**IN THE NATIONAL COMPANY LAW TRIBUNAL,**

**MUMBAI BENCH, COURT II**

**IA/2717/2021**

**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**

*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

**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* for seeking following reliefs:

   i.) Direct the Respondent to make such contributions to the account of the Corporate debtor aggregating to sum of Rs. 4.15 Crores as stated in this Application with regard to the financial benefit fraudulently derived by the Respondent 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 Mr. Surendra C Lodha (respondent and suspended Director) has blatantly misused his fiduciary position as a "director" and pocketed an amount of Rs. 2.57 Crores for his personal financial gains. The Corporate Debtor was under tremendous financial stress but the Respondent callously and without keeping in mind the interest of the Corporate Debtor and its stakeholders conveniently increased his monthly remuneration by 100% i.e from Rs. 5,00,000/- to Rs. 10,00,000/-. The Applicant submits that the financial situation of the Corporate Debtor was bleak and it was not a case where any major project or supernormal profits were earned by the Corporate Debtor and hence such 100% increase in his own salary is a clear example of fraudulent transaction with an intent to defraud the creditors and siphon off the money for his own personal gains.

In addition to this, the Applicant came across a copy of the ledger of Mr. Surendra Lodha as per the records of Rajmal Gorecha & Sons (sub-contractor of the Corporate Debtor). The said ledger shows transactions made during the period from 01.04.2019 to 30.09.2020 (a month prior to insolvency commencement date i.e. 09.10.2020) which clears that the Respondent has also siphoned off an amount of Rs. 1.58 Crores in his personal capacity. In fact, the said ledger has also been signed off by the Respondent. The Applicant submits that the conduct and fraudulent intent of Respondent is evident from the face of the document itself wherein without any valid business reason the Respondent for his own personal financial gain started withdrawing a substantial sum under the guise of "monthly remuneration" which is squarely covered under the provisions of section 66(2) of the Code and has led to a substantial financial loss to the Corporate Debtor to the tune of Rs. 4.15 crores (Rs. 2.57 crores and Rs. 1.58 crores) which ought to be recovered from the Respondent. Under such circumstances, the Applicant has filed the present application for seeking appropriate orders against the respondent.

**<u>Reply filed by the Respondent</u>**

3. In response to this, the Respondent has filed a detail reply and 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 Respondent have siphoned off money from the Corporate Debtor.

The Respondent, who is a suspended director, has submitted that out of Rs. 2.57 crores, Rs. 97,82,752/- was paid as a part director's remuneration which was duly authorized in the Extra Ordinary General Meeting ("EGM") of the Corporate Debtor held on 01.11.2019. The increase in the salary of the Respondent was duly authorized by the members. The Respondent has been instrumental in the sustenance of the Corporate Debtor that justified the increase in remuneration. The Respondent has further submitted that he reduced the traffic leakages which led to increase in toll collection revenues for the Corporate Debtor. He also successfully liaised with Madhya Pradesh Development Corporate Limited ("MPRDC") and guided the Corporate Debtor through a very difficult financial time when the lenders were not supporting after the account of the company was declared as NPA. His success can be gauged from the fact that the toll road was successfully operational otherwise the project would have been terminated by MPRDC.

The Respondent has further submitted that out of the total payment to Respondent, Rs. 86,419/- was paid as reimbursements for travelling expenses against the bills submitted to Corporate Debtor and Rs. 1,58,48,000/- was paid as reimbursement for the payments made by the Respondent to Rajmal Gorecha & Sons on behalf of the Corporate Debtor against the work issued by the Corporate Debtor to Rajmal Gorecha & Sons. The payment was made due to non-availability of requisite funds with the Corporate Debtor required for maintenance and operation issues of toll road. Rajmal Gorecha & Sons was awarded the contract for maintenance of the toll road by the Company vide Work Order No. TTUPL/18-19/005 dated 27.03.2019. Before awarding work order to Rajmal Gorecha & Sons, their quotation was sought and meetings were held with them. Basis the work order and the revision of rates, the total work order value Res. 14.69 Crore (excluding GST). Their work was continuing with regular supervision of MPRDC.

**Findings:**

*4.* 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.*

5. We have heard the counsel for the parties and gone through the record. Keeping in view the requirements of the provision of section 66 of the Code, we are of the considered view that the applicant has not able to satisfy the requirements of the provision of Section 66. The applicant/resolution professional has wholly relied upon the forensic report to substantiate the allegations of fraud. So far as the allegation with regard to enhancement of salary by the Respondent from Rs. 5 Lakhs to 10 Lakhs per month with effect from 01.11.2019, the same cannot be treated to be a fraudulent at on the part of the Respondent, especially, when the enhancement of the remuneration was duly approved by the shareholders in the EoGM held on 01.11.2019.

The second part of the allegations are with regard to the reimbursement of travel expense of Rs. 86,419 which can also not be termed as fraudulent by any stretch of imagination. In the forensic audit report relied upon by payment, the applicant has alleged that the Respondent had diverted funds of the

Corporate Debtor. It is mentioned in the audit report that the payment of INR 2.57 crores was made to Surender Lodha against Director's remuneration of INR 1.56 crores and payment made by Surender Lodha to Vendor (Rajmal Gorecha and Sons) on behalf of Topworth Tollways.

In the conclusion part of the report, it has been mentioned that the payments were made by the Respondent on behalf of the company and the same were reimbursed to the Respondent later on. It is further concluded in the report that such payment appears to questionable in nature. However, in the report no clear-cut finding have been recorded. In the disclaimer part, it has been mentioned that the finding and the report should not be interpreted as documentary evidence, nor the report should be considered a definite pronouncement on any individual or the company. Therefore, whatever has been stated in the audit report, the only inference that can be drawn is that report is tentative in nature and cannot be relied upon to hold that the questioned transactions are fraudulent in nature. 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. 2717/2021** is **dismissed** being without any merits.

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

Arpan, LRA

11.08.2023