

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 100 of 2017

[arising out of Order dated 22nd June, 2017 by NCLT, Mumbai Bench, Mumbai in C.P. No. 1103/I&BP/NCLT/MAH/2017]

IN THE MATTER OF :

**Leo Duct Engineers & Consultants Limited,
Unit No. 603, 604 & 605,
Shalimar Morya Park,
Oshiwara, Andheri (West),
Mumbai MH 400 053**

...Appellant

Vs.

**1. Canara Bank,
Vile Parle East Branch,
38, Brij Bhoomi, Nehru Road,
Mumbai – 400 057**

**2. Standard Chartered Bank,
Standard Chartered Tower, 201,
B/1, Western Express Highway,
Goregaon (East),
Mumbai – 400 063.**

...Respondents

Present:

For Appellant : Shri Darpan Wadhwa, Senior Advocate assisted by
Shri Devesh Bhatia, Shri Saurabh Kumar and Shri
Auburt Sebastian, Advocates

For 2nd Respondent : Shri Kersi Dastoor, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The appellant, Leo Duct Engineers & Consultants Ltd. (Corporate applicant) preferred an application under Section 10 of the Insolvency and Bankruptcy Code (hereinafter referred to as the 'I & B Code'). On notice the

Canara Bank and Standard Chartered Bank (Financial Creditors) appeared and opposed the appeal. The Adjudicating Authority while noticed that the petition has been filed in the required format providing requisite details of its corporate debtor and its creditors and details of debts and default but dismissed the application under Section 10 on the ground that the petition would have serious impact on the financial creditor who have already set the wheel in motion to Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act').

2. For deciding this case, it is desirable to notice the ground shown by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai, relevant portions of which read as follows :

“10. Given the aforesaid facts, it appears that the Corporate Debtor is eager to sound its own death knell, presumably to scuttle the proceedings before SARFAESI as the consequential moratorium imposed u/s 14 of the Code on admission of this Petition would automatically stay/ stall the proceedings vide which the personal properties of the guarantors offered as securities/ collateral are not enforced or taken possession of. Under the provisions of SARFAESI, guarantees can be invoked, as the liability towards the Financial Creditors would be joint and several. In the resolution process, these personal properties would neither be seized, attached nor repossessed, as the resolution professional would only be concerned about the assets of the Corporate Debtor or any immovable property in its name. The direction for imposing a moratorium would suit the

directors and the guarantors perfectly from being dispossessed from their immovable properties.

11. *The admission of the Petition would have a serious impact on the Financial Creditors who have already set the wheel in motion to secure their debts. The apprehension, or rather certainty, of taking away the physical possession of their valuable properties and being dispossessed appears to be the motivation for the Corporate Debtor to approach this Tribunal under the Code, rather than ensuring Resolution of their debts or seeking a turnaround of the Corporate business. To stay the repossession of immovable properties by Banks by resorting to the provision of Sec. 10 of the Code, and the consequential effect of the moratorium which has to follow, would clearly be an abuse of the process of law to which this Bench certainly cannot be a party to. It is not sufficient just to meet the requirements under sec. 10 of the Code which would automatically entitle the Corporate Debtor to initiate such proceedings. Surely it could never have been the intention of the legislature to provide relief to defaulters of the Banks by taking refuge under this Code. The Adjudicating Authority has to consider the merits of each case and see beyond what meets the eye, and only after due application of mind, consider the case on its merits.*

12. *In the facts of the case, this Bench does not deem it just, fit and proper to admit the petition as initiation of the proceedings by the Corporate Debtor shall cause irreparable loss and injury to the Banks, and an uncalled for protection to the borrowers and various guarantors.”*

3. The main plea taken by the appellant – Corporate Applicant is that initiation of proceedings under the SARFAESI Act cannot be a ground to reject an application under Section 10, if otherwise it is complete in terms of I & B

Code and Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the 'Adjudicating Authority Rules') including Form 6 therein. The respondents on appearance have taken the similar plea as noticed by the Adjudicating Authority and recorded as above.

4. Similar question fell for consideration before this Appellate Tribunal in “*M/s. Unigreen Global Private Limited vs. Punjab National Bank and others*” – *Company Appeal (AT) (Insolvency) 81/2017*. In the said case, this Appellate Tribunal by its judgement dated 1st December, 2017 held as follows :

“20. Under both Section 7 and Section 10, the two factors are common i.e. the debt is due and there is a default. Sub-section (4) of Section 7 is similar to that of sub-section (4) of Section 10. Therefore we, hold that the law laid down by the Hon’ble Supreme Court in “*Innoventive Industries Ltd. (Supra)* is applicable for Section 10 also, wherein the Hon’ble Supreme Court observed as “The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority” .

21. In an application under Section 10, the ‘financial creditor’ or ‘operational creditor’, may dispute that there is no default or that debt is not due and is not payable in law or in fact. They may also oppose admission on the

ground that the Corporate Applicant is not eligible to make application in view of ineligibility under Section 11 of the I & B Code. The Adjudicating Authority on hearing the parties and on perusal of record, if satisfied that there is a debt and default has occurred and the Corporate Applicant is not ineligible under Section 11, the Adjudicating Authority has no option but to admit the application, unless it is incomplete, in which case the Corporate Applicant is to be granted time to rectify the defects.

22. *Section 10 does not empower the Adjudicating Authority to go beyond the records as prescribed under Section 10 and the informations as required to be submitted in Form 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 subject to ineligibility prescribed under Section 11. If all informations are provided by an applicant as required under Section 10 and Form 6 and if the Corporate Applicant is otherwise not ineligible under Section 11, the Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground.*

23. *Any fact unrelated or beyond the requirement under I & B Code or Forms prescribed under Adjudicating Authority Rules (Form 6 in the present case) are not required to be stated or pleaded. Non-disclosure of any fact, unrelated*

to Section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the Corporate Applicant has not come with clean hand except the application where the 'Corporate Applicant' has not disclosed disqualification, if any, under Section 11. Non-disclosure of facts, such as that the 'Corporate Debtor' is undergoing a corporate insolvency resolution process; or that the 'Corporate Debtor' has completed corporate insolvency resolution process twelve months preceding the date of making of the application; or that the corporate debtor has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under the said Chapter; or that the corporate debtor is one in respect of whom a liquidation order has already been made can be a ground to reject the application under Section 10 on the ground of suppression of fact/not come with clean hand.

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25. *Similarly, if any action has been taken by a 'Financial Creditor' under Section 13(4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against Corporate Debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal cannot be a*

ground to reject an application under Section 10, if the application is complete.

26. *Any proceeding under Section 13(4) of the SARFAESI Act, 2002 or suit under Section 19 of the DRT Act, 1993 pending before Debt Recovery Tribunal or appeal pending before Debt Recovery Appellate Tribunal cannot proceed in view of the order of moratorium as may be passed.*

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28. *In a case where a winding up proceedings has already been initiated against a Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed in respect of Corporate Debtor, no application under Section 10 can be filed by the Corporate Applicant in view of ineligibility under Section 11(d) of I & B Code, as quoted below:*

“11. **Persons not entitled to make application** - *The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:—*

(a) *a corporate debtor undergoing a corporate insolvency resolution process; or*

(b) *a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or*

- (c) *a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or*
- (d) *a corporate debtor in respect of whom a liquidation order has been made.*

Explanation.— For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.”

29. In view of the aforesaid provision where a winding up proceeding has already been initiated under the Companies Act, 1956 / 2013 by the Hon’ble High Court such cases have not been transferred to National Company Law Tribunal, pursuant to “Companies (Transfer of Pending Proceedings) Rules, 2016”, framed by the Central Government.”

5. In the present case, it has not been pleaded that the appellant – Corporate Debtor is ineligible in terms of Section 11 of the I & B Code. The Adjudicating Authority has noticed unrelated facts which are not required to be disclosed in terms of Section 10 or Form 6 and as the case also relates to third party suit or proceeding, and not the Corporate Debtor. In the circumstances, the Adjudicating Authority was not correct in rejecting the application on the ground of suppression of relevant facts.

6. The Adjudicating Authority, having held that otherwise the application under Section 10 is complete and in absence of any ineligibility of appellant, it was incumbent on the part of the Adjudicating Authority to admit the appeal, having no jurisdiction to notice unrelated facts beyond the requirement under the I & B Code and the Forms prescribed under the Adjudicating Authority Rules.

7. For the reasons aforesaid and as the case of the appellant is covered by the decision of this Appellate Tribunal in “*M/s. Unigreen Global Private Limited*” (*Supra*), we have no option but to set aside the order dated 22nd June, 2017 passed in CP No. 1103/I&BP/2017 and the same is accordingly set aside. The case is remitted back to the Adjudicating Authority, Mumbai Bench to admit the application under Section 10 after notice to the parties if there is no defect. In case of any defect, appellant be allowed time to remove the defects. The appeal is allowed with the aforesaid observations. However, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

New Delhi
13th December, 2017

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