

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

IA/2701/2021

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

Rajmal Gorecha & Sons, *(Partnership firm)*

*114, Dhan Mandi, Ratlam, Madhya Pradesh- 457001.
ember of CoC of Prince MFG Industries Private Limited.*

... Respondent 2

In the matter of

Bank of Baroda

...Financial Creditor

V/s

Topworth Tollways (Ujjain) Private Limited

...Corporate Debtor

Order Pronounced on :- 19.05.2023

CORAM:

SHRI SHYAM BABU GAUTAM
HON'BLE MEMBER (T)

SHRI KULDIP KUMAR KAREER
HON'BLE MEMBER (J)

Appearances (through video conferencing)

For the Applicant/RP: (PCA) Ayush J Rajani a/w. Khushboo Shah
i/b AKR Advisors for Applicant.

For the Respondent : Adv. Devul Dighe, (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 Rajmal Gorecha & Sons, *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. 9.25 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.

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. 9.25 crores from the Corporate Debtor which is adversarial to 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 during the course

of CIRP, it is seen that invoices amounting to INR 10.93 crores were booked towards maintenance charges and 9 out of 18 invoices of Rajmal Gorecha & Sons (Respondent No 2) aggregated to an amount of Rs 9.09 crores in which, GST was charged by Respondent No 2 but GST number was not mentioned on the bills and there was no inward stamp of TTUPL on the bills of Respondent. Furthermore, 4 out of these 9 invoices aggregating to Rs 2.73 crores, did not even have any receipt of acknowledgement by any employee of the Corporate Debtor. Whilst on the remaining bills, only signature of Senior Manager of Corporate Debtor is available on the bill which too couldnot be verified. The Applicant further submits that vehicle's number mentioned in the bills were reviewed and it was identified that existence of 6 vehicle numbers out of 16 vehicle numbers could not be verified or traced. Moreover, there were no supporting document also to evidence the transport of any such goods.

The Applicant further submits that 179 instances out of 216 cases were verified and weight of material transported was 40% more than the defined payload capacity of the vehicle. In order to prove his case, the Applicant submits that the Corporate Debtor was under tremendous financial stress, when the Respondent No 2 has managed to pocket a substantial sum of Rs. 9.25 crores which ought to have been utilised towards serving the debt/dues of the Corporate Debtor towards the secured financial creditors. The Applicant submits that based on the findings of the transaction auditors, as also mentioned

in the transaction audit report, it is evident that Respondent No 2 has received a total sum of Rs. 9.25 crores which amounts to 38% of the total payment transactions of the Corporate Debtor. Under such circumstances, the Applicant has filed the present application for seeking appropriate orders against 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 allegation of fraud. The Ld. Counsel for Respondent no.1 has submitted while arguing the matter that the Applicant has miserably failed to demonstrate that any of

the ingredients of section 66 of the Code have been fulfilled by any of the alleged transactions.

4. The Respondent no. 2 has also submitted a detailed reply along with a written submission and has submitted that it is admitted position that Respondent No. 2 was made payments of Rs. 9.25 Crores for repair, maintenance and overlay work (“Work”) of Ujjain-Nagda-Jaora Highway (“the said Highway/Highway”) constructed by the Corporate Debtor on the basis of contract awarded to it by Madhya Pradesh Road Development Corporation Limited (“MPRDC”) in terms of work order dated 27.03.2019 which was amended vide on 16.10.2019 for an amount of Rs. 14.69 Crores Approximately apart from other works awarded. In order to preserve the business of the CD and keep it as going concern apart from preserving value of its huge investment made to construct highway, it was essential for the CD to undertake the said work and hence CD awarded the said work to Respondent No. 2 after obtaining quotation from it and owing to other works successfully done by Respondent No. 2 as required by CD.

The entire Application is based on the assumption made by the RP/Applicant that payment made to the Operational Creditors such as Respondent No. 2 during look back period of 2 years should not have been made since the same is in violation of payment waterfall under Section 53 of the Code and hence the payment made to Respondent No. 2 has been at the cost of jeopardizing the interest of financial creditors. Hence

Applicant is attempting to claim that every time CD meets fate of CIRP, OCs like Respondent No. 2, whose payment made in ordinary course of business, must be undone as it is violative of Section 53. The same is without legal basis and just an attempt to please Financial Creditor and only by way of chance taking.

The Respondent 2 has submitted that the present I.A. is filed under Section 66 of IB Code for fraudulently transacting the business of Corporate Debtor i.e. Topworth Tollways Private Limited taken out by Applicant/RP is at the outset not maintainable on the following grounds, which are in alternate and without prejudice to each other: -

- The Applicant has to provide its case for "fraud" as per settled law beyond any reasonable doubt;
- Respondent No. 2 states that it does not even create doubt;
- TAR nowhere provides any supporting documents or information on the basis of which it arrived at such "observation". Not even single document is annexed to the same or application to demonstrate and prove the ingredients of fraud.
- The Applicant/RP's own admitted case is that payments were towards work performed by Respondent No. 2 by addressing letters/emails to rectify defect marking a copy to MPSRDC.
- The entire application is based on Transaction Audit Report dated July 2021 ("said TAR") which itself is not

conclusive and merely prima facie "observations" and not even an opinion expressed by Auditor. The said TAR is itself a draft TAR and not even signed by the Transaction Auditor.

5. While arguing the matter, the Ld. Counsel for the Applicant has submitted that GST Returns have been duly filed with government and GST levied at the rate of 12% amounting to Rs. 1,08,14,950/- was duly deposited with government treasury. It was further argued that Bills were duly submitted to CD by Respondent No. 2 from time to time via email, which proves that the transactions being genuine and in ordinary course of business. The Ld. Counsel has further submitted that the Respondent No. 2 used to manufacture the material Bitumen from its own factory on the very same highway using its own trucks and Applicant/RP has admitted that work was duly performed. The Ld. Counsel further relied on Judgement of Hon'ble National Company Law Appellate Tribunal in ***Birla Financial Distribution Limited vs Shri Jagdish Shah Singh Nain (Company Appeal (AT) (Ins) No. 585 of 2022)*** wherein it has held that mere opinion (which is itself also not there in present case) by TAR is not sufficient to make out a case under Section 66 in the absence of conclusive opinion backed by material evidence. Further relied on ***Edelweiss ARC vs RTIL Limited (MA No. 05/2019 in CP(IB) No. 382 of 2018)*** wherein the NCLT Mumbai Bench has held that onus of proof is on Applicant to substantiate its claim and transactions in ordinary

course of business cannot be termed as covered by Section 66. It has further been submitted that the said Application under Section 66 of IB Code is liable to be dismissed with exemplary cost.

6. As the present application is 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 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 matter; 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.*

7. 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 report to substantiate alleged fraud wherein, the transaction auditor itself states that the report should not be considered a definitive pronouncement on the individual or the company. The onus of 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, in relation to Respondent no.2, the GST Returns have been duly filed with government and GST levied at the rate of 12% amounting to Rs. 1,08,14,950/- was duly deposited with government treasury showing not only bonafides of Respondent No. 2 but also genuineness of the work performed in ordinary course of business. In view of the above brief discussion, we are of the opinion that the applicant has failed to make out a case and prove the allegations and element of fraud in the so called disputed transactions. Therefore, in our considered view, the IA no. 2701/2021 deserves to be dismissed, being devoid of any merit. Ordered Accordingly.

Sd/-

**SHYAM BABU GAUTAM
(MEMBER TECHNICAL)**

Sd/-

**KULDIP KUMAR KAREER
(MEMBER JUDICIAL)**