

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1133 OF 2022

In

IA 1444/2021

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Section 424
(4) of the Companies Act, 2013

Mr. Sunil G. Kundnani

...Applicant

Vs.

Mr. Pankaj Shyam Joshi

...Respondents

In the matter of

C.P.(IB) No. 2156/MB/2019

Canara Bank

Financial Creditor

Vs.

KGS Sugar & Infra Corporation Ltd.

Corporate Debtor

Order delivered on: 03.05.2024

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Partho Sarkar, Advocate
For the Respondent : Mr. Shyam Kapadia, Advocate

ORDER

Per: V.G. Bisht, Member (Judicial)

1. This Application IA 1133/2022 is filed by Mr. Sunil G. Kundnani ("Applicant") against Mr. Pankaj Shyam Joshi, in the matter of KGS Sugar & Infra Corporation Limited (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs :
 - a. To exclude the instant applicant as a respondent in LA 1444/2021.
 - b. Summoning the instant respondent U/rule 39 of NCLT rules.
 - c. Initiating of proceedings U/s 424(4) of the Companies Act r/w Sec 340 of Cr PC.
 - d. Appropriate reliefs in terms of prayer clause/s 'a to c and such other directions given the factual matrix/circumstances of the present matter.
2. The instant applicant was served with a Legal Notice dt/- 24th Dec, 2021 purportedly for & on behalf/under instructions of the captioned respondent. The order dated 7th December 2021 recites that there has been no representation from Respondent 4; inter alia causing the instant IA.
 - 2.1. The Respondent Nos. 1 to 7 are the directors and key and personnel of the Corporate Debtor. Respondent Nos. 8 to 12

are the persons responsible for the day to day activities of the Corporate Debtor. Respondent Nos. 13 to 27 were otherwise knowingly parties to the carrying on of the business of the Corporate Debtor for fraudulent purposes.

2.2. That the instant applicant is not a director of the company is a matter of MCA record/s, hence not dilated upon. So far as the definition of Key Managerial Personnel is concerned, a profitable reference could be drawn U/s 2 (51) & (59) of the Companies Act 2013, extracted infra:

Section 2 (51) defines key managerial personnel in relation to a company, means

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer; and
- (v) such other officer as may be prescribed;

Section 2 (59) officer includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act;

2.3. The applicant had never been the director of the company nor is its key management personnel/CFO is self-evident of MCA extract U/Exh C; wherein only CeO Debashish Mandal has been listed as key management personnel.

2.4. In the traverse of factual matrix, a misleading proceeding has been initiated by the captioned respondent against the instant

applicant; rendering the instant respondent be liable for perjury proceedings U/s 340 Of CrPC r/w Sec 424(4) of Companies Act.

2.5. In the interest of transparency the instant applicant avers that the spouse of the instant applicant had invested Rs. 50 lacs in the Corporate Debtor. There was a bonus issue in the year 2013-14 by the CD and Holding of Kashish which self-corroborates that the instant applicant could not have been construed as a related party as defined U/s 2 (76) of the Companies Act.

2.6. Cross-examining the instant Respondent Under Rule 39 of NCLT Rules is imperative to ascertain veracity of the instant averment qua the instant applicant of being Key Managerial Personnel and having indulged in Fraudulent Trading within the meaning of Sec 66 of IBC. Ratio of rulings of the Hon'ble Supreme Court relied NOUINN stated infra:

A.K. Roy V/s Union of India (1982) 1 SCC 271, Para 98.

Telstar Travels (P) Ltd. V/s Enforcement Directorate (2013) 9 SCC 549, Para 25

Ayaaubkhan Noorkhan Pathan V/s State of Maharashtra, (2013) 4 SCC 465, Para 24, 25, 26, 27, 29 & 30.

3. The Respondent filed affidavit in reply stating that an Order issuing a Show Cause Notice has serious consequences, and the same necessarily has to be based on reasons qua the case set up. In the instant case, there is no consideration of the case set up by the Applicant and/ or reasons for issuing the same. In such facts and

circumstances this Tribunal ought to consider recalling the Order dated 26 February 2024. Pursuant to the Order dated 26th February 2024 ('the Order') and the show-cause notice issued on the same date i.e. 26 February 2024 which was received by me on 7th March 2024 through post ("notice").

3.1. The Interim Application No. 1133 of 2022 (IA No. 1133 of 2022) filed by the Applicant in Interim Application No. 1444 of 2021 (IA No. 1444 of 2021) is premature, legally misconceived and untenable. IA No. 1133 of 2022 has been filed by the Applicant inter alia to exclude the Applicant as a party Respondent in IA No. 1444 of 2021 and to seek initiation of proceedings under sections 424(4) of the Companies Act, 2013 read with section 340 of the Code of Criminal Procedure, 1973 against me. Thus, since, IA 1444 of 2021 is yet to be heard on merits by this Tribunal, any orders passed in IA No. 1133 of 2022 would be pre-mature.

3.2. The Applicant overlooks the averments made in IA No. 1444 of 2021 as against the Applicant, and is thoroughly misconceived in facts and on law. This is so, for the following reasons: (i) At the 1st Committee of Creditors ("CoC") meeting of the corporate debtor held on 25 November 2019, Mr. Balady Shekhar Shetty, the erstwhile Resolution Professional of the Corporate Debtor and the CoC were of the opinion that it was necessary to conduct a forensic audit of the corporate debtor. Accordingly, it was resolved that a forensic auditor would be appointed. (ii) Accordingly, the erstwhile Resolution Professional, in usual course and in accordance with Rule 35A(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016 (CIRP Regulations) appointed GSA Associates, Chartered Accountants on 13 January 2022 to conduct forensic audit of the corporate debtor. (is) Subsequently, at the 6 CoC meeting held on 26 March 2020, the CoC resolved to appoint me as the new Resolution Professional of the Corporate Debtor in place of the said erstwhile Resolution Professional of the Corporate Debtor. By way of an order dated 27 May 2020, I was appointed as the new Resolution Professional of the Corporate Debtor by the Hon'ble NCLT. (iv) The forensic auditors GSA Associates, Chartered Accountants submitted their audit report dated 3 June 2020, providing the details and modus operandi of the preferential transactions, fraudulent transactions and the disclosed and suspected related parties of the corporate debtor. The said Forensic Audit Report is well considered. cognisant and thorough. (v) Based on the findings in the Forensic Audit Report submitted by GSA & Associates, at the 9t CoC meeting convened on 13t June 2020, the CoC inter alia resolved that the Resolution Professional may file Interlocutory Applications before the NCLT. Mumbai Bench for appropriate reliefs vis-a-vis the preferential and fraudulent transactions that the Corporate Debtor was subjected to. As such, the CoC of the Corporate Debtor has duly considered the matter, and is in accord with institution of IA 1444 and 1445 of 2021. (vi) Accordingly. on 29th June 2021, I, in my capacity as the Resolution Professional of the Corporate Debtor in accordance with law, filed two IA's viz. IA No. 1444 of 2021 (under sections 66 and 67 of the Code) and IA No. 1445 of 2021 (under sections 43 and 44 of the Code).

3.3. The averments and/or allegations as against the Applicant in the (i) the forensic audit report; (ii) IA No. 1444 of 2021; and (iii) Affidavit dated 11 July 2022 filed in Reply to IA No. 1133 of 2022 are relevant to demonstrate how the Applicant is obfuscating facts and law; on this basis, has come to prefer the misconceived and untenable IA No. 1133 of 2022; and IA 1133 of 2022 is nothing but a counterblast to avoid the legitimate adjudication of IA 1444 of 2021. This is evident from the following:

- a. Allegations as against the Applicant in the forensic audit report a. At. para 2.2, page 9 of the audit report, the Applicant has been identified as "key personnel" in view of the fact that he was the previous auditor and current Chief Financial Officer ("CFO") of the corporate debtor;
- b. The Applicant was also the auditor of other related parties of the corporate debtor viz. Celestial Logistics Pvt. Ltd. and Viscap Corporations Pvt. Ltd. This fact is also borne out in the audit report in Part 10 at internal pages 85, 86 (Part 10.1) and 91 (Part 10.2) of the audit report.
- c. The Applicant was the auditor for the various time periods of companies Corporate Debtor- F.Y. 2012-13 to FY 2013-14 D Celestial Logistics Pvt. Ltd. F.Y. 2012-13 to FY 2017-18 Viscap Corporations Pvt. Ltd.- FY 2011-12 to FY 2016-17;
- d. As more particularly elaborated in the forensic audit report, the forensic auditors have opined that Celestial and Viscap were incorporated in the years 2012 and

2011 only with the intent of making investments into the corporate debtor and there are serious allegations against them for round tripping in respect of issuance of shares by Corporate Debtor in F.Y. 2012-13. Further, the Income tax assessment order for A.Y. 2017-18 has also opined that the capacity of Celestial and Viscap to forward loan that too interest free is doubtful and cannot be accepted as genuine. The same can be found at pages 13, 14, and 85 to 91 (Part 10) of the forensic audit report.

- e. As is clearly evident from the above, the Applicant was the common auditor of all the three entities at the relevant time period. The Applicant's such long, proximate and common involvement in all 3 entities, against which the assertions of fraudulent transactions are made and the high-ranking post he was occupying, naturally makes him key personnel and an individual liable to be proceeded against in IA No. 1444 of 2021.
- f. Further, in the list of shareholders of the corporate debtor as the annual returns, Mrs. Kashish Kundnani-wife of the Applicant is shown to hold 1% shares of the corporate debtor. This is borne out from Annexure-E of the forensic audit report.
- g. At page 56 [Part 5.27(5)] of the forensic audit report, it is further provided with respect to the investments in the project by the corporate debtor the chartered accountant certificates issued by the Applicant have been relied upon.

h. The Applicant has been impleaded as Respondent No. 7 in IA No. 1444 of 2021. In IA No. 1444 of 2021, the reference to the Applicant in the averments appears in two places i.e. paragraphs 3 (pg. 5) and 20 (pg. 10), which read as under: "3. *The Respondent Nos. 1 to 7 are the directors and key personnel of the Corporate Debtor. Respondent Nos. 8 to 12 are the persons responsible for the day to day activities of the Corporate Debtor. Respondent Nos. 13 to 27 were otherwise knowingly parties to the carrying on of the business of the Corporate Debtor for fraudulent purposes. 20. The Respondent Nos. 1 to 7 are the directors and key personnel of the Corporate Debtor. Respondent Nos. 8 to 12 are the persons responsible for the day to day activities of the Corporate Debtor. Respondent Nos. 13 to 27 were otherwise knowingly parties to the carrying on of the business of the Corporate Debtor for fraudulent purposes.*"

3.4. As against this, the Applicant in IA No. 1133 of 2022 has obfuscated and mis-read the facts pleaded in IA No. 1444 of 2021 to suggest that in IA No. 1444 of 2021 the Applicant has been impleaded in his capacity "key managerial personnel", which is not so. In a Section 66 Application under the Code, and more particularly under sub-section (1), any persons who have subjected the Corporate Debtor to fraudulent or wrongful trading can be impleaded in such an Application by the Resolution Professional. Thus, when IA No. 1444 of 2021 and the Code is correctly read, IA No. 1444 of 2021 is maintainable and makes out a cause of action as against the Applicant, who

is impleaded as Respondent No. 7 therein. Therefore, till such time IA No. 1444 of 2021 is not heard on merits, it would be premature to delete the Applicant as a party in IA No. 1444 of 2021 and would prejudice the corporate debtor and its stakeholders, more particularly in light of the role, involvement and position of the Applicant in respect of the Corporate Debtor.

3.5. By an email dated 4 June 2022 in reply to the email addressed by me, GSA Associates have informed that the website of the corporate debtor has shown the name of the Applicant under the head "Board of Directors and Management Team". Further, in the 11 CoC meeting held on 14 December 2020 of the corporate debtor, the CoC basis material available resolved that the Applicant is a related party of the Corporate Debtor under section 5(24) of the Code. Further, it was also noted that one Karda Buildcon Pvt. Ltd. which is a not a related party had appointed the Applicant (who is a related party) to participate in the CoC meetings of the corporate debtor.

3.6. Accordingly, the Applicant was asked to leave the CoC meeting and not attend the future CoC meetings.

4. Heard learned counsel and perused the materials available on record.

4.1. On perusal of pleadings in IA 1444/2021, we note that the Applicant is arrayed as Respondent No.7 and has been referred as key personnel at two places. The Respondent has placed on record various facts leading to the prima facie conclusion that the Applicant was a key personal of the Corporate Debtor

having been its auditor and auditor of its group companies on various occasions. Further, Respondent stated to have relied upon website of the corporate debtor which has shown the name of the Applicant under the head "Board of Directors and Management Team" as informed to the Respondent by the transaction auditor.

- 4.2. The Applicant has made out a case on the ground that the Applicant has been referred as key managerial personnel and stated that auditors do not fall within the definition of key managerial personnel provided in Section 2 (51) of the Companies Act, 2013. On careful reading of IA 1444/2021, Personnel we note that the Applicant has been referred as key personnel and not key managerial personnel. The word key is defined in Cambridge dictionary to mean "*very important and having a lot of influence on other people or things*". The oxford dictionary defines it to mean "*most important; essential*". There is a wide difference between both the words i.e. key personnel and key managerial personnel. While key managerial personnel necessarily form part of the management team, the key personnel on the other hand may be external persons having significant role in the affairs. An auditor of the Company and its associate company, though an independent person, it exercise in important influence on the financial reporting of the Corporate Debtor. Accordingly, we are of considered view that such auditor can be loosely referred to as key personnel qua company financial affairs.
- 4.3. Since, the basis of complaint is prima facie distinguishable and the Respondent has already filed an affidavit bringing on record such distinction, we do not consider any further necessity on

calling them to give evidence in terms of Rule 39 of the NCLT Rules, 2016. Similarly, the issue in question is based on the documentary evidences placed on record which lead to a prima facie conclusion that a common man could have inferred an auditor to be key personnel. We do not consider necessity of any cross examination to decide the present issue.

4.4. In view of the above, we are of considered view that the Respondent has not made any false or misleading statement in IA 1444/2021 and whatever has been stated in the application in relation to the status of the Applicant is merely a bonafide statement which a man of ordinary prudent could have inferred. Accordingly, no case is made out for perjury.

4.5. The Applicant has also sought his exclusion in IA 1444/2021 on this ground. Since, we do not find any merit in the allegation of false and misleading statement, the case of exclusion of applicant as respondent in IA 1444/2021 shall be decided on merits while adjudicating that application.

5. In view of foregoing, the IA 1133/2022 is dismissed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)