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

IA/2874/2021

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

Shree Balaji Tradelinks, *(Partnership firm)*

House No. 71/A, 4th Floor, Krishna House, ST Bus Stand Road, Ganeshpeth, Nagpur- 440018.

… 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. Amey Hadwale, (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, *Suspended Director of Corporate Debtor* and Shree Balaji Tradelinks, *Partnership Firm* for seeking following reliefs:

   i.) Direct the Respondent no. 2 to make such contributions to the account of the Corporate debtor aggregating to sum of Rs. 1.78 Crores as stated in this Application with regard to the financial benefit fraudulently derived by the Respondent no. 2 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 based on the financial records and information available with him it is clear that the Respondent No 2 has managed to siphon off an amount of Rs. 75 Lakhs from the Corporate Debtor which was against the interests of the stakeholders of the Corporate Debtor and such transactions squarely fall under the provisions of section 66 of the Code. The Applicant submits that a tripartite agreement was signed between Corporate debtor (Party A), Rajmal Goercha and Sons (Party B) and Shri Balaji Tradelinks/Respondent no.2 (Party C) on 08.10.2019. The relevant contents of the said Tripartite Agreement is provided hereunder:

> *Party A confirms that it will pay an amount to the extent of Rs. 75,00,000/- to party C on behalf of Party B against the work order no. TTUPL/18-19/005 dated 27.03.2019.*
>
> *Based on discussions and mutual consent of Party A, Party B and party C, all parties to this agreement confirm the following:*
>
> *A sum to the extent of Rs. 75,00,000/- will be paid by Party A to party C on behalf of Party B, all parties to pass necessary accounting entries in their books of accounts based on this confirmation letter.*

The Applicant submits that this is a clear case of fraudulent transaction where the document itself states that the dues of Respondent no. 2 was towards another partnership firm (Party B in the said Triparty Agreement- Rajmal Gorecha & sons) where Respondent no. 1 is also a partner while the amounts have been withdrawn from the Corporate Debtor which itself have been declared as NPA and was under financial turmoil and struggling to service its own debt. The Applicant also submits that overall Respondent no. 2 has received an amount of Rs. 1.78 Crores (including Rs. 75 Lakhs). There are no business Transactions between the Corporate Debtor and Respondent no. 2 nor any justifications for making such exorbitant payments to Respondent no. 2. Under such circumstances, the Applicant has filed the present application for seeking appropriate orders against the Respondents.

Reply filed by the Respondents

3. In response to this, the Respondents have filed a detail separate reply 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 making 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 there is no averment in the application, which establishes the role of the Respondent No. 1 in the alleged fraudulent transactions. Additionally, no prayer has been sought against the Respondent no.1. The Respondent no.1 has further submitted that the entire application is based on the transactions between the Corporate Debtor and Respondent no.2. The Resolution Professional ought to have brought forth the role and contribution of the Respondent no.1 before making such serious allegations of fraud.

4. The Respondent no. 2 has also submitted a detailed reply and has submitted that the tripartite agreement executed between the Corporate Debtor, Ramal Gorecha & Sons and Respondent No. 2 on 08.10.2019 is the foundation of the baseless allegations put forth by the Applicant. It is alleged that the amount of Rs. 75 lakhs paid in pursuant to the agreement is the siphoning off the money which is adversarial to the interests of the stakeholder. The Respondent no. 2 submits that the events that occurred prior to the execution of the tripartite agreement are required to be looked into in order to truly understand the nature of transaction which is wrongly presented as “fraudulent”. Rajmal Gorecha & Sons (“Rajmal”) is a partnership firm which was allotted work order No. TTUPL/18-19/005 by the corporate debtor for the maintenance of the toll road after the continuous following up by the Madhya Pradesh Development Corporate Limited (“MPRDC”). The allotment of work order was a crucial business decision taken in ordinary course of business to circumvent the liabilities that may arise due to non-compliance of the conditions of the Concession Agreement executed between the Corporate Debtor and MPRDC. The payments to Rajmal during the work were necessary to ensure the continuance of work without any disruption.

It is submitted that during the audit period for the work order issued by the corporate debtor to Rajmal, Respondent No.2 paid an amount of Rs. 74,20,000/- to Rajmal on behalf of the corporate debtor. Hence, pursuant to this transaction the tripartite agreement was entered between the parties, wherein, the corporate debtor agreed to pay the amount extent to Rs. 75 Lakhs to Respondent No.2 against the work order done by Rajmal. Thus, there was legitimate reason to make payment to the Respondent No.2 by the Corporate Debtor.

5. The Respondent no.2 further submits that as per transaction audit, the Respondent No.2 made TDS payments on behalf of the corporate debtor and supporting document for such documents were not made available to the auditor. Moreover, no such request was received by the Respondent No.1 from the Applicant. Respondent no. 2 has given challan wise details of payments made by the Respondent no. 2 on behalf of the Corporate Debtor:

Date	**Particulars**	**Amount**	**Challan no.**
07.01.2020	TDS PAYABLE ON CONTRACTOR 19-20	17,591	31001
07.01.2020	TDS PAYABLE ON CONTRACTOR 19-20	1,71,151	30682
07.01.2020	TDS ON SALARY 19-20	1,78,650	30225
07.01.2020	TDS ON PROFESSIONAL FEES-19-20	63,500	29857
04.02.2020	TDS PAYABLE ON CONTRACTOR 19-20	2,01,255	07003

04.02.2020	TDS ON PROFESSIONAL FEES-19-20	19,250	06740
04.02.2020	TDS ON SALARY 19-20	1,78,650	06818
04.02.2020	TDS PAYABLE ON CONTRACTOR 19-20	1,503	06934
03.03.2020	TDS PAYABLE ON CONTRACTOR 19-20	2,06,978	10800
03.03.2020	TDS ON SALARY 19-20	1,78,650	10774
03.03.2020	TDS ON PROFESSIONAL FEES-19-20	16,000	10739
13.05.2020	TDS PAYABLE ON CONTRACTOR 19-20	1,00,000	01737
19.05.2020	TDS ON SALARY 20-21	1,69,950	02466
19.05.2020	TDS ON PROFESSIONAL FEES-19-20	7,000	02458
19.05.2020	TDS ON SALARY 19-20	1,76,450	02444
19.05.2020	TDS PAYABLE ON CONTRACTOR 19-20	42,707	02431
02.06.2020	TDS ON CONTRACTOR 20-21	27,941	04427
02.06.2020	TDS ON SALARY 19-20	6,500	04397
02.06.2020	TDS PAYABLE ON CONTRACTOR 19-20	2,066	04411
02.06.2020	TDS ON SALARY 20-21	1,69,950	04449
20.06.2020	TDS PAYABLE ON CONTRACTOR 19-20	2,38,025	03917
11.07.2020	TDS ON CONTRACTOR 20-21	16676	00351
11.07.2020	TDS ON CONTRACTOR 20-21	2,581	00364

30.07.2020	TDS ON SALARY 20-21	5,64,333	09346
31.07.2020	INTEREST ON LATE PAYMENT OF TDS	4,672	06373
31.07.2020	INTEREST ON LATE PAYMENT OF TDS	53	06450
05.08.2020	TDS ON CONTRACTOR 20-21	19,916	04842
05.08.2020	TDS ON SALARY 19-20	2,25,324	04557
07.09.2020	TDS ON CONTRACTOR 20-21	3,00,572	43653
14.09.2020	TDS ON CONTRACTOR 20-21	2,38,822	11556
14.09.2020	TDS on Professional Fees 20-21	18,500	11691
14.09.2020	TDS ON SALARY 20-21	32,741	11862
15.09.2020	TDS ON SALARY 20-21	7,00,554	27151
28.09.2020	TDS ON SALARY 20-21	2,00,000	04646
03.10.2020	TDS ON SALARY 20-21	2,00,000	04618
05.10.2020	TDS ON SALARY 20-21	2,96,209	18836
09.10.2020	TDS ON CONTRACTOR 20-21	43,514	05265
09.10.2020	TDS ON SALARY 20-21	2,50,000	05297
	Total Payments	**52,88,234**	

The Corporate Debtor was not able to make TDS payments from the bank accounts maintained by the Corporate Debtor as they were not linked with tax departments website, hence to pay the statutory dues, the Corporate Debtor requested Respondent No.2 to pay the tax obligations of the corporate debtor to the tune of Rs. 52,91,834/-. The corporate debtor sought financial assistance of Rs. 51 lakhs from one of its vendors which Respondent No.2 in the present case. The amount paid by the Respondent No.2 on behalf of corporate debtor at aforementioned occasions warranted payments to be made to it. A summary table is produced highlighting the transactions conducted between the concerned parties:

Amount received by CD from Respondent No.2 for expenses	Rs. 51,00,000
TDS & other charges paid by Respondent No.2 on behalf of CD (Details as mentioned in the above point)	Rs. 52,91,834
Payment made by Respondent no.2 on behalf of CD to Rajmal Gorecha & Sons	Rs. 74,20,000
Total Amount Received	Rs. 1,78,11,834
Total payment to respondent no.2 by CD	Rs. 1,78,00,521
Balance amount payable by CD to Respondent no.2 on Insolvency Commencement Date	Rs. 11,313

6. While arguing the matter, the Ld. Counsel for the Applicant has submitted that neither the transaction auditor nor the Resolution Professional sought any information from the Respondent No.1 before making serious allegations of fraud. The auditor classified the transactions with the Respondent No.2 as fraudulent basis on non-receipt of the supporting documents for the TDS payments. That now the necessary

details have been provided, the application is liable to be dismissed.

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 proof on record to satisfy the ingredients of Section 66. Further, the Resolution Professional solely relies upon the forensic report to substantiate alleged fraud wherein, the transaction auditor's itself states that the report should not be considered a definitive pronouncement on the individual or the company. From, 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.

Further, the work order was issued by the corporate debtor to Rajmal. The Respondent No.2 paid an amount of Rs. 74,20,000/- to Rajmal on behalf of the corporate debtor. Hence, pursuant to this transaction the tripartite agreement was entered between the parties, wherein, the corporate debtor agreed to pay the amount of Rs. 75 lakhs to Respondent No.2 against the work order done by Rajmal. Thus, it seems to be legitimate reason to make payment to the Respondent No.2 by the Corporate Debtor. 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. 2874/2021** is **dismissed** being without any merits.

Sd/- Sd/-

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

Arpan, LRA

11.08.2023