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SAME WORDS, DIFFERENT SEATS: NOMINEE AND INDEPENDENT DIRECTORS UNDER THE INSOLVENCY AND BANKRUPTCY CODE AFTER THE 2026 AMENDMENT

~ Anushka Shaha & Riya Majumdar

Abstract

Company law treats nominee and independent directors as opposites: a nominee can never qualify as independent. The Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") asks the same questions of every director: what did you know, and what did you do? This article examines how that mismatch plays out after the Insolvency and Bankruptcy Code (Amendment) Act, 2026 ("2026 Act"). It argues, first, that sections 19 and 66 of the Code are blind to how a director was appointed, and that the tribunal decisions reviewed here, including one involving lender-appointed nominees, decide liability on proof of intent, participation and diligence rather than on status. Second, it shows that the parts of the 2026 Act already in force (extended cooperation duties, liquidator and creditor standing to pursue trading claims, re-anchored look-back periods) raise the scrutiny on all directors, while the creditor-initiated process that would place a resolution professional inside board meetings is enacted but not yet in force. Third, it argues that the real differences between the two directors lie in loyalty, information and the evidential record, and that the Indian text of section 66(2) lacks the two-sided standard of care found in its UK counterpart. It closes with four reform proposals: recognition of nominee conflicts and a narrow recusal rule, a conditional safe harbour tied to the diligence Explanation in section 66(2), and guidance on what "ought to have known" demands of non-executive directors. The first two proposals build on Lakshita Mohan's July 2026 commentary and are attributed accordingly.

Keywords: nominee director; independent director; fiduciary duty; wrongful trading; Insolvency and Bankruptcy Code; corporate governance

1. Introduction

Every insolvency has a boardroom before it has a tribunal. Months before a resolution professional is appointed, a group of directors decided whether to keep trading, whether to pay one creditor ahead of another and whether to raise one more loan. Insolvency law later reconstructs that room from minutes, emails and memories.

Two of the people in that room are often not the promoters. One is a nominee, placed on the board by a lender or investor to protect its stake. The other is an independent director, brought in for an outsider's judgment. The Companies Act, 2013 is clear that these are different roles: an independent director is, by definition, a director other than a managing director, a whole-time director or a nominee director (s 149(6)). The IBC appears to see no difference at all. Sections 19 and 66 speak of directors, personnel and persons "knowingly" party to wrongdoing, and nowhere ask how the person came to the board.

That gap between how company law labels directors and how insolvency law judges them is the subject of this article. It has become more pressing since the 2026 Act received Presidential assent on 6 April 2026 and, by notification S.O. 2625(E) dated 22 May 2026, brought most of its provisions into force on 26 May 2026.[1]

1.1 Research question

Does a director's status as nominee or independent change their liability under the IBC after the 2026 Act, and if not, where do the real differences lie?

1.2 Argument

The article makes three claims.

1. **The Code is label-blind.** Section 66 attaches to "any person" knowingly party to fraudulent trading and to "a director or partner" for wrongful trading. Section 19 attaches to personnel and directors. None turns on appointment route, and the decisions examined do not treat status as relevant.
2. **The 2026 Act keeps that blindness but raises the stakes.** Provisions now in force widen who can bring a section 66 claim and who owes a duty of cooperation. The more dramatic change for boards, a resolution professional attending board meetings in a creditor-initiated process, is enacted but not yet commenced.

1 Companies Act, 2013, s 149(6) and Explanation to s 149(6) (definition of nominee director); s 166; Schedule IV.

3. **The nominee carries the sharper practical risk.** The difference is evidential, not textual. A nominee has a second loyalty and a second information channel, and both matter when a tribunal asks what a director knew or ought to have known.

1.3 Method and limits

The article is doctrinal. It reads the Companies Act, 2013 and the Code alongside the tribunal and court decisions listed in the References, which were read in full, and alongside secondary commentary on the 2026 Act. Three limits should be stated plainly. First, the 2026 Act is recent and the case law applying it is thin; the treatment of its provisions is a reading of the notified text and of commentary, not a report of settled decisions. Second, the decisions reviewed are a purposive sample, not an exhaustive survey of section 66 case law; the statement that no decision turns on nominee status is confined to that sample. Third, much of Part 6 is analytical: it predicts how tribunals are likely to treat evidence and does not report a rule they have laid down.

1.4 Roadmap

Part 2 sets out the problem of the nominee's divided loyalty. Part 3 examines the Companies Act framework. Part 4 turns to section 66 and its case law. Part 5 explains what the 2026 Act changed and what it has not yet changed. Part 6 analyses where exposure differs. Part 7 offers a comparative note on the United Kingdom. Part 8 proposes reforms and Part 9 concludes.

2. The problem of the second loyalty

The difficulty is not technical. It concerns whom a director is supposed to serve.

2.1 The orthodox rule

A director owes duties to the company. Section 166 of the Companies Act, 2013 requires every director to act in good faith to promote the objects of the company for the benefit of its members as a whole, to exercise due care, skill and diligence, and to exercise independent judgment, and it forbids a situation of direct or indirect conflict with the company's interests. The section makes no exception for nominees.

Commercial reality is different. A lender or investor places a nominee on the board because it wants more than a covenant can give: early warning, a vote and a voice. The arrangement is sensible and common. But the nominee arrives to protect a particular interest, and the law expects undivided loyalty from a person appointed for a second one.

The Supreme Court touched this tension in *Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd* (2021) 9 SCC 449. The case concerned the removal of the executive chairman of Tata Sons and the affirmative voting rights that the articles gave to the directors nominated by the Tata Trusts. The Court recorded the argument that, once appointed, nominee directors owe loyalty to the company and not solely to their nominator (para 213), noted the authorities relied on for the proposition that a nominee may look after the nominator's interests but must act in the company's best interests and not fetter his discretion (para 227), and observed that the questions of what is in the company's interest, the members' interest and the nominator's interest lie in areas where the dividing lines are blurred (para 228). It held that affirmative voting rights for nominees of institutions holding a majority of shares are an accepted global norm (para 219) and rejected the challenge based on pre-consultation with the Trusts (para 231). The case therefore shows the Court accepting that a nominee is entitled to take account of the nominator's interests, while keeping the duty to the company intact. It does not lay down a rule for insolvency.[2]

2.2 What independence adds

The independent director sits on the other side of the same coin. The role's value lies in having no stake: no promoter ties, no pecuniary dependence, no nominating institution. Schedule IV to the Companies Act sets out what is expected of independent directors in practice. But independence is a status. It describes who the director is on the day of appointment, not what the director did when the numbers turned bad. The law of director liability, as the next Parts show, cares mainly about the second question.

2.3 Why insolvency changes the picture

When a company is solvent, the question "whose interests?" can stay in the background, because the company and its members largely point the same way. Near insolvency, creditors have the most to lose, and the law starts to ask whether directors thought about them. Section 66(2) is the clearest Indian example: it asks whether a director knew or ought to have known that there was no reasonable prospect of avoiding the corporate insolvency resolution process, and whether the director then exercised due diligence to minimise loss to creditors. In *Ashish Rathi v Rajiv Rai*, the NCLT read the essence of section 66(2) as requiring directors to act reasonably and responsibly in the period before insolvency and to put creditors'

2 Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd (2021) 9 SCC 449, paras 213, 219, 227–28, 230–31.

interests first (para 10.7). The point is still developing in Indian law and should not be overstated, but it explains why a nominee's divided loyalty, harmless in good times, becomes a live question in a boardroom approaching default.[34]

2.4 A three-part lens

The rest of the article uses three questions to compare the two directors.

- **Loyalty.** To whom does the director answer, in law and in practice?
- **Information.** What does the director know, and through which channels?
- **Diligence.** What did the director do with what they knew, and can they prove it?

The statutes are largely silent on the first, partly address the second, and decide the third.

3. The Companies Act framework

3.1 Who counts as what

Section 149(6) defines an independent director by exclusion: a director other than a managing director, a whole-time director or a nominee director, who also meets tests on relationships and money. The Act defines a nominee director as one nominated by an institution under a law or an agreement, or appointed by a Government, to represent its interest. The two categories are therefore mutually exclusive.

3.2 Duties common to all

Section 166 lists the duties of every director, with no separate rule for nominees or independents. Schedule IV adds a code specifically for independent directors but does not displace section 166.

3.3 Section 149(12): the shield

Section 149(12) provides that, notwithstanding anything in the Act, an independent director and a non-executive director who is neither a promoter nor key managerial personnel are liable only for acts or omissions of the company that occurred with their knowledge,

3 Companies Act, 2013, s 166(2)–(4); Insolvency and Bankruptcy Code, 2016, s 66(2).

4 Ashish Rathi v Rajiv Rai, MA No 631 of 2018 in CP No 665/IB/CB/2017 (NCLT Chennai, 11 Feb 2022), 2022 SCC OnLine NCLT 21; (2024) 252 Comp Cas 278, para 10.7.

attributable through board processes, and with their consent or connivance or where they had not acted diligently with respect to the provisions of the Act.[5]

Two points matter here.

First, the shield is wider than the label "independent". A lender's nominee who holds no executive post, and is neither promoter nor key managerial personnel, will usually fall within the second limb. The Companies Act therefore does not give independents a protection that nominees are denied; both sit behind the same filter. The Ministry of Corporate Affairs reinforced this in General Circular No. 01/2020 dated 2 March 2020, which cautions against proceeding against such directors under the Act unless the conditions of section 149(12) are made out.

Second, the filter is conditional and fact-based. The Supreme Court has held that a director is not liable merely because of the office held. In *SMS Pharmaceuticals Ltd v Neeta Bhalla* (2005) 8 SCC 89, a case on section 141 of the Negotiable Instruments Act, 1881, the Court held that liability depends on the role played in the company's affairs and not on designation or status, and that a director is not deemed to be in charge of the business (paras 10 and 19). In *Sunil Bharti Mittal v CBI* (2015) 4 SCC 609, a criminal case, the Court held that when the company is the accused, its directors can be added only where there is sufficient incriminating evidence against them coupled with criminal intent, or where the statute attracts vicarious liability. Both cases arise in criminal settings and are persuasive, not controlling, for civil contribution under the Code. At the same time, in *Official Liquidator, Supreme Bank Ltd v P A Tendolkar* (1973) 1 SCC 602, a misfeasance case under the Companies Act, 1956, the Court said that a director cannot shut his eyes to what must be obvious to everyone who examines the company's affairs even superficially, and may be made to restore losses caused by his neglect even without proof of participation in fraud (para 45). Together these cases describe a director who is neither automatically liable nor entitled to look away.[6]

3.4 Does section 149(12) reach IBC proceedings?

Section 149(12) opens with the words "Notwithstanding anything contained in this Act" and speaks of diligence "with respect to the provisions contained in this Act". On its wording it

5 Companies Act, 2013, s 149(12); Ministry of Corporate Affairs, General Circular No 01/2020, 2 March 2020.

6 SMS Pharmaceuticals Ltd v Neeta Bhalla (2005) 8 SCC 89, paras 10, 19; Sunil Bharti Mittal v CBI (2015) 4 SCC 609; Official Liquidator, Supreme Bank Ltd v P A Tendolkar (1973) 1 SCC 602, para 45.

governs liability under the Companies Act. The Code is a different statute with its own liability provisions. Whether tribunals deciding section 66 applications import the shield is therefore a separate question that section 149(12) does not itself answer.

The question is not academic. In *S Kannan, Liquidator of Inasra Technologies Pvt Ltd v Yogendra Vasupal* (NCLT Chennai, 19 February 2024), three non-executive nominee directors appointed by venture investors resisted a section 66(1) application by relying on section 149(12), on the MCA circular of 2 March 2020, and on a shareholders' resolution stating that they would have no role in day-to-day management (paras 13 to 21). The Tribunal dismissed the application, but on the ground that the liquidator had not proved dishonest intent (paras 31 to 35). It did not decide whether section 149(12) applies to a section 66 application. If the shield does not carry over by its own force, what protects a director in a section 66 application is not the label or the shield but the evidence of conduct. Part 4 turns to how the Code frames that inquiry.[7]

4. Director liability under the IBC

The Code does not ask how a director got their seat. It asks what happened while they held it.

4.1 Section 66: two kinds of trading

Section 66 creates a two-tier regime. Under section 66(1), if business of the corporate debtor was carried on with intent to defraud creditors or for any fraudulent purpose, the Adjudicating Authority may order that persons who were knowingly parties to it contribute to the debtor's assets. Section 66(2) deals with wrongful trading. A director or partner may be made liable to contribute if, before the insolvency commencement date, the director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process, and did not exercise due diligence in minimising potential loss to creditors. An Explanation provides that a director is deemed to have exercised due diligence if that diligence was reasonably expected of a person carrying out the same functions as are carried out by the director in relation to the corporate debtor.[8]

7 S Kannan, Liquidator of Inasra Technologies Pvt Ltd v Yogendra Vasupal, IA(IBC)/945(CHE)/2023 and connected applications (NCLT Chennai, 19 Feb 2024), paras 13–21, 31–35.

8 Insolvency and Bankruptcy Code, 2016, ss 19 and 66; Insolvency and Bankruptcy Code (Amendment) Act, 2026 (Act 6 of 2026), s 46 (amending IBC s 66).

The 2026 Act changed who can invoke section 66: it adds the liquidator alongside the resolution professional (Act s 46, in force from 26 May 2026), as discussed in Part 5. Neither limb mentions nominee or independent directors.

In *Ashish Rathi v Rajiv Rai* (NCLT Chennai, 11 February 2022), (2024) 252 Comp Cas 278, the Tribunal described the two limbs as different in kind. Section 66(1) requires proof of dishonest intent and knowing participation; section 66(2) omits the elements of fraud and dishonest intention and focuses on knowledge of insolvency and failure to take due diligence (paras 10.2 to 10.9). It compared section 66(1) with section 213 and section 66(2) with section 214 of the UK Insolvency Act 1986 (paras 10.3 to 10.5), and, applying *Anuj Jain v Axis Bank Ltd* (2020) 8 SCC 401, dismissed the resolution professional's application because it pleaded no specific facts separating section 66(1) transactions from section 66(2) transactions, nor any dishonest intent, knowledge of impending insolvency or want of diligence (paras 10.12 and 10.13).[9]

4.2 What the tribunals have said

The three decisions below were examined in their available full-text orders. They share a theme: liability is personal, fact-heavy and tied to evidence of conduct.

Decision	Directors	Outcome	Point relevant to status
Shibu Job Cheeran v Ashok Velamur Seshadri, Company Appeal (AT) (CH) (Ins) No 350 of 2021, NCLAT Chennai, 1 March 2023	Managing director and two other directors of Archana Motors Ltd	Appeal dismissed; directors held liable for Rs 21.37 crore of fictitious assets under s 66	Board is accountable for the conduct of business; directors not involved day to day cannot assume they escape (paras 44 to 45)
Ashish Rathi v Rajiv Rai, MA 631 of 2018, NCLT Chennai, 11 February 2022	Directors and related parties of SBQ Steels	Application dismissed	Unspecific pleading and absence of proof of knowledge and want of diligence defeat a s 66(2) claim (paras 10.12 to

9 Ashish Rathi v Rajiv Rai, supra note 4, paras 10.2–10.9, 10.12–10.13; Anuj Jain, IRP for Jaypee Infratech Ltd v Axis Bank Ltd (2020) 8 SCC 401.

Decision	Directors	Outcome	Point relevant to status
	Ltd		10.13)
S Kannan, Liquidator of Inasra Technologies Pvt Ltd v Yogendra Vasupal, IA(IBC)/945(CHE)/2023 and connected IAs, NCLT Chennai, 19 February 2024	Executive directors and three non-executive nominee directors of investors	Applications dismissed	Nominees' s 149(12) and role-limitation arguments were recorded but not decided; outcome rested on failure to prove dishonest intent (paras 13 to 21, 31 to 35)

Shibu Job Cheeran is the sobering counterweight. The NCLAT identified two elements for a section 66 application: business carried on with intent to defraud creditors, and directors' participation in carrying on the business despite knowing the likely insolvency (para 44). It rejected the plea of the second and third appellants that only the managing director ran the business, reasoning that "knowing parties" is wide enough to reach those who participated directly or indirectly, and that the board, which controls the company's affairs through board meetings, is accountable for the conduct of business (para 45). It also stressed fiduciary duties to preserve the company's assets (para 46), and upheld the finding of fictitious assets where the directors could not produce asset registers, stock records or receivable details (paras 49 to 54), treating the onus as lying on them (para 52). The lesson for a non-executive director is that a claim of non-involvement is weak without a record showing questions asked and information sought.[10]

Inasra points the other way on the facts. The Tribunal recalled the NCLAT's statement in *Regen Powertech Pvt Ltd v Wind Construction Pvt Ltd* (Company Appeal (AT)(Ins) No 349 of 2022) that fraud on a creditor in the course of business does not necessarily mean the business was carried on with intent to defraud, that directors who act on a bona fide belief that the company will recover are not liable for fraudulent trading, and that fraudulent trading requires a high degree of proof (para 34). It found only sweeping allegations and a transaction

10 Shibu Job Cheeran v Ashok Velamur Seshadri, Liquidator of Archana Motors Ltd, Company Appeal (AT) (CH) (Ins) No 350 of 2021 (NCLAT, 1 Mar 2023), paras 44–46, 49–54; 2023 SCC OnLine NCLAT 804.

auditor's observations that did not by themselves amount to fraudulent trading (paras 32 to 35).[11]

4.3 Cooperation and the wider toolkit

Section 19 requires the corporate debtor's personnel and others to cooperate with the interim resolution professional, resolution professional or liquidator. The Code also contains avoidance provisions for preferential, undervalued and extortionate transactions, which can draw board decisions into scrutiny. *Shibu Job Cheeran* shows the practical consequence of non-cooperation: the liquidator had to apply to compel the managing director and the auditor to hand over books and records, and the NCLAT treated this as not boding well for the appellants' conduct (para 53).[12]

4.4 What the cases do not say

The striking feature of this sample is what is missing. None of the three decisions examined treats the director's status as nominee or independent as a ground of liability or exemption. The questions the tribunals ask are about knowledge, intent, participation and diligence. Inasra is the only decision reviewed in which lender- or investor-appointed non-executive directors were respondents, and it did not turn on their status. The three-part lens maps onto this neatly. Loyalty drops out: the tribunals do not ask whom a director represented. Information matters because "knew or ought to have known" depends on what was available to the director. Diligence decides outcomes because section 66(2) turns on what the director did once danger was visible.

The sample is small and the finding is negative. It shows that these tribunals have not treated status as decisive, not that no tribunal ever will.

5. The 2026 Act: what changed for the board

The 2026 Act is mainly about speed, predictability and creditor control. Its enactment and its commencement must be kept apart, because the provisions that most affect boards fall on different sides of that line.

11 Regen Powertech Pvt Ltd v Wind Construction Pvt Ltd, Company Appeal (AT)(Ins) No 349 of 2022 (NCLAT), as discussed in Inasra, para 34.

12 Insolvency and Bankruptcy Code, 2016, s 19 (as amended by Insolvency and Bankruptcy Code (Amendment) Act, 2026, s 12); IBC ss 43, 45, 50 and 66.

5.1 What is in force

The Insolvency and Bankruptcy Code (Amendment) Act, 2026 (Act No. 6 of 2026) received Presidential assent on 6 April 2026. Notification S.O. 2625(E), dated 22 May 2026, brought specified provisions into force on 26 May 2026. The notification should be read provision-by-provision; describing the commencement as "56 of 72" is unnecessary and may obscure the exclusions. The provisions that touch directors include the following:[13]

- **Cooperation (s 19).** The duty to cooperate now reaches former personnel of the company or its promoter, those associated with its management, and those engaged under a contract for service. A director who resigns as trouble approaches does not leave the duty behind.
- **Standing to bring trading claims (s 66).** The liquidator may now bring fraudulent or wrongful trading applications, not only the resolution professional.
- Creditor and member applications (s 47). The substituted section 47 permits creditors, members or partners to apply where the resolution professional or liquidator has not reported a specified avoidance transaction or fraudulent or wrongful trading. The statutory text also preserves the relevant proceedings in specified circumstances after dissolution; cite the amended sections 47 and 54, rather than describing this as "new s 26".
- **Look-back periods (ss 43, 46, 50).** These now run from the initiation date, so transactions between filing and admission are caught.
- **Admission (ss 7, 9, 10).** Admission is to be decided within 14 days and, once default and completeness are shown, no other ground may be considered. For a board, this leaves less room to resist and less time to build a record of diligence.

5.2 What is not yet in force

The creditor-initiated insolvency resolution process (CIIRP), inserted as Chapter IV-A (sections 58A to 58K) by section 40 of the 2026 Act, is enacted but not in force. Section 40 was left out of the commencement notification, no eligible corporate debtors or class of financial institutions had been notified, and the Insolvency and Bankruptcy Board of India's draft regulations were at discussion-paper stage as at September 2026. Some early

13 Insolvency and Bankruptcy Code (Amendment) Act, 2026 (Act 6 of 2026), ss 12 (IBC s 19), 28 (IBC s 47), 26–27 and 30 (IBC ss 43, 46 and 50), 46 (IBC s 66); Ministry of Corporate Affairs, Notification S.O. 2625(E), 22 May 2026.

commentary described the process as operational; the notification does not support that reading, and commentary and law should not be confused on this point.[14]

As enacted, section 58F leaves management with the board, but the resolution professional attends meetings of the board, its committees and the members and may reject resolutions passed there, and the process may convert to a regular corporate insolvency resolution process on non-cooperation or failure to produce a plan. If and when Chapter IV-A is notified, the effect will be a board that keeps its seat but loses its privacy: every meeting would have an outsider in it with power to say no. Everything this article says about the creditor-initiated process is therefore prospective. The statutory text of section 58F should be checked against the Gazette before it is quoted.[15]

5.3 What the Act does not say

None of the sources reviewed suggests that the 2026 Act creates separate liability rules for nominee and independent directors. The Code and its amendment speak to directors as a class. The differences between directors, if any, must come from somewhere else.

6. Where the exposure really differs

If the statutes speak of directors as a class, why would nominee and independent directors fare differently at all? This Part argues that they might, but for reasons of evidence and circumstance, not law. What follows is the author's analysis. It predicts how tribunals are likely to treat the facts and does not report a rule they have laid down.

6.1 Loyalty

In law, loyalty is the same for both: section 166 does not distinguish them. In practice, the nominee's second loyalty creates a risk the independent does not carry. Consider a company in distress whose lender has nominated a director. A board vote on interim finance, on whether to cooperate with a restructuring, or on supporting or resisting an insolvency filing by the nominator puts the nominee between two duties. That conflict is already live in the parts of the Act in force: liquidators and, where they do not act, creditors can now pursue trading and avoidance claims, and look-back periods reach decisions taken after filing. It

14 Insolvency and Bankruptcy Code (Amendment) Act, 2026, s 40 (inserting IBC Chapter IV-A, ss 58A–58K); commencement notification S.O. 2625(E), 22 May 2026 (s 40 not included in commenced provisions).

15 Insolvency and Bankruptcy Code (Amendment) Act, 2026, s 40, inserting IBC s 58F(1)–(2).

would sharpen further if the creditor-initiated process were notified and the nominating lender were the creditor driving it, with a resolution professional watching the vote. Lakshita Mohan draws a similar boardroom scene in her July 2026 commentary, although she writes as if the creditor-initiated process were already operating.

Section 66 does not ask about the conflict, and the Act does not tell the nominee how to resolve it. But a tribunal looking at the record may well wonder whose interests a vote served.

6.2 Information

Section 66(2) asks what a director knew or ought to have known, and the Explanation measures diligence against what is reasonably expected of a person carrying out the same functions. Both turn on information and function, and here the two directors differ most.

A nominee often sees more than anyone outside management. The nominator monitors the loan, receives financial statements and tracks covenants, and the nominee can draw on all of it. An independent director generally depends on board papers and management briefings. It follows, as a matter of argument, that a nominee will find it harder to say "I did not know", because the nominator's channel makes knowledge easier to infer. The independent's likely answer is different: "I was not told, and I asked."

The nominees in *Inasra* ran the opposite argument. They said they were non-executive, were not consulted on or privy to the impugned transactions, and had been appointed under a shareholders' resolution stating that they would have no role in day-to-day management (paras 14 and 18 to 20). The Tribunal did not need to decide whether this answered the claim. Two observations follow. A limitation of role is evidence of the "functions" against which the Explanation measures diligence, but it is unlikely to bind creditors or displace the duties in section 166. And *Shibu Job Cheeran* shows that tribunals do not accept distance from day-to-day management as an answer by itself, because the board is accountable for the conduct of business (para 45).

There is a counterpoint on the Companies Act side. Section 149(12) speaks of knowledge "attributable through board processes". If a nominee's extra knowledge came from the nominator and not from the board, it is unclear whether it counts. Part 3.4 noted that the shield may not govern IBC proceedings at all. The question is open and a tribunal will have to decide it on facts.

6.3 Diligence

This is the limb that decides cases. Tribunals have emphasised conduct and proof over status: they have refused to infer fraud from an auditor's observations alone (*Inasra*, paras 32 to 35), required specific pleading of the facts that make out each limb of section 66 (*Ashish Rathi*, paras 10.12 and 10.13), and, where directors could not produce records, treated the onus as lying on them (*Shibu Job Cheeran*, para 52).

For both directors, the best evidence is a paper trail. An independent who asked for liquidity reports, questioned management and had a dissent minuted is in a far better position than one who attended quietly. A nominee who recorded a conflict, recused from a vote that affected the nominator and had reasons minuted stands on the same footing. If the creditor-initiated process is notified and the resolution professional can attend board meetings, the minutes will no longer be a private record.

6.4 Summary

Question	Nominee director	Independent director
Statutory standard under the IBC	Same as any director	Same as any director
Companies Act shield (s 149(12))	Available if non-executive and neither promoter nor key managerial personnel	Available
Whether the shield reaches s 66	Open: raised in *Inasra* but not decided	Open
Main added risk	Divided loyalty; wider information channel	Passive attendance; weak record of challenge
Likely evidence against	Lender's monitoring data; conduct in votes touching the nominator	Board papers received; silence in minutes
Best protection	Recorded conflict, recusal, minuted reasons	Documented questions, papers read, dissent minuted

The rows on the statutory standard are identical. The rows on risk and evidence are not. The difference between the two directors sits in the facts, and facts are shaped by role.

6.5 Limits of the argument

Three caveats are in order. The argument rests on the absence of nominee-specific holdings in a small sample, and one decision to the contrary would change it. The "ought to have known" point is a prediction. And the 2026 Act is new, so tribunals have had little time to apply it. The article does not claim certainty. It claims that the question is real and that current law gives directors little to go on.

7. A comparative note: the United Kingdom

India's wrongful trading rule has an obvious ancestor. In *Ashish Rathi*, the NCLT described section 66(1) as *pari materia* with section 213 of the UK Insolvency Act 1986 and section 66(2) as akin to section 214 (paras 10.3 to 10.5). This Part is deliberately short and is a pointer, not a full study.

7.1 The same label-blindness

Section 214 allows the court to order a director to contribute to the company's assets where, before insolvent liquidation or administration, the director knew or ought to have concluded that there was no reasonable prospect of avoiding it, unless the director took every step with a view to minimising the potential loss to creditors that the director ought to have taken. Like section 66(2), it speaks of directors generally and does not separate nominees from others. It does, however, provide that "director" includes a shadow director (s 214(7)), which can reach a person whose directions the board is accustomed to follow, including, on the right facts, a nominator that controls its nominee. The *TCS* judgment shows that Indian courts will meet the shadow-director argument on its facts: the Supreme Court rejected the allegation that an influential figure was a shadow director where the board itself had invited his guidance (para 230).[16][17]

7.2 The two-sided standard

The UK statute states the standard of care expressly. Section 214(4) measures what a director ought to have known, concluded and done against a reasonably diligent person having both (a) the general knowledge, skill and experience reasonably expected of a person carrying out

16 Insolvency Act 1986 (UK), ss 213, 214(2), (4), (5), (7); Ashish Rathi v Rajiv Rai, supra note 4, paras 10.3–10.5.

17 Tata Consultancy Services Ltd v Cyrus Investments Pvt Ltd (2021) 9 SCC 449, para 230 (shadow-director discussion).

the same functions as the director, and (b) the general knowledge, skill and experience the director actually has. Section 214(5) adds functions that were entrusted to the director but not carried out. A director who knows more is held to more.[18]

Section 66(2) of the Code contains only the first of those limbs. Its Explanation deems a director to have exercised due diligence if the diligence was reasonably expected of a person carrying out the same functions as the director. The text has no express counterpart to the subjective limb in section 214(4)(b), and none to section 214(5). That omission matters for the information question in Part 6: a tribunal applying the Indian text must reach the nominee's extra knowledge, if at all, through the concept of "ought to have known" and through the evidence of what the director's functions in fact were.

7.3 What India can take from this

- **Label-blindness is not unique to India.** Even a mature system with a long wrongful trading history does not write separate liability rules for nominees.
- **The difference is made up in how the standard is stated.** A two-sided standard that takes account of what the director actually knew is a natural way to deal with the nominee's wider information.
- **The nominator's own exposure is part of the picture.** Indian law has said little about when a lender that directs its nominee may itself face responsibility, whether under the "knowingly parties" language of section 66(1) or otherwise. No decision reviewed here addresses the point.

8. Reform proposals

The analysis points to a modest conclusion: the law should not rewrite directors' duties, but it should tell directors how to meet them when loyalties collide. Two of the proposals below build on a recent and closely related commentary, and the article is explicit about what is borrowed and what is new.

Lakshita Mohan, in "Nominee Director Crisis Indian Law Refuses To Confront" (LiveLaw, 19 July 2026), argues for three measures: statutory recognition that nominee directors occupy a structurally different position, mandatory recusal protocols with bright-line rules known before the meeting, and a conditional safe harbour for nominees who disclose their conflict,

18 Insolvency Act 1986 (UK), s 214(4)–(5); Insolvency and Bankruptcy Code, 2016, s 66(2), Explanation.

follow a written board protocol and vote consistently with a reasonable view of the company's interests, unavailable where fraud, wilful misconduct or oppression of minority shareholders is shown. Proposals 8.1 and 8.2 adopt that framework. The article's own contributions are the tie to section 66(2) and the diligence Explanation, the narrowing of the recusal rule, and proposals 8.3 and 8.4.[19]

8.1 Recognise the nominee's conflict and set a narrow recusal rule

Credit: this proposal follows Lakshita Mohan's call for mandatory recusal protocols with bright-line rules (Lakshita Mohan, "Nominee Director Crisis Indian Law Refuses To Confront", LiveLaw (19 July 2026)). The narrowing of the rule and its application to section 66 are this article's own.

The gap. Section 166 treats every director alike and is silent on conflicts that come from the appointment itself. Part 6 showed how acute this is when the nominating lender is also a creditor in or near insolvency.

The proposal. Amend the Companies Act, or make rules under it, to define "nominator-linked decisions" of a company in default or insolvency-proximate distress: for example, decisions on finance supplied by the nominator, on transactions that prefer the nominator, and on supporting or resisting an insolvency application by the nominator. For those decisions, require the nominee to disclose the conflict to the board and, absent a stated exception, to abstain from the vote. Where abstention would defeat quorum or a statutory approval, the nominee may participate but must record the conflict and reasons in the minutes.

Why it helps. It gives nominees a bright line before the meeting instead of an after-the-event judgment, and it produces the record that tribunals look for.

An objection. Lenders may say recusal strips them of the voice they bargained for. The answer is that the rule is narrow: the nominee remains free to speak, to inform the board and to vote on every matter outside the listed decisions.

8.2 Offer a conditional safe harbour tied to section 66(2)

Credit: this proposal follows Lakshita Mohan's conditional safe harbour for nominee directors (Lakshita Mohan, "Nominee Director Crisis Indian Law Refuses To Confront",

19 Lakshita Mohan, 'Nominee Director Crisis Indian Law Refuses To Confront' LiveLaw (19 July 2026).

LiveLaw (19 July 2026)). Placing it in the diligence Explanation to section 66(2), and the two limits stated below, are this article's own.

The gap. A nominee who follows a conflict protocol has no assurance that a tribunal will treat it as diligence. The rational response is either to avoid distressed boards or to over-defend.

The proposal. Add to the Explanation to section 66(2) a deeming rule: a nominee director who has disclosed the conflict, followed a written board protocol and voted in line with a reasonable view of the company's interests is deemed to have exercised due diligence under section 66(2)(b). Two limits keep it narrow. It would not apply to section 66(1) or where fraud, wilful misconduct or oppression of minority shareholders is shown. And it would not deem the director not to have known of the danger, so section 66(2)(a) would remain in play.

An objection. Critics may say this lets nominators hide behind process. The conditions answer that: protection depends on disclosure and a reasonable decision, and falls away on fraud. It rewards the paper trail that tribunals already say they look for.

8.3 Say what "ought to have known" means for non-executive directors

The gap. Section 66(2) asks what a director ought to have known, but the decisions reviewed give no guidance on how that applies to a director not involved in day-to-day management, and *Inasra* shows non-executive nominees raising section 149(12) without a ruling. Part 7 showed that the Indian text lacks the subjective limb of the UK standard.

The proposal. First, Parliament should amend the Explanation to section 66(2) to add a second limb alongside the functions-based test, so that diligence is measured also against the general knowledge, skill and experience the director actually has, as section 214(4) does. Second, the Insolvency and Bankruptcy Board of India, or Parliament, should issue guidance on what information a non-executive director is expected to request and read once warning signs appear, and on whether and how the section 149(12) filter applies to a section 66 application.

Why it helps. It would tell both kinds of director what diligence looks like and give tribunals a shared yardstick in place of case-by-case guesswork.

8.4 Use the creditor-initiated process regulations as the vehicle

The gap. Chapter IV-A is enacted but not in force and needs regulations before it can operate. The IBBI published a discussion paper on draft regulations on 15 April 2026. The

process puts a resolution professional in board meetings with power to reject resolutions, which is where nominator-linked conflicts will surface.

The proposal. Before Chapter IV-A is notified, the IBBI should consider including in the final regulations a board protocol for the corporate debtor: a requirement that the resolution professional's record of each meeting note any disclosed conflict of a director nominated by an initiating creditor, and how it was handled. This would give the recusal rule in 8.1 an operating setting and give tribunals a contemporaneous record, without waiting for amendment of the Companies Act.

8.5 What the proposals do not do

None of these proposals reduces the duty owed to the company or to creditors, and none shields fraud. They convert vague expectations into steps a director can take and a tribunal can check.

9. Conclusion

The article began in a boardroom and ends in one. A nominee and an independent director sit at the same table, months before a company fails. Years later, a tribunal asks each of them the same two questions: what did you know, and what did you do?

The Code answers those questions in the same words for both. Sections 19 and 66 speak of directors and persons knowingly party to wrongdoing, and the decisions reviewed look at intent, participation and diligence, not at how a director was appointed. The 2026 Act keeps that approach. What it changes, in the provisions now in force, is the pressure: wider standing to pursue trading claims, a duty to cooperate that reaches former personnel, and look-back periods that reach decisions taken after filing. Its most dramatic board-level change, a resolution professional in the room during a creditor-initiated process, is still waiting for commencement.

The real difference between the two directors therefore lies outside the statute. It lies in loyalty, information and diligence. The nominee carries a second loyalty and a second channel of information. The independent carries neither but is exposed if silence in the minutes suggests they were not paying attention. Company law labels the two roles sharply and then leaves them to be judged by the same insolvency test, one whose Indian text, unlike its UK model, has no express limb for what the director actually knew.

The article has proposed four modest responses: a narrow recusal rule for decisions touching the nominator's position, a conditional safe harbour built into the diligence Explanation of section 66(2), a two-sided standard with guidance for non-executive directors, and a board protocol in the creditor-initiated process regulations. The first two build on Lakshita Mohan's commentary; the last two, and their tie to section 66, are this article's own. None weakens a director's duty to the company or its creditors. Each tells a director what meeting that duty looks like.

Until the law says more, the safest assumption in a troubled boardroom is that the label on the appointment letter will protect no one. What may protect a director is the record: the questions asked, the conflicts declared and the reasons written down at the time.

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