

IN THE NATIONAL COMPANY LAW TRIBUNAL

AHMEDABAD

COURT - 2

ITEM No.302

IA/652(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 Dhhandhania & Anr.

.....Respondent

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 652/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

1. **Suniel Dhhandhania**

2. **Pawan Kumar Malsaria**

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

1. **Suniel Dhandhanania**

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

2. **Pawan Kumar Malsaria**

r/o D-2, 4th Floor
Sheetal Apartment
R.C. Dutt Road, Alkapuri
Vadodara-390 007, Gujarat
Email: malsariapawan@gmail.com

... Respondents

Present:

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

For the RP : Mr. Anurag Bisaria, Adv.

For the Respondents : 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 respondents.
2. The applicant is the Resolution Professional (RP) of M/s. Golden Tobacco Limited (Corporate Debtor) while respondents were Executive Directors of the corporate debtor. It is stated that the respondents failed and ignored to deposit the sums deducted from employees of the corporate debtor towards repayment of their respective loans from GTC Employees Cooperative Credit Society (hereinafter referred to as Society) and instead dishonestly and illegally used said funds for the benefit of the corporate debtor. Thus, carried on the business of the corporate debtor with fraudulent purposes. The RP came to know through representative of Society on 19.07.2022 that the corporate debtor deducted sum of Rs.6,33,735/- from the salary of employees during the period from September 2021 to May 2022 but not deposited the same with the Society.

The Society also submitted a claim in respect of said amount which has been admitted by the applicant as other creditors.

3. Both the respondents have resigned from the corporate debtor on 17.02.2023 and 23.02.2023 respectively. 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 Respondent no. 2. The Suspended Management of the corporate debtor concealed the said facts from applicant. As the respondents carried business with intent to defraud the creditors or for fraudulent purpose without depositing the amount with the Society dishonestly and illegally used for own purposes, they are liable to be punished in accordance with Section 70 of the Code. The applicant, therefore, prayed to allow the application and declare that diversion of sums deducted from the salaries of employees was carried on for fraudulent purpose and in

a fraudulent manner and impose appropriate punishment on the respondents.

4. Respondents have filed their reply. They have denied the allegations levelled against them. According to respondents, the total liability to the Society amounts to Rs.6,33,735/-. This amount includes Rs.48,133/- designated for the executive staffs. It is further stated that due to financial difficulties there were delays in paying the said amount. It is further stated that the worker's salaries were paid up to March 2022 while the staff salaries paid up to July 2021. The respondents further contended that as the corporate debtor was facing financial constraints which hindered payment to the Society. The delays were unintentional. Due to financial crunch, said amount was then utilised for the working capital of corporate debtor. The funds were not diverted to the accounts of the respondents. 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 respondents have misutilized the funds or

derived benefit from non-payment of salary or deductions. There is no evidence of presence of intent or *mens rea* on part of the respondents. The respondents were only fulfilling their 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 respondents.
6. The respondents 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 respondents 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 will have to verify from the record whether any such act was committed by the respondents.
9. The applicant alleged that the respondents have deducted sum of Rs.6,33,735/-from salary of employees during the period from September 2021 to May 2022 and was not deposited with the Society. The respondents have clearly admitted that they have deducted said amount from the salary of the employees but not deposited the same with the Society. It is pertinent to note that this amount is not deducted for any one month but these are series of transactions right from September 2021 till May 2022. Every month the

respondents deducted the amount from the salary of the employees/workers but not deposited the same with the Society. After admitting this fact, the respondents submitted that due to financial difficulties there were delay in paying the said amount. In fact, the amount is not at all paid so there is no question of any delay. According to the respondents, as the corporate debtor facing financial constraints, they have utilized the amount for the working capital of the corporate debtor. If we see the total amount deducted i.e. Rs.6,33,735/- in nine months, a very meagre amount is deducted every month i.e., less than Rs.1 lakh. The respondents have not categorically stated in which month the corporate debtor was facing financial crunches. For all nine months the amount deducted was not deposited with the Society. This itself shows that their intention to misuse the salary of the employees/workmen for their benefit. It is also not digestible that only some portion of salary of workmen was necessary to run business of the CD.

10. This amount is the contribution of the employees to their Society and it is from their salary. Thus, the amount deducted by the employer is in fact of the salary of the employees which is kept with the employer under trust. By not depositing the same with the Society, they have committed breach of trust as well as misappropriated the amount for the use of corporate debtor as per their admission. They have not demonstrated how such a meagre amount was required to run the corporate debtor smoothly. As the fact of deduction of amount as well as utilization of the same for the corporate debtor is admitted by the respondents, no further proof is required from the applicant to prove that there was any *mens rea* or intention of the respondents for fraudulent purpose.
11. The applicant clearly stated that this fact was suppressed from him and has come to know about the same only from the representative of the Society. By suppressing the said fact from the RP, it shows the fraudulent intention of the respondents. The claim was also submitted to the RP. The RP also received Show

Cause Notice issued by SEBI to the respondents and, therefore, on a clear cut opinion of fraudulent transaction by the respondents was formed and he has filed the present application.

12. Though objection is taken on behalf of the respondent that RP has not formed opinion as per Regulation 35(A) of IBBI Regulation, the RP filed report of his opinion under Section 35(A) which was also sent to IBBI on 17.04.2023. In the said letter, the RP clearly specified diversion of Rs.1.5 crores a part of security deposit. Thus, the contention of the respondent is that no opinion has formed by the RP as per Regulation 35(A) holds no water.
13. The respondents nowhere mentioned that how they have used the amount deducted from employees/workmen salary in running of the corporate debtor. Amount deducted was Rs.6,33,735/- with interest it amounts to Rs.6,92,679/. As the respondents have used the amount deducted from the salary of the employees/workmen, they are liable to make such contribution to the asset of the corporate debtor, so that

it can be deposited with the society. Hence the application can be partly allowed. Hence, we pass the following order:

ORDER

- i) The IA.652 of 2023 in CP (IB) 268 of 2020 is partly allowed.
- ii) The respondents are directed to contribute jointly and severally Rs.6,92,679/- to the Society through Corporate Debtor within 15 days along with interest @12% p.a. from the date of the application till its realisation.
- iii) Prayer to impose punishment under Section 70 of the Code is rejected. The applicant is to take necessary steps before the appropriate forum.

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

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**CHITRA HANKARE
MEMBER (JUDICIAL)**