

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD

COURT - 2

ITEM No.303

IA/653(AHM)2023 in CP(IB) 268 of 2020

Order under Section 66 r.w 60(5) IBC r.w Rule 11 of NCLT Rules, 2016

IN THE MATTER OF:

Dr Vichitra Narayan Pathak RP Of Golden Tobacco Ltd.Applicant

Vs.

Suniel DhhandhanianRespondent

Order delivered on: 17/04/2024

Coram:

Mrs. Chitra Hankare, Hon'ble Member(J)

Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

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**DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)**

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**CHITRA HANKARE
MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)**

IA 653/NCLT/AHM/2023

IN

CP(IB)268/NCLT/AHM/2020

(Application under Section 66 of Insolvency and Bankruptcy
Code, 2016)

IN THE MATTER OF:

Dr. Vichitra Narayan Pathak

Resolution Professional of

Golden Tobacco Ltd.

... Applicant

Versus

Suniel Dhhandhanian

IN THE MATTER OF:

Arrow Engineering Ltd.

... Financial Creditor

Versus

Golden Tobacco Ltd.

... Corporate Debtor

Order pronounced on: 17.04.2024

Coram:

MRS. CHITRA HANKARE

HON'BLE MEMBER (JUDICIAL)

MR. VELAMUR G VENKATA CHALAPATHY

HON'BLE MEMBER (TECHNICAL)

Memo of Parties

In the matter of

Dr. Vichitra Narayan Pathak

Resolution Professional of
Golden Tobacco Ltd.,
Having his office at
120, Jharneshwar Colony Madhuban Vihar,
Near International Public School,
Hoshangabad Road,
Bhopal-462047, Madhya Pradesh
E-mail: cirp.goldentobacco@gmail.com ... Applicant

Versus

Suniel Dhhandhanian

r/o B-802, Rushi Heights
CHS Ltd. Riddhi Garden Road
Malad (East), Mumbai-400 097
Maharashtra
E-mail: sunieldhhandhanian@gmail.com ... Respondent

Present:

For the Applicant : Mr. Robin Jainsinghani Adv. a/w. Mr.
Jacinta D Silva, Adv.

For the RP : Mr. Anurag Bisaria, Adv.

For the Respondent : Mr. Saurabh Soparkar, Sr. Adv. Mr. Jay
Kansara, Ms. Aishwarya Reddy, Adv. a.w
Ms. Laghima Jain, Adv.

JUDGEMENT

1. This application is filed under Section 66 r.w. Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 11 of the NCLT Rules, 2016 seeking necessary and appropriate directions against the respondent.
2. The applicant is the Resolution Professional (RP) of M/s. Golden Tobacco Limited (Corporate Debtor) while respondent was Executive Director of the corporate debtor. It is stated that on 23.06.2021, the CD, through the Respondent, entered into an agency/brokerage agreement with one M/s Aimgold Hospitality LLP (hereinafter referred to as the "Agent") with respect to renting out the property of CD at Tobacco House, S.V. Road, Vile Parle (West), Mumbai – 400056 on short term basis. According to terms of clause 3A of the Agreement, Agent was required to deposit a sum of Rs.2,90,00,000/- as interest free refundable security deposit with the CD, of which only a sum of Rs.1,39,00,000/- was received into the bank account of the CD while Rs.1,50,00,000/- was paid to M/s Golden Realty and Infrastructure Ltd, a 100% owned subsidiary

of the CD, where also the Respondent was a Director at the relevant time and Rs.1,00,000/- to Consulting Engineers & Architects. Applicant further submitted that the respondent failed to explain/clarify the reason or justification for such diversion of sums due to the CD. Thus, carried on the business of the corporate debtor with fraudulent purposes.

3. The respondent has resigned from the corporate debtor on 17.02.2023. Applicant submitted that there are some other such transactions carried out by the erstwhile directors to defraud the creditors or for fraudulent purposes as is amply borne out by the *prima facie* findings noted in the show cause notice dated 05.12.2022 issued by the Securities and Exchange Board of India to one of the directors. The Suspended Management of the corporate debtor concealed the said facts from applicant. The applicant, therefore, prayed to allow the application and declare that diversion of funds of CD to other entities was carried on for fraudulent purpose and in a fraudulent manner and direct the respondent to refund the entire sum so diverted

together with interest of 12% p.a. from the date of such diversion till the date of its refund in full and also impose appropriate punishment on the respondent.

4. Respondent has filed their reply. He has denied the allegations levelled against him. According to respondent, at the time of the agreement respondent held the position of Deputy General Manager at the CD and his role was limited to being a signatory on behalf of the CD for the purpose of signing the agreement and he was not solely involved in any decision making. The respondent further contended that entire sum received from Agent by M/s Golden Realty and Infrastructure Ltd was transferred to CD and was fully utilized for and on behalf of CD. Further all the above transactions were approved by the Board of Directors as due to financial constraints the said amount was used to keep the CD afloat. Respondent submitted that the balance payment of Rs.1,00,000/- to Consulting Engineers & Architects was made by the Agent to conduct a structural audit of CD's premises located in Ville Parle, Mumbai. Also, all the above transactions have been subjected to auditing

by Statutory Auditors, therefore there is no scope for fraud or fraudulent diversion. Respondent further submitted that the ingredients of Section 66 of the Code are not fulfilled, there should have been clear opinion followed by suitable determination under Regulation 35(A). There is no proof that respondent has misutilized the funds or derived benefit from diversion of sums. There is no evidence of presence of intent or *mens rea* on part of the respondent. The respondent was only fulfilling his fiduciary duties diligently acting in the best interest of the company. The applicant was fully aware of the investigation proceedings conducted by SEBI. Thus, the applicant is not entitled for the reliefs prayed for. Hence, prayed for dismissal of the application.

5. Heard Ld. Counsel for the applicant and Ld. Counsel for the respondent.
6. The respondent have relied upon following citations:-
 - i) *Jayesh Shanghrajka Vs. Divine Investments*
[MANU/NC/1868/2021]

ii) *Venkatesan Sankaranarayan, RP for RTIL Limited and Ors. Vs. Nitin Shambhukumar Kasliwal and Ors. [MANU/NC/3506/2021]*

iii) *R. Ramela Rangasamy Vs. Kandrikar Shahid Mansoor MA No. 1061 of 2019 CP No. 522(IB) of 2018*

7. This application is filed under Section 60(6) as well as under Section 70 of the IBC. Section 70 of the IBC provides for punishment for misconduct in the course of Corporate Insolvency Resolution Process. It is punishable with imprisonment as well as with fine. However, such a punishment cannot be awarded without conducting trial on a complaint made to that effect. The Hon'ble NCLAT in the matter of Sapan Mohan Gard, Resolution Professional of Sort India Enviro Solution Ltd. Vs. Manish G. Patel & Anr. C.A. (AT) (Ins.) No. Comp. App. (AT) (Ins) No. 966 of 2022 837 of 2021, it was held that *"in order to initiate prosecution under Section 70 of the Code and complaint has to be filed by the Insolvency and Bankruptcy Board*

of India (IBBI) or Central Government or person authorized by the Central Government”.

Therefore, action cannot be taken against the respondent under Section 70 of the Code in this application.

8. As the application is also filed under Section 66 of the Code which provides for directing the director or partners of the corporate debtor to make such contribution to the assets of the corporate debtor as it may deem fit if the business was carried out by them to defraud creditors or in any fraudulent manner. So the Tribunal will have to verify from the record whether any such act was committed by the respondent.
9. It is an admitted fact that on 23.06.2021 the corporate debtor through the respondent, the then DGM (Commercial), entered into an agreement with one Aimgold Hospitality LLP with respect to renting of property of the corporate debtor located in Mumbai for film shoot, etc. In the agreement, it is mentioned that the agent has deposited with the owner a sum of INR 2,90,00,000/- as a security. The amount of

Rs.1,50,00,000/- was deposited with sister concern of corporate debtor M/s. Golden Reality & Infrastructure Ltd. on their behalf. The said amount was deposited as a security deposit and it is to be refunded. According to applicant the said sister concern is their subsidiary company and there was no siphoning of funds. Out of the total amount, Rs.1,00,000/- was also given to Consulting Engineers & Architects. Thus, the amount to be received by way of agency agreement is not fully deposited in the account of corporate debtor but some amount is deposited in the subsidiary company. No reason is mentioned why the full amount is not deposited in the account of the corporate debtor.

10. The respondent mentioned in the reply that it was not fully deposited with the corporate debtor but with its sister concern as per the instruction of Aimgold Hospitality LLP and not by the corporate debtor. There was no reason for said company to ask for depositing part of the amount in the account of company other than the corporate debtor. Another explanation given by the respondent is that though the amount was

deposited in the account of sister concern of corporate debtor it was fully utilized on behalf of corporate debtor. The respondent has provided statement of account of Golden Reality and Infrastructure Limited evidencing full transfer of amount of 1.5 Crores in the accounts of Corporate Debtor (applicant) in Annexure A-Colly of reply. The Resolution Professional has not filed any rejoinder to the reply of the respondent.

11. From the statement of proof provided by the respondent by affidavit evidencing such payment (from ledger record of Golden Reality and Infrastructure Limited) and from the bank account statement of Punjab National Bank, Kareli Baug Vadodara from account No. 1443002110097873 wherein there are transfers made to Golden Tobacco Limited (Corporate Debtor) (debit proof of bank submitted) along with the statement annexed in Annexure D on following dates: 08.03.2021, 12.03.2021, 17.03.2021, 18.03.2021, 24.03.2021, 26.03.2021 and 12.04.2021. The respondent therefore is not liable for any of the transactions, since the alleged amount received by

Golden Reality and Infrastructure Limited, 100% subsidiary company of Corporate Debtor, had already been transferred to the account of the Corporate Debtor. In RP had not submitted any statement from the Bank Account with proof that such amount had not been received. Hence the ingredients of Section 66 of IBC, 2016 are not fulfilled.

12. Accordingly, we pass the following order:

ORDER

The IA.653 of 2023 in CP (IB) 268 of 2020 is rejected.

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DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

CHITRA HANKARE
MEMBER (JUDICIAL)