mumbai – 400064

...Appellant No.3

Versus

1. Vinodkumar Pukhraj Ambavat

Applicant/Resolution Professional/
Liquidator of Varsha Corporation Ltd.

C/o SDS Advocates

Resolution Professional No. 155,

15th Floor Maker Chamber-III,

Nariman Point

Mumbai-400021

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...Respondent No. 1

2. M/s Swastik Diamonds

Office Nos. 23, 1st Floor, Hanuman Building

67 Mumbadevi Road,

Tamba Kanta Mumbai

...Respondent No. 2

3. Maa Kali Jewellers

23/35, Mohamedi Manzil
2ndFloor, Shop No.-7A
Mirza Street, Mumbai

...Respondent No. 3

4. Sharad Construction Company

Varsha Building 13 Adarsh Society
Ramchandra Lane Extension, Malad – West,
Mumbai - 400064

...Respondent No. 4

Present:

For Appellant : Mr. Ashish Raghuvanshi, Advocate.

For Respondent : Ms. Disha Shah, Advocate for R-1.

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

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

The instant appeal has been preferred by the appellants under Section 61 of the IBC, 2016 (Code) against the impugned order dated 12.03.2025, passed by Ld. National Company Law Tribunal, Mumbai in IA No. 110 of 2023 in CP (IB) No. 3863/ (MB)/2019 whereby the Ld. Adjudicating Authority partially allowed the aforesaid IA declaring two transactions in violation of Section 66 of the Code and directed appellants no. 1 to 3 to jointly or severally contribute to the CD a sum of Rs. 16,49,32,520/- i.e (sixteen crores forty-nine lakhs thirty-two thousand five hundred and twenty) and Rs. 29,65,464/- (twenty-nine lakhs sixty-five thousand four hundred sixty-four) along with interest of @12% p.a from the date of the order till its payment.

2. Ld. Counsel for the appellants submits that on 30.10.2019, one Mr. Rajendra Shah, financial creditor (FC) filed an application under Section 7 of

the IBC, 2016 bearing in CP (IB) No. 3863/ (MB)/2019 requesting to initiate Corporate Insolvency Resolution Process (CIRP) against the CD (Varsha Corporation Ltd.) for non-payment of outstanding dues and vide order dated 10.06.2022, the application aforesaid was admitted and CIRP against the CD was initiated and Respondent No. 1 Vinod Kumar Pukharaj Ambavat, was appointed as Interim Resolution Professional (IRP).

3. It is further submitted that the appellant filed an appeal against the aforesaid CIRP admission order to this appellate tribunal which was dismissed vide order dated 02.11.2022, and the order of this appellate tribunal was further assailed by the appellants before the Hon'ble Supreme Court by filing appeal and the same is also stated to have been dismissed vide order dated 13.12.2022.

4. It is also submitted that on 03.07.2022, Committee of Creditors (CoC) of the CD was formed and the Respondent No. 1 was appointed as the RP of the CD and in between the CD had some outstanding payments from one of its client M/s Pentabullion LLP to the tune of Rs. 10,92,24,988/- (Rs. Ten crore ninety-two lakhs twenty-four thousand nine hundred eighty-eight only) and to settle this views the Pentabullion agreed to sell gold to the CD and between 03.07.2020 to 14.07.2020 the CD purchased gold from M/s Pentabullion amounting to Rs. 12,50,47,150/- (twelve crore fifty lakhs forty-seven thousand one hundred fifty only).

5. It is further submitted that as a matter of regular business from 11.08.2020 to 17.08.2020 the aforesaid gold was sold by the CD to M/s Swastik Diamonds (Respondent no. 2) for Rs. 16,09,74,720/- (sixteen crore nine lakhs seventy four thousand seven hundred twenty only).

6. It is also submitted that the CD requested for clearance of trade dues on multiple occasions however Respondent No. 2 requested cooperation because of the happening of Covid-19 pandemic and from 15.09.2020 to 11.11.2020 CD received a part payment of Rs. 24,00,000/- (twenty four lakhs) and from 11.01.2022 to 17.03.2022 Rs. 42.10 lakhs from Respondent No. 2 on different dates.

7. It is also submitted that on 11th and 12th March, 2022 CD sold 560 grams of gold worth Rs. 30.09 lakhs to Maa Kali Jewellers/Respondent No. 3 and on 07.04.2022 received a part payment of Rs. 43,826/- (forty-three thousand eight hundred twenty-six only) from Respondent No. 3 and during the same period the appellant had also dealt with many other traders.

8. It is submitted that Respondent No. 2 expressed its intent to do further business with the CD and accordingly on 06.06.2022 CD sold gold worth Rs. 1.0567 crore to Respondent No. 2 on an assurance that passed dues would be cleared.

9. It is further submitted that on 10.11.2022, Respondent No. 1 had sent email seeking clarification regarding suspected transaction which appellant No. 1 replied vide letter dated 16.11.2022 and it was on 14.11.2022 in the 4th CoC meeting wherein the draft transaction audit was discussed and on 28.11.2022, the final transaction audit report was submitted by CA Kansal Singla and Associates was submitted.

10. It is further submitted that on 22.12.2022 Respondent No. 1 mechanically filed IA No. 110 of 2023 under Section 25 (2) (j) read with Section 43, 45 and 66 of the Code for seeking appropriate directions against

appellants with respect to certain transaction identified as either preferentially or fraudulent.

11. It is also submitted that during the pendency of aforesaid proceedings the RP preferred an application bearing IA No. 314 of 2023 seeking liquidation of the CD which was allowed vide order dated 02.08.2023 and the CD was put under liquidation and it was on 12.03.2025, the IA No. 110 of 2023 was allowed by the Ld. NCLT partly holding transactions with M/s Swastik Diamonds (Respondent No. 2) and Maa Kali Jewellers/ Respondent No. 3 as fraudulent under Section 66 of the Code and directions as indicated in the opening part of this judgment were issued.

12. It is submitted with considerable force that liquidator has failed to discharge the burden of proving fraud which was heavy on him because to label a transaction fraudulent the intention to defraud is mandatory which is completely lacking in this case. Reliance in this regard has been placed on ***Atlanti Spinning and Weaving Mills Ltd. vs. Dolly Investment Co. Pvt. Ltd. (2023) SCC online NCLAT 477.***

13. It is further submitted that no evidence of either collusion, personal enrichment, siphoning or of any dishonest intention has been placed and the simple default of non-payment by a business partner has been associated with fraud. A mere non-recovery of a debt may not be termed as fraud in absence of any ill intention. Reliance has been placed in this regard on ***Renuka Devi Rangaswamy v. Madhusudan Khemka Suspended Director of M/s Regen Infrastructure and Services Pvt. Ltd. & Ors. (Comp. App. (AT) (CH) (Ins.) No. 356 of 2022).***

14. It is further submitted that an erroneous finding of wrongful trading has been recorded by the tribunal by totally misinterpreting of the two bifurcation test provided under Section 66 (2) of the IBC as the adjudicating authority wrongly concluded that mere filing of Section 7 proceedings in October, 2019 would mean that the appellants ought to have known insolvency unavoidable. Ld. Counsel placed reliance on ***Dheeraj Wadhwan v. Yes Bank Ltd. [Comp. App. (AT) (Ins) No. 953 of 2021]***.

15. While relying on ***Nalinesh Kumar Paurush & Ors. v. Arvind Mittal (RP) & Anr. (Comp. App. (AT) (Ins) No. 346 of 2024 & IA No. 6783 of 2024)*** and ***Regen Powertech P. Ltd. v. Wind Construction P. Ltd. & Ors. (2022) SCC Online NCLAT 3801*** it is submitted that every error in commercial wisdom resulting in loss may not label the transactions as fraudulent as otherwise the transactions impugned by the liquidator were made bona fide in hope to get more profit in future.

16. It is vehemently submitted that the Ld. Tribunal has committed material illegality in penalising the appellants (formal directors of the CD) on the basis of an incomplete and undiscussed transaction audit report while no action has been taken against the other party involved therein and also that the allegation of fraudulent transaction was not proved and miserably failed. Reliance has been placed on ***State Bank of India v. Dommeti Surya Rama Krishna Saibaba & Ors. Comp. App. (AT) (CH) (Ins) no. 461/2023 (IA No. 1444/2023)***, ***Shibu Job Cheeran & Ors. vs. Ashok Velamur Seshadri, Liquidator of M/s. Archana Motors Ltd., 2023 SCC Online NCLAT 804***, ***Manish Kumar Bhagat, Liquidator of Pioneer Globex Pvt. Ltd. v. Narendrakumar Jayantilal Shah & Ors. (2025 SCC***

Online NCLT 1401), Renuka Devi Rangaswamy v. Madhusudan Khemka Suspended Director of M/s Regen Infrastructure and Services Pvt. Ltd. & Ors. (Comp. App. (AT) (CH) (Ins.) No. 356 of 2022).

17. Ld. Counsel for the Respondent No. 1 on the other hand submitted that the appeal is liable to be dismissed as the same is devoid of merits and also that the appellants being erstwhile directors of the CD not only failed to discharge their fiduciary duties but also facilitated and approved transactions that were patently prejudicial to the interest of the creditors and in utter disregard to standard commercial norms and are deliberate attempt to siphon off assets of the CD to defeat the lawful claims of the creditors.

18. It is further submitted that, the transactions executed by the Appellants, acting as suspended directors of the Corporate Debtor, with M/s Swastik Diamonds ("Respondent No. 2) and Maa Kali Jewellers/Respondent No. 3 and 1 do not qualify as transactions taken place in the ordinary course of business, instead, the pattern, timing, quantum, and commercial irrationality of these transactions demonstrate that they were entered into with full knowledge of impending insolvency, and with the intent to defraud the Financial Creditors and diminish the asset base of the Corporate Debtor.

19. It is also submitted that appellants were fully aware, by virtue of the order dated 05.11.2019 passed in C.P. No. 38631 IBC/MB/2019, that the proceedings under Section 7 of the Code had already been initiated against the Corporate Debtor, however even thereafter the appellants effected a series of fraudulent transactions by selling gold to Respondents Nos. 2 and

3, on 100% credit basis and with no security or reasonable assurance of recovery.

20. It is further submitted that transactions with Respondent No. 2 to the tune of Rs. 16,09,74,720/- were carried out within a span of 7 days i.e. from 11.08.2020 to 17.08.2020 without any recovery mechanism or payment track record and despite recovering only 4% of this outstanding amount in next two years (only 66.10 lakhs) the appellant still proceeded to execute an additional credit sale worth Rs. 1.0567 crores on 06.06.2022 just 4 days before the commencement of CIRP which is in itself a clear proof of fraudulent transaction.

21. It is also submitted that so far as the transaction with Respondent No. 3 i.e. Maa Kali Jewellers are concerned these transactions were held between 11.03.2022 and 12.03.2022 worth Rs. 30.09 lakhs and this transaction was 100% on credit and the recovery of Rs. 43,826/- has been affected which is less than 1.5% of the total sale value.

22. It is also highlighted that the gold bullion trade, because of its thin margin, operates on cash transactions on real time liquidity and there is no commercial practice of extending large credit lines. In this regard reliance has been placed on the law laid down by this appellate tribunal in ***Shri Baiju Trading and Investment vs. Nandkishore Vishnupant Deshpande, CA (AT) (Ins) No. 699 of 2021.***

23. It is further submitted that absence of basic safeguards such as KYC verification, execution of formal contracts, procurement of security or collateral or any documented recovery mechanism leads to the only conclusion that these transactions were not transactions of ordinary

commercial arrangements and appears to be same transactions committed with the intent to transfer valuable assets i.e. gold outside the reach of creditors of the CD and these transactions comes within the ambit of Section 66 of the Code.

24. It is further submitted that under Section 66 (2) of the IBC a director or any person in charge of the management of the CD having knowledge that there is no reasonable prospect of avoiding the CIRP and he did not exercise due diligence in minimising the potential loss to the creditors would be liable to contribute to the assets of the CD for any loss occurred to the CD and in the instant case appellants were in charge of the management of the CD and these transactions have been made when the CIRP application was pending before the adjudicating authority.

25. It is also submitted that the appellants have not only acted with gross negligence but also with specific knowledge that the prospective insolvency proceedings pending in the NCLT could not be avoided and all these transactions have been done with the intent to defraud the creditors of the CD and after having full knowledge of the pendency of the proceedings before NCLT.

26. Ld. Counsel for the Respondent has drawn our attention on the timeline of these transactions in order to show that all these transactions have been done during the pendency of application filed by the financial creditor under Section 7 of the IBC with fraudulent intention and even without exercising any due diligence or taking reasonable steps to minimise potential loss to creditors therefore the appellants were liable both under Section 66 (1) and 66 (2) of the Code to contribute to the state of the CD and

in this regard no mistake has been committed by Ld. tribunal in passing the impugned order.

27. It is further submitted that some new documents have been presented by the appellants before this appellate tribunal which were not before Ld. NCLT and therefore the same could not be relied, as a party could not use appellate proceedings to cure evidentiary deficiencies. In this regard reliance has been placed on judgment dated 10.12.2021, passed in IA No. 580 of 2021 in CA (AT) No. 325 of 2019, **Shankar Sundaram vs. M/s Amalgamations Ltd.**

28. Ld. Counsel for the Respondent has relied on following case laws:

(i)Rajendra Shah vs. Varsha Corporation Ltd., I.A. (I.B.C)/3300(MB) 2025 in C.P. (IB)/3863(MB)2019.

(ii)Shibu Job Cheeran & Ors. vs. Ashok Velamur Seshadri, Liquidator of M/s. Archana Motors Ltd., 2023 SCC Online NCLAT 804.

(iii) Shri Baiju Trading & Investment Pvt. Ltd. vs. Arihant Nenawati (Liquidator of Royal Refinery Pvt. Ltd.) & Ors., 2023 SCC Online NCLAT 845.

(iv) Mr. Shankar Sundaram vs. M/s Amalgamations Ltd. & Ors., IA No. 580/2021 in TA No. 18/2021, Comp. App. (AT) No. 325/2019.

(v)Bhrugesh Amin vs. Fun Gateway Arena Pvt. Ltd. & Ors., IA 4888/2023 in CP No. (IB) 935/MB/C-III/2020.

29. Having heard Ld. Counsels for the parties and having perused the record, we deem it proper to first have a glance on the substantive law and the case law on the subject and also on the cases relied on by the parties.

30. Section 66 of the Code for convenience is reproduced as under:

Section 66: Fraudulent trading or wrongful trading.

(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.

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.

31. A plain reading of this Section would evidently demonstrate that if during the corporate insolvency resolution process or a liquidation process it is found that the 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 moved by the resolution professional may pass

an order directing any persons who were knowingly parties to the carrying of the business in such manner to make contributions to the asset of the CD as the tribunal may deem fit.

32. Sub-Section 2 of Section 66 also provides that on an application made by the RP during corporate insolvency resolution process the adjudicating authority may by an order direct that a director or partner of the CD shall be liable 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 commencement of CIRP and they did not exercise due diligence in minimising the potential loss to the creditors of the CD.

33. This appellate tribunal in **Atlanti Spinning and Weaving Mills Limited, vs. Dolly Investment Company Private Limited**, [2023 SCC Online NCLAT 477] relied on by Appellant opined that the "*The 'Adjudicating Authority' while dismissing the said Application has observed that the Applicant / Liquidator had failed in establishing that the sale Transaction, dated 11/08/2008, in favour of the Respondent, was fraudulent.*"

34. In **Renuka Devi Rangaswamy v. Mr. Madhusudan Khemka Suspended Director of M/s. Regen Infrastructure and Services Pvt. Ltd.** [Company Appeal (AT)(CH)(Ins) No. 356 of 2022], relied on by appellant, this appellate tribunal held in paragraph No.37 as under; -

"Para 37 'Dishonesty', is an essential ingredient of 'Fraudulent Trading'. The 'Aspect of Dishonesty', is to be established and it cannot be inferred in any manner. Whether a 'Director', had exercised his skill,

experience and general knowledge, to be expected of a person, in carrying out the `duties of his functions`, is to be determined for a `Liability`, in the considered opinion of this `Tribunal`."

35. Reliance has also been placed by Ld. Counsel for the appellant on paragraph 60 of **Piramal Capital and Housing Finance Limited v. Moons Technologies Ltd. & Ors.** [2025 SCC Online SC 690], relevant paragraphs of the same 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."

36. Another case relied on by Ld. Counsel for the appellant is **Dheeraj Wadhawan v. Yes Bank Limited & Anr** [Comp. App. (AT) (Ins) No.953 of 2021], wherein this appellate tribunal held as under: -

"31-As noted above, there being no default by the principal borrower on 01.08.2019, all subsequent action by the Bank on the alleged default dated 01.08.2019 are unsustainable. Hence, information recorded in the information utility on the strength of loan recall notice dated 18.11.2019 in no manner can be read as material to prove that default was committed by the Bank on 01.08.2019. Under the statutory scheme, the record of information utility is relevant but record of information utility is not conclusive proof of any default and a Corporate Debtor is always at liberty to disapprove the statement as contained in the information utility record.

... [Emphasis Supplied]"

37. In the case of **Mr. Nalinesh Kumar Paurush & Ors. v. Mr. Arvind Mittal Resolution Professional of Temple Leasing and Finance Limited** [Company Appeal (AT) (Insolvency) No. 346 of 2024 & IA No. 6783 of 2024] this appellate tribunal set aside order of the NCLT directing appellants to contribute to the asset of the CD holding that "*the transactional audit report which may not be termed as a conclusive piece of evidence, has arrived at an*

erroneous conclusion that impugned transactions made by the appellant at the relevant point of time were fraudulent without adverting to see the impugned transactions in the broad spectrum of commercial wisdom."

38. In **Regen Powertech Pvt. Ltd. v. M/s. Wind Construction Private Limited. & Ors.** [2022 SCC Online NCLAT 3801] this appellate tribunal reiterated the same view by observing that "*One cannot remain 'oblivious' of the candid fact that, if the 'Directors' of a 'Company' had acted on a 'bonafide belief' that the 'Company' would 'recover' from its 'Financial Problems' / 'Difficulties', then, they will not be held liable for the 'act' / 'offence' of 'Fraudulent Trading.'*"

39. In **State Bank of India v. Dommeti Surya Rama Krishna Saibaba & Ors. (COMPANY APPEAL (AT) (CH) (INS) NO.461/2023 (IA NO.1444/2023)**, another case relied on by Ld. Counsel for appellant it is held as under: -

"11. In the absence of such supporting documents and evidence, we are of the view that, the Forensic Auditors Report alone, in its present shape, cannot be extracted to be applied for the purposes of deciding an application under Section 66 of the I & B Code, 2016, for the purposes of determining the fraudulent act, as it was alleged therein in the application. The plea of the Appellant herein and the Resolution Professional before the learned Adjudicating Authority is that because of non-cooperation of Suspended management, supporting evidence could not be produced. In such a case, only criminal investigation can unearth the evidence and learned Adjudicating Authority in para 12 of the Impugned Order has rightly noted that the FC has filed a complaint with CBI, New Delhi on 16.07.2022."

40. The appellate tribunal again in **Shibu Job Cheeran & Ors. v. Ashok Velamur Seshadri Liquidator of M/s. Archana Motors Ltd. (2023 SCC OnLine NCLAT 804)**, the case relied on by appellant held as under:

"43. It is therefore clear that for establishing the fraudulent purpose, it must be shown that the Ex-Directors of the 'Corporate Debtor' knew that the Company was insolvent but continued to run business with dishonest intentions. On a broader sense, concealment of true financial position of the 'Corporate Debtor' can also be covered under such provisions.

44. This 'Appellate Tribunal', therefore, observes that the following elements need to be established for success of Section 66 Application, namely,

(i) Business of the 'Corporate Debtor' has been carried out with an intent to defraud the creditors.

(ii) Directors participated in carrying on business of the 'Corporate Debtor' despite knowing likely insolvency of the 'Corporate Debtor'."

41. In **Manish Kumar Bhagat, Liquidator of Pioneer Globex Pvt. Ltd. v. Narendrakumar Jayantilal Shah & Ors. (2025 SCC OnLine NCLT 1401)**, this appellate tribunal in paragraph No.10 held as under: -

"10. The Audit Report has been prepared with constraints and limitations. In absence of crucial records, no conclusion can be drawn that the alleged transactions done are under section 66 & 67 of I&B Code 2016. The applicant has not filed sufficient evidence to hold that the alleged transactions are fraudulent transaction under section 66 of the Code. It is also pertinent to note that the

RP has not form opinion and determination as per Regulation 35A of IBBI (Resolution Process for Corporate Persons) Regulations, 2016. "

42. In **Renuka Devi Rangaswamy v. Madhusudan Khemka Suspended Director of M/s. Regen Infrastructure and Services Pvt. Ltd. & Ors. (Company Appeal (AT) (CH) (Ins.) No. 356 of 2022)**, a coordinate bench of this appellate tribunal held that "A 'Single Fraud', against 'a person', may result in Civil Action in the 'Realm of Tort'. It does not lie in the mouth of 'Directors of a Company', being accused of 'Fraudulent Trading', to allege that the 'Company's Claim', for recovery in Civil Action is barred".

43. This appellate tribunal in **Swapan Kumar Saha v. Ashok Kumar Agarwal, (2025) [ibclaw.in](https://www.ibclaw.in) 911 NCLAT**, while considering many cases, including those relied on by Ld. counsel for the appellants, 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,"

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 of *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. Thus we now proceed to appreciate the facts and circumstances of the present case on the touch stone of the law laid down in above mentioned cases.

44. Coming to the facts of the instant case it is reflected that the timeline of the transactions which have been labelled as fraudulent and also to have been executed without due diligence and without exercising any effort to minimise potential loss to the creditors of the CD, is not disputed.

45. It is evident from the record that financial creditor has filed an application under Section 7 of the IBC against the CD on 25.10.2019 and the CIRP against the CD i.e. Varsha Corporation Ltd. was initiated vide order dated 10.06.2022 passed in CP (IB) No. 3863/MB/2019. It has been noted by the Ld. NCLT in its CIRP initiation order precisely at page no. 12 that though the CD has filed his reply on 15.02.2020 they thereafter did not appear resulting in an ex-parte order.

46. The first transaction which has been declared as fraudulent by the Ld. Tribunal by passing the impugned order is in terms that between 03.07.2020 and 14.07.2020 the appellant purchase gold from M/s. Pentabullion LLP worth Rs. 125047150/- against outstanding dues of it of Rs. 109224988/- with regard to the settlement of earlier liability. It has been

highlighted by the Respondent that the total sales revenue of the CD in the financial year 2020-2021 was only Rs. 16.48 Crores.

47. It is also not in dispute that appellants sold gold worth Rs. 160974720/- to M/s Swastik Diamonds (Respondent No. 2) in five separate tranches within a span of 7 days i.e. from 11.08.2020 to 17.08.2020 worth Rs. 160974720/-.

48. It is also not in dispute that this entire sale was made on 100% credit and no security or recovery assurance has been ensured. As said earlier the total sales revenue of the CD during the relevant year was Rs.16.48 Crores of which Rs. 16.10 Crores i.e. 98% of the total revenue was pertaining to this transaction i.e. selling of gold to the Respondent No. 2 and all transaction with regard to the sale has taken place during the pendency of CIRP application before the Ld. Tribunal and therefore the initiation of CIRP was clearly in sight of the appellants and they instead of taking due diligence and caution in running the business of the CD entered into these transactions, whereby the asset of the CD was apparently siphoned to the other party and taken out of the CD and significantly this whole transaction was done on credit, which is an alien word in gold bullion trading because of their margin of profit and in this way the fraudulent intention of the appellants was crystal clear.

49. Ld. Tribunal on the basis of the record available before it i.e. ledger account of M/s Swastik Diamonds (Respondent No.2) found that the first payment of only Rs. 6 lakhs was received from Respondent No. 2 on 15.09.2020 while the sale was amounting to Rs. 160974720/- which had taken place up to 17.08.2020. From the same ledger it is reflected that a

sum of Rs. 24 lakhs were received by the appellants up to November, 2020 and thereafter an aggregate sum of Rs. 4610000/- was received in the year 2021-2022.

50. It also appears to be an admitted situation and has been correctly recorded by Ld. Tribunal in the impugned order that even when there was an outstanding amount of Rs. 154364720/- (Rs. 160974720-4610000=154364720/-) on 06.06.2020, which is a period of more than 20 months the CD again made a sale of Rs. 10567800/- on that day without receiving any further money.

51. It is to be highlighted that the first tranche of Rs. 24 lakhs paid by the Respondent No. 2 was only constituting 4.1% of the sale consideration i.e. 160974720/- and the part payment of Rs. 42.10 lakhs made between 01.04.2021 till 17.03.2022 was also barely 1.5% of the above mentioned sale consideration and there was an outstanding amount of about Rs. 154364720/- at the end of financial year 2021-2022.

52. Similarly, in case of Respondent No. 3 i.e. Maa kali Jewellers the two transaction of gold sale had taken place of total consideration of Rs. 30,09,290/-. These transactions were also on 100% credit and only Rs. 43,826/- out of total outstanding amount of Rs. 30,09,290/- was paid by the Respondent No. 3 on 07.04.2022. It is in the background of these transactions and also keeping in view the timeline of these transaction precisely during the pendency of the application filed by a financial creditor against the CD under Section 7 of the IBC, these transactions in our considered view have been rightly labelled as fraudulent by Ld. Tribunal and thereafter the appellants being the Directors of the CD were rightly directed

to contribute Rs. 164932520/- and Rs. 2965464/- to the estate of the CD, respectively.

53. In **Shri Baiju Trading & Investment Pvt. Ltd. v. Arihant Nenawati (Liquidator of Royal Refinery Pvt. Ltd.) & Ors. 2023 SCC OnLine NCLAT 845** this appellate tribunal with regard to the nature of gold bullion trade observed as under:

“38. This ‘Appellate Tribunal’ notes that the business of the ‘Corporate Debtor’ was related to trading in Bullion i.e. import/ export/ dealing in local markets by way of sale/purchase of gold and the ‘Corporate Debtor’ was not at all connected with business of financial services or lending money. It has also been brought to our notice that as per normal business practice in gold business, the transaction and dealing occur on spot payment basis and in such business there is hardly any scope for lending money. It also transpires that the bullion/ gold business is conducted on ‘thin margins’ and cash flow of the such business is required to be regulated/ maintained strictly in order to sustain and for growth of the business by way of purchase of gold on continuous basis. In this background, this ‘Appellate Tribunal’ finds it quite unusual on the part of the ‘Corporate Debtor’ to lend such huge amount of Rs. 41.03 crores and similarly unusual on point of the ‘Appellant’ to have benefitted of this largesse without any explainable rhyme or reason”.

54. At this juncture, we also notice the transaction audit report wherein the transaction auditor after inspecting the financial statements of the CD and Respondent No. 2 so far as the sale of gold to Swastik Diamond/Respondent No. 2 is concerned, has opined that the audited financials of the CD for the financial year 2020-2021 shows sales revenue of Rs. 16.48 Crores and 98% of the aforesaid sales amounting to Rs. 16.10 Crores were made to the single party (M/s Swastik Diamond) in just five transactions held from 11.08.2020 to 17.08.2020.

55. It is also highlighted in the said report that the Company made sales of total of 29.885 kilograms of 995 gold aggregating sales of Rs. 16.10 Crores as per the narration of the ledger entries and out of this sale i.e. 16.10 Crores the CD only received Rs. 24 lakhs in financial year 2020-2021 resulting in outstanding receivable of Rs. 15.86 crores at the end of financial year 2020-2021. It is also highlighted that the CD received another Rs.42.10 lakhs in financial year 2021-2022 leaving thereby an outstanding receivable of Rs. 15.44 crores at the end of financial year 2021-2022.

56. It is also highlighted by the transaction auditor that despite such an huge amount remaining receivable the CD made another sale of Rs. 1.0567 Crores to the same party on 06.06.2022 four days before the commencement of CIRP resulting in outstanding receivable increased to 16.49 crores as on 10.06.2022. It is also highlighted that from the available information and tally backup provided and that this sale in financial year 2020-2021 was the first time sale to Swastik Diamond/Respondent No. 2 and thereafter the transaction auditor opined that given the fact that the CD

reported huge losses since financial year 2017-2018 no Director in charge of the Company would make a legitimate commercial decision of sale of 31.885 kg of gold of Rs. 17.15 Crores on Credit to any party and thereafter has held that this sale was made by the Directors with malafide intentions to keep the inventory of gold out of reach of financial creditors.

57. Similar observations have been made by the transaction auditor with regard to the sale of 560 grams of gold to Maa Kali Jewellers/Respondent No. 3 amounting to Rs. 30.09 lakhs in March 2022 out of which Rs. 29.65 lakhs remained outstanding on the date of the CIRP.

58. Certainly the transaction audit report could not be perceived to be a conclusive evidence of Fraud, but it is a valuable piece of evidence, more so when the same is based on the audited financial records of the parties and therefore, could not be lightly brushed aside. The factual position of the financials relied on by the transaction auditor has not been dissipated rather an effort has been made by the appellants to justify these transactions as done in ordinary course of business. However, these transactions on the face of them appears to be fraudulent for the reasons mentioned by the transaction auditor in its report and also on the basis of timing of execution of these transactions. The appellants in our considered opinion have miserably failed to justify these transactions as done in ordinary course and to us, these transactions have been executed to take out money out of the CD, fraudulently.

59. Keeping in view all the facts and circumstances of this case, especially the timing of these transactions, when the insolvency proceedings were pending against the CD and the appellants, who are none other than the

Directors of the CD, were very well aware of the same and also keeping an eye on the nature of transactions and also considering the *modus-operandi* whereby a large quantity of gold of the CD has been sold on credit which is not a regular practice in gold bullion market, and not securing this credit transaction by any security etc., we do not have any doubt in our mind that these transactions were fraudulent transactions on the face of them and were fraudulently transacted to keep the inventory of gold of the CD out of the reach of the creditors of the CD.

60. Thus, in the facts and circumstances of this case and for the reasons state hereinbefore, we do not find any illegality so far as the impugned judgment, passed by the Ld. Tribunal, is concerned.

61. Resultantly the appeal is lacking force and is **dismissed** as such.

62. Pending IA's if any is also closed. There is, however no order as to costs.

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

[Naresh Salecha]
Member (Technical)

New Delhi.
04.12.2025

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