IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II

IA/2907/2021

In
CP(IB)4106/MB/2018

Application filed under section 66 r/w section 25(j) of Insolvency and Bankruptcy Code, 2016.

Mr. Anuj Bajpai, *RP of Tollways (Ujjain) Private Limited.*

…Applicant/Resolution Professional

V/s

Surendra Lodha, *Suspended Director of Corporate Debtor 126-128, Shriram Tower, Kingsway Sadar, Nagpur-440001, Maharashtra.*

… Respondent 1

Deepak Manohar Katakwar, *Suspended Director of Corporate Debtor.*

H No. 2264/3, Sneha Nagar, Wardha Road, Nagpur, Maharashtra- 440015.

… Respondent 2

In the matter of

Bank of Baroda

…Financial Creditor

V/s

Topworth Tollways (Ujjain) Private Limited

…Corporate Debtor

Order Pronounced on :- 11.08.2023

CORAM:

SHRI SHYAM BABU GAUTAM **SHRI KULDIP KUMAR KAREER**
HON'BLE MEMBER (T) **HON'BLE MEMBER (J)**

Appearances (through video conferencing)

For the Applicant/RP: Adv. Mitali Bhatt

For the Respondent : Adv. Eshna Kumar, (for *Respondent 2*)

ORDER

Per- Coram

1. It is an application filed by Anuj Bajpai, RP of Topworth Tollways (Ujjain) Private Limited under section 66 read with section 25(j) of the Insolvency and Bankruptcy Code, 2016 against Surendra Lodha and Deepak Manohar Katakwar, *Suspended Director of Corporate Debtor* for seeking following reliefs:

   i.) Direct the Respondent no. 1 and 2 to make such contributions to the account of the Corporate debtor aggregating to sum of Rs. 23.37 Crores as stated in this Application with regard to the financial benefit fraudulently derived by misusing his fiduciary powers which falls within the ambit of provisions of section 66 of the Code;

   ii.) Pass appropriate directions/orders in terms of Section 67, of the code including for recovery/restoration of legitimate amounts due to the Corporate Debtor;

iii.) Issue orders that recovery, if any, made pursuant to this Application, shall form part of the liquidation estate as per section 36 of the Code and shall be exclusive right of the CoC/stakeholders of the Corporate Debtor.

iv.) Impose such fine under section 71, 72 and 73 of the Code upon the Respondent No 2 as this Hon'ble Tribunal may deem fit.

Facts of the IA

2. On perusal of the Application, it reveals that during the course of CIRP, transaction auditor viz. BDO India LLP was appointed to undertake the transaction audit of the books of the Corporate debtor for the period from 10.10.2018 to 09.10.2020. The Transaction Auditors filed their Forensic Audit Report in July 2021. Considering the findings of the Transaction Audit Report, the Applicant submits that the transactions so identified are covered under the provisions of section 66 of the Code. The Applicant submits that there are certain transactions which have been entered into with a clear intent to defraud the creditors and to siphon off the money from the Corporate Debtor.

The Applicant submits that concession agreement dated 06.05.2010 was essential between Madhya Pradesh Road Development Corporation Limited and the Corporate Debtor ("concessionaire"). As per the aforesaid agreement, the

Corporate Debtor was supposed to deposit the following inflow and receipts into Escrow Account:

a. *All funds constituting the financial package*
b. *All fees and other revenue from or in respect of the Project Highways, including the proceeds of any rentals, deposits, capital receipts or insurance claims; and*
c. *All payments by the MPRDC, after deduction of any outstanding Concession Fees.*

3. The Applicant submits that based on the financial records and the transaction audit report, it is clear that there is clear violation of the terms of the concession agreement and the amount to the tune of Rs. 23.37 crores has been siphoned off which is adversarial to the interests of the stakeholders, primarily the Secured Financial Creditors of the Corporate Debtor and such transactions squarely fall under the provisions of section 66 of the Code.

The Applicant further submits that on review of ledgers, we noted that, Revenue for the review period amounted to Rs. 31.56 crores which was the total cash collection. Out of total cash proceeds, Rs. 23.37 crores (74% of total deposit) was deposited in Jila Sahkari Bank (ac. No. 174001171624) and INR 8.02 crores (26% of total deposit) was deposited in SBI Escrow bank (ac. No. 30630221933) which is the designated escrow account of the Corporate Debtor where all of the toll collection needs to be deposited. Further, the amount of Rs. 23.37 crores was transferred to another bank account of Respondent No. 2 maintained with Wardhaman Urban Cooperative Bank and this account was under the control and management of Respondent No. 1 being the key managerial personnel at the relevant time. The Applicant submits that it is important to considering the manner in which the said transactions aggregating to Rs. 23.37 crores were entered into, goes on to show that this is nothing else but a fraudulent transaction entered into with a clear intent to defraud the secured financial creditors of the Corporate Debtor, who were relying for repayments primarily from this Escrow Account and did not have any other significant security in this BOT project.

Reply filed by the Respondents

4. In response to this, the Respondents have filed a detail replies and have submitted that the application is based on the forensic audit submitted in July 2021, which has not taken the material facts into consideration and overlooked certain crucial details before arriving at the erroneous conclusion that the Respondents have siphoned off money from the Corporate Debtor.

The Respondent no.1, who is the suspended director has submitted that the entire application is premised on the opening of an account with the Jila Sahkari Bank. The Resolution professional ought to have brought forth the role and contribution of the Respondent no. 1 before making such serious allegation of fraud other than a mere feeble averment that the Respondent 1 is in the control and management of the Corporate Debtor. Further submits that the forensic auditor appointed by SBI has concluded that there has been no diversion of funds from Jila Sahakari Kendriya Bank account to Wardhaman Co-operative Bank controverting the allegation that the transactions are fraudulent.

5. The Respondent no. 2 has also submitted that it is pertinent to take consideration of the events that unfurled prior to the transfer of the amount to the account other than the escrow account of the Corporate Debtor. Respondent No. 2 has submitted that a concession agreement was executed between the corporate debtor and Madhya Pradesh Road Development Corporation ("MPRDC"). The genesis of the issue dates back to 2016 when two months suspension of toll collection was imposed by MPRDC vide its order dated 31.03.2016 due to Simhasth Mela. The corporate debtor represented to MPRDC vide its letter dated 12.04.2016 that the toll collections have been lower than projections which were not enough to even service the debt and hence for the 2 months period of suspended toll collection, compensation should be given to the corporate debtor. However, MPRDC rejected the demand of compensation and extended the toll collection period by 2 months towards the end of the concession period vide its letter dated 03.09.2016. The immediate requirement of the corporate

debtor was compensation to pay the bank liabilities and other fixed costs however MPRDC choosing to extend the concession period instead of payment resulted in death blow to the corporate debtor and the accounts of the Company were declared as Non-Performing Asset by its lenders.

Due to declaration of account as NPA by its lenders, the Corporate Debtor started facing difficulties in realizing payments for operations and maintenance from the escrow account maintained with State Bank of India ("SBI') and SBI stopped all operational payments after last payment on 29.12.2016.

Considering difficulties in operating the toll road operations and noncooperation of lenders in releasing the funds from Escrow Account for the operations of the corporate debtor led to opening Jila Sahakari Kendriya Bank account in November 2017. The Respondent no. 2 further submitted that in order to keep the toll road operational, the corporate debtor was forced to open this account to facilitate payments to vendors and meet other payment/expense obligations which was utmost necessary considering the warning letters from MPRDC for the maintenance of road and overlaying work as also communicated to State Bank of India.

6. The Counsel for the Respondent no. 2 argued that there was no ill-intention of the corporate debtor behind opening Jila Sahakari Kendriya Bank account as the toll collection after

meeting out operational expense and maintenance expense was getting deposited in the escrow account as indicated from the statement of escrow account. If this account had not been opened by the Corporate Debtor, this would have resulted in stopping of all operations of the company due to non-availability of any account for payment of dues (including salaries, taxes, vendor payments etc.) by the Corporate Debtor. Both the lenders to the corporate debtor were well aware of the accounts of the corporate debtor. The same can be also understood from the fact that the corporate debtor is carrying out the maintenance of road and overlaying work as directed by MPRDC in order to continue the concession agreement. The Corporate Debtor had also submitted the financial statement on regular basis to the banks where the bank balance has been disclosed. Further, audit report had also mentioned to the State Bank of India that the corporate debtor had carried out expenditure of approximately Rs. 3+ Cr from 2017-2019, whereas no such payments were made from State Bank of India. Also as mentioned in the draft transaction audit report, the majority of the payments were made to the contractors/vendors of the corporate debtor and hence considered to be essential for the smooth running of toll without any hindrance from MPRDC.

Further submitted that the present application is liable to be dismissed as the allegations made by the Applicant are based on mere assumptions, conjectures and hypothetical.

The Applicant has failed to satisfy the ingredients of Section 66 of the Code and hence failed to make out a case.

Findings:

7. The present application has been filed under section 66 of the IB Code, 2016, which reads as follows:

> *"**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 the 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.*
>
> *(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.*
>
> *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.

From a bare perusal of the aforementioned Section 66 of the Code, it is clear that in order to attract the aforementioned Section, the following ingredients are to be fulfilled:

a.) That the business of the company undergoing insolvency has been carried on with the intent to defraud the creditors of the company or for any other fraudulent purpose;

b.) That the defendant sought to be made liable participated in the carrying on of the business of the company in that manner; and

c.) That it did so knowingly i.e. with knowledge that the transactions it was participating in were intended to defraud the creditors of the company or were in some other way fraudulent.

8. After hearing both the parties and on perusal of the application and section 66 of the Code, we are of the view that the Applicant/RP has placed no substantial proof on record to satisfy the ingredients of Section 66. The Resolution Professional has solely relied upon the forensic report to substantiate the alleged fraud whereas, the transaction auditor itself states that the report should not be considered a definitive pronouncement on the individual or the company. The veracity of the report is not even affirmed by the auditor itself. Therefore, such a report cannot be relied upon solely to prove the case

under section 66 of the code. Moreover, no case has been made against the Respondent no.1/ Suspended Director as all the challenged transactions took place between the Corporate Debtor and Respondent no.2.

As regards the allegation that the toll cash amounting to Rs. 23.37 crores were deposited in bank account of Jila Sahkari Bank, though, it was required to be deposited in the Escrow account in terms of the concession agreement, it is worthwhile to mention that in the reply it is stated that circumstances forced the Corporate Debtor to open a new bank account to carry on its business. It has further been claimed by the Respondent that after MPRDC rejected the demand of the Corporate Debtor for compensation, it required funds to pay the bank liabilities and other fixed costs. The Corporate Debtor was facing difficulties in realising payments for operations and maintenance from the escrow account maintained with State Bank of India, as the said bank had stopped all operational payments after 29.12.2016. Therefore, merely on the basis that the funds were not deposited into the Escrow account and were instead deposited in the Jila Sahkari Bank account from where the required expenses were met with by the Corporate Debtor from time to time it cannot be said that some fraud was committed in terms of Section 66 of Insolvency and Bankruptcy Code,2016. It is settled proposition of law that to prove the transaction to be fraudulent in nature, the degree of proof and evidence required should be of unimpeachable nature and a transaction cannot be dubbed as fraudulent, on the basis of inadequate and tentative findings, as recorded in the forensic audit report relied upon by the applicant. Therefore, we are of the considered view that the applicant has not able to establish the transactions questioned in the application are fraudulent in nature. In the light of the same, the **IA No. 2907/2021** is **dismissed** being without any merits.

Sd/-	Sd/-
SHYAM BABU GAUTAM	**KULDIP KUMAR KAREER**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**

Arpan, LRA

11.08.2023