

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Ins) No. 841 of 2024

[Arising out of the Order dated 17.04.2024, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad- Court-II), in IA 652/NCLT/AHM/2023 IN CP(IB)268/NCLT/AHM/2020.]

IN THE MATTER OF:

1. SUNIEL DHHANDHANIA

R/O B-802, Rushi Heights
CHS Ltd. Riddhi Garden Road
Malad (East), Mumbai-400097
Maharashtra

E-mail: sunielddhandhaniania@gmail.com

...Appellant No.1

2. Pawan Kumar Malsaria

r/o D-2, 4th Floor
Sheetal Apartment
R.C. Dutt Road, Alkapuri
Vadodra-390007,
Gujarat

Email: malsariapawan@gmail.com

...Appellant No.2

Versus

1. Dr. Vichitra Narayan Pathak

Resolution Professional of
Golden Tobacco Ltd.
Having his office at
120, Jharneshwar Colony Madhuban
Vihar,
Near International Public School,
Hoshangabad Road,
Bhopal-462047, Madhya Pradesh
E-mail: cirp.goldentobacco@gmail.com

..Respondent

Present:

For Appellant : Ms. Purti Gupta, Ms. Heena George, Ms. Sunidhi Sah, Ms. Pooja & Ms. Khushi Sharma, Advocates.
For Respondent : Mr. Anurag Bisaria, Advocate.

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

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

The instant appeal has been filed by the appellant challenging the impugned order dated 17.04.2024, passed by the National Company Law Tribunal, Ahmedabad (Adjudicating Authority) in IA No. 652 of 2023 in CP (IB) No. 268 of 2020 under Section 66 of the Insolvency and Bankruptcy Code, 2016 ('Code') whereby the application moved by the applicant-RP under Section 66 of the Code has been allowed and the appellants have been directed to contribute Rs. 6,92,679/- to the Society within 15 days along with 12% interest p.a. from the date of the application.

2. Brief facts necessary for the disposal of this appeal are that the Insolvency Process was initiated against the CD/M/s Golden Tobacco Ltd. vide order dated 07.06.2022, in CP (IB) No. 268 of 2020 and Dr. Vichitra Narayan Pathak- Respondent was appointed as the IRP who was later on confirmed as RP.

3. It is stated that on 19.07.2022, the GTC Employees, Co-operative Credit Society Ltd. (Society) through its authorized representative informed the RP of the CD pertaining to the deduction of a sum of Rs. 6,33,735/- from the salary of its employees during the period September 2021 to May 2022 and further that the aforesaid money has not been deposited with the Society. The Society has also submitted claim in respect of the said amount and also for the interest accumulated thereon which has been admitted by the RP as other Creditors.

4. It is further reflected that an application under Section 66 of the Code being IA No. 652 of 2023 was moved by the RP before the Ld. Adjudicating

Authority stating therein that appellants were Executive Directors of the CD and despite deduction of the aforesaid amount from the salary of the employees of the CD towards repayment of their respective loans from the Society used the aforesaid funds illegally and dishonestly for the benefit of the CD and therefore it is alleged that the business of the CD was carried on for fraudulent purposes.

5. It is further stated that both the appellants have resigned from the CD on 17.02.2023 and 23.02.2023 respectively and also that the impugned transaction is not the only transaction of such nature as other such transactions were carried out by the appellants to de-fraud the creditors of the CD for fraudulent purposes as is borne out by the prima facie findings noted in the show cause notice dated 05.12.2022 issued by the SEBI.

6. The appellants had appeared before the Ld. Adjudicating Authority and have denied the allegations however stated that due to financial difficulties there were delays in paying the said amount to the Society and the workers' salaries were paid up to March, 2022 but the salaries of the staff could only be paid up to July, 2021 as the CD was facing financial constraints which hindered the payment to the Society.

7. It is further contended that the delays were unintentional and only due to financial crunch and the said amount was utilized for the working capital of the CD and in any case these funds were not diverted to the accounts of the Respondents.

8. It is further contended that the ingredients of Section 66 of the Code are not fulfilled and there is no clear opinion formed by the RP as required under Regulation 35 (A) of the CIRP Regulations, 2016 and there is no proof

that the aforesaid amount has been misused by the appellants and as such there is no evidence of ill intent or *mens rea* on the part of the appellant and they were fulfilling their duties in the best interest of the CD.

9. Ld. Adjudicating Authority, as stated earlier, found that the appellants have used the amount of Rs. 6,33,735/- in running the CD and held them liable to make such contribution to the assets of the CD and directed accordingly to contribute Rs. 6,92,679/- to the Society along with up to date interest of 12% p.a.

10. Ld. Counsel for the appellant while drawing our attention to the impugned order submits that the controversy is only of deducting Rs. 6,33,735/- from the salary of the employees of the company for the period from September 2021 to May 2022 and of not depositing it with the Society, while the Society has not filed any application with regard to the same and the claim filed by the Society has been duly admitted by the RP.

11. It is further submitted that appellants were the Employee Directors of the CD who were not being paid their salaries and have therefore resigned from the Company and they were not the beneficiary of the transaction in question and further could not have gained anything through the alleged non-payment to the Society.

12. It is further submitted that the impugned order is based on a fallacy that the Appellants have used the amount deducted from the salary of the employees, however the CD was having a running account and the amount relying with the CD of the Company could have been used for its working capital requirements including payment of salaries of workers and employees however the misuse of the fund has not been substantiated from

the record and the amount deducted from the salary from the employees/workmen has not been used by the appellants for their personal gains.

13. It is further submitted that Section 66 of the Code could only be invoked when the business of the CD has been carried on with the intent to de-fraud creditors of the CD and for any other fraudulent purpose which is not an admitted case here as the using of the fund for running of the CD may not amount to misuse of the fund or of fraudulently dealing with the funds. According to Ld. Counsel for the appellant a very high degree of proof of fraudulent intention is required in these types of cases. Reliance in this regard has been held on in ***Regen Powertech Pvt. Ltd. vs. M/s Wind Construciton Pvt. Ltd., CA (AT) (CH) (Ins) No. 349 of 2022 dated 23.09.2022, Rakshit Dhirajlal Doshi vs. Chirag Shah, CA (AT) (Ins) No. 1855 of 2025 dated 03.03.2026.***

14. It is vehemently submitted that in absence of any proof of having any intention to de-fraud the creditors of the CD or to conduct the business of the CD in a fraudulent manner no liability could be fixed on the appellant. Reliance in this regard has been placed on ***Svenska Handelsbanken vs. Indian Charge Chrome, (1994) Vol 1 SCC 502.***

15. It is further submitted that no opinion as required under Regulation 35(A) of the CIRP Regulations, 2016 has been formed by the RP and no enquiry has been made by him before filing the application under Section 66 of the Code.

16. It is further submitted that proceeding under Section 447 of the Companies Act, 2013 are not proceedings of civil nature and keeping in view

the procedure provided therein these are criminal in nature and the ingredients of fraud as defined under Section 447 of the Companies Act, 2013, which are sought to be relied on could only be determined by the Registrar of Companies after an extensive and exhaustive examination of relevant documents.

17. It is further submitted that the Ld. Adjudicating Authority has not considered the matter in right perspective and have passed the impugned order without adverting to the necessary ingredient of Section 66 of the Code.

18. Ld. Counsel for the Respondent, having been given opportunity to file written submissions did not file the same however in oral submissions submits that there is no illegality in the impugned order as it was an admitted case of the appellants before Ld. Adjudicating Authority that they did not deposit the amount deducted from the salaries from the employees in the Society and no proof of its utilization for the CD has been given and while the appellants were at the helm of the affairs of the CD.

19. It is further submitted that the deduction of the amount from the salaries of the employees and workmen for a long period of time and not depositing it with the Society ipso facto suggest the requisite intention to defraud the employees and workmen of the CD who have filed the claim later on through the Society. Therefore, the requisite intention to defraud the creditors of the CD was implicit in the act of the appellants.

20. It is further submitted that the appellants have themselves admitted that they were at the relevant point of time were Directors in the CD and thus they were holding the deducted amount from the salaries of the

employees and workmen in trust and therefore non-depositing of the same with the Society makes them liable from payment of the same and therefore no illegality has been committed by the Ld. Adjudicating Authority in allowing the application.

21. It is further submitted that after the appointment as IRP/RP the IRP/RP has assumed the duties to represent the CD and also to take charge of the affairs of it and since a communication was made to him by the Society through its authorized representatives and after forming an opinion and being satisfied he moved the application under Section 66 of the Code and therefore it could not be said that the application has been given by the RP without forming requisite opinion.

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

“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”.

23. Before moving further let us have a glance with regard to the ingredients of Section 66 of the IBC as is evident that the requirement of Section 66 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 business of the CD or for any fraudulent purpose the adjudicating authority may pass an order that the persons who are carrying on the business would make such contributions to the assets of the CD as it may deem fit. And 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 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 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.

24. Thus the necessary ingredients of invoking this section appears to be that (i) the business of the CD has been carried on with intent to defraud

creditors of the CD or for any fraudulent purpose. (ii) 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 (iii) or such director or partner did not exercise due diligence in minimizing the potential loss to the creditors.

25. At this juncture, let us also see the manner in which the requirement of Section 66 has been interpreted by this Tribunal.

26. In **Regen Powertech Pvt. Ltd. vs M/s Wind Construction Pvt. Ltd. and Ors., 2022 SCC Online NCLAT 3801**, this tribunal has opined as under:

“33. Be it noted, this “Tribunal”, significantly, points out that, whenever “fraud” on a “creditor” is perpetrated in the course of “carrying on business”, it does not necessarily follow that the “business” is being carried on with an “intent to defraud” the “creditor”.

34. One cannot remain, “oblivious” of the candid fact that, if the “directors” of a “company” had acted on a “bona fide 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”.

35. As a matter of fact, the “aspect” of “fraudulent trading” requires a very “high degree of proof”, which is attached to the “fraudulent intent”. To put it emphatically, a more compelling “material”/ “evidence” is required to satisfy the conscience of this “Tribunal”, “on a preponderance of probability”. Apart from that, an “isolated”/ “solo fraud” case, against the person, then, action in “tort” can be resorted to, as opined by this “Tribunal”. No wonder a “creditor”, who was defrauded, will have “recourse” to an “alternative remedy”, under “civil law”.

27. This appellate tribunal again in **Renuka Devi Rangaswamy vs. Mr. Madhusudan Khemka and Ors., 2023 SCC Online NCLAT, 1722** while considering the ingredients of Section 66 of the Code has held as under:

“33. To be noted that, the expression ‘Party to the carrying on business’, indicates ‘taking positive steps’, in carrying on ‘company’s business’, in a ‘fraudulent manner’. The intent to ‘defraud’, is to be judged, by its ‘effect’ on a ‘Person’, who is the ‘object of conduct’, in question.

34.A ‘preponderance of probability suffices’, but the degree of probability must be such that the ‘Tribunal’, is satisfied and further that under Section 66 of the I&B Code, 2016, it is not essential to attract that there ought to be a ‘Debtor’ and a ‘Creditor’ relationship.

35. It must be borne in mind that for proving a ‘Fraudulent Trading’ needs meeting the ‘High Standard of Proof’, which is attached to a ‘Fraudulent Intent’. A ‘Director’, of a ‘Company’, may be proceeded against for a ‘Wrongful Trading’, because of the reason of ‘Negligent Failure of Management’. Besides this, ‘a person’, knowingly a ‘Party’ to a ‘Fraudulent Trading’, by the ‘Company’ concerned, may be subject to the proceedings.

36.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.

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’.

38. The Appellant has a ‘duty’, to establish to the satisfaction of this ‘Tribunal’, that a ‘person’, is knowingly carrying on the business with the ‘Corporate Debtor’, with an ‘dishonest intention’, to ‘defraud’, the ‘Creditors’. For a ‘Fraudulent Trading’/‘Wrongful Trading’, necessary materials are to be pleaded by a ‘Litigant’/‘Stakeholder’, by furnishing ‘Requisite Facts’, so as to come within the purview of the ingredients of Section 66 of the I & B Code, 2016. Suffice it, for this ‘Tribunal’, to pertinently point out that the ingredients of Section 66(1) and 66(2) of the I & B Code, 2016, operate in a different arena”.

28. In **Shibo Job Cheeran & Ors. vs. Ashok Velamur Seshadari, liquidator of M/s Archana Motors Ltd., 2023 SCC Online, NCLAT 804.**

This appellate tribunal again considered Section 66 of the Code and has opined as under:

“42. It is seen from the above that Section 66 of the 1 & B Code, 2016, gives powers to the 'Adjudicating Authority' to pass suitable orders, if it is found that any person has carried on the business of the 'Corporate Debtor' with an intention to defraud its 'Creditors' or other 'stakeholders'. Section 66 also give powers to the 'Adjudicating Authority' to give directions for making contribution to the assets of the 'Corporate Debtor'. This also includes Directors of the 'Corporate Debtor', and their personal liability towards contribution, provided such Directors did not exercise due diligence or failed to take reasonable steps to minimize potential losses to the creditors when there was no possibility of avoiding the commencement of 'Corporate Insolvency Resolution Process'. However, a director can be deemed to have exercised due diligence, if such diligence was exercised as expected reasonably of a director carrying out a business in ordinary course of business.

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'.*

Thus the facts of the instant case are to be appreciated in the background of the abovementioned substantive law and legal precedents.

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

30. We notice that the Ld. Adjudicating Authority by passing the impugned judgement directed the appellants to contribute Rs. 6,92,679/- along with 12% interest from the date of application till realization. In order to arrive at this conclusion, the Ld. Adjudicating Authority has considered that Section 66 of the Code provides the liability for the Directors or Partners of the CD to make such contributions to the assets of the CD if the business of the CD was carried out by them to de-fraud creditors or in fraudulent manner. Ld. Adjudicating Authority found that the appellants have deducted a sum of Rs. 6,33,735/- from the salary of employees during the period from September 2021 to May 2022 and did not deposit it with the Society.

31. The Ld. Adjudicating Authority found that appellants have clearly admitted of deducting the aforesaid amount from the salary of the employees and not depositing the same with the Society.

32. It is further observed by Ld. Adjudicating Authority that the amount in question has not been deducted only for any month but these are series of transactions right from September 2021 till May 2022 and every month about Rs. 1 lakh have been deducted from the salaries of the employees and workers and were not deposited with the Society. The Ld. Adjudicating Authority also observed that though a claim has been made to deposit the amount with delay however no amount at all has been deposited and so far as the claim of the appellants with regard to utilizing this amount for the working capital of the CD it was observed that the claim of utilizing this

amount of working capital of the CD is not substantiated by the appellants with any evidence as the appellants failed to show how such meagre amount was required to run the CD smoothly and keeping in view the admission of the appellants of not depositing any such amount after deduction from the salaries of the employees and workmen the impugned order has been passed.

33. Having considered all the facts and circumstances of the case, we are of the considered view that no illegality has been committed by the Ld. Adjudicating Authority by allowing the application filed by the RP under Section 66 of the Code. Perusal of the record would reveal that right from the filing of reply before the Ld. Adjudicating Authority up to the filing of the appeal it is an admitted case of the appellants that the amount could not be deposited with the Society, after its deduction from the salaries of the employees and workmen, as the CD was passing through a phase of financial crunch and the amount has been utilized as the working capital for the CD. Much emphasis has been given by the Ld. Counsel for the appellant on the ground that there is no allegation that this amount has been utilized by the appellants for their personal use and therefore the requisite intention to de-fraud the creditors of the CD or running the business of the CD fraudulently is not emerging in this case. We are not in agreement with the submissions made by Ld. Counsel for the appellant. When the appellants have admitted to have deducted the amount in question from the salaries of the workmen and employees over a long period of time, the onus was on them to establish that this amount was utilized as the working capital for the CD. However, they have failed in their duty to establish so. No reliable

evidence or material has been placed on record which may substantiate their claim.

34. So far as the contention of the submission of Ld. Counsel for the appellant with regard to the fact that the amount has not been used for their personal gain is concerned we notice that in Section 447 of the Companies Act, 2013 the fraud has been defined as under:

“Explanation- For the purposes of this section-

(i) “fraud” in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

35. Perusal of the definition of fraud as provided under Section 447 of the Companies Act, 2013 would reveal that fraud in relation to the affairs of the Company or any body corporate includes any act omission concealment of any fact or abuse of position committed by any person with intent to deceive or to gain undue advantage or to injure the interest of the Company or its shareholders or its creditors whether or not there is any wrongful gain or wrongful loss.

36. Thus, it is evident that unlike the fraud as defined under the Erstwhile Indian Penal Code to substantiate fraud under the Companies Act there is no requirement of establishing wrongful gain or wrongful loss any act or omission with the intent to deceive or to gain undue advantage or to adversely affect the interest of the company or its creditor may result in the commission of fraud. So even if, as per the submissions advanced by the Ld. Counsel for the appellants, the money deducted from the salaries of the

employees and workmen of the CD even have not been misappropriated by the appellants for their personal use and have been diverted or siphoned off somewhere else the same may for the purpose of Section 66 of the Code would constitute the running of the affairs of the company fraudulently in order to deceive the creditors of the CD.

37. We notice that it is an admitted fact that the amount which has been deducted from the salaries of the employees and workmen of the CD was required to be deposited with the Society on monthly basis or as has been observed by Ld. Adjudicating Authority this amount was only to the tune of Rs. 1 lakh per month and therefore it was not on a solitary occasion for a month or two that the deducted amount was not deposited with the Society and in fact it was for various months the amount after being deducted from the salaries of employees and workmen of the CD was not deposited with the Society. It is undisputed that this amount was held by the appellants only as a trustee and they were not having any right to utilize the same for any other purpose except to deposit with the Society and admittedly they have failed in their duty to deposit the same with the Society.

38. Keeping in view the facts and circumstances of the case, we do not find any good ground to interfere in the impugned order and resultantly the appeal appears to be devoid of merit and is **dismissed** as such. There is no order as to costs.

39. Pending IA's if any are also closed.

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

[Arun Baroka]
Member (Technical)

New Delhi.
16.04.2026.

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