

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT)(Insolvency) No. 946 of 2020

[Arising out of order dated 17th September, 2020 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, in CP No. (IB) 61/10/NCLT/AHM/2018]

IN THE MATTER OF:

M/s. Neesa Infrastructure Limited,

Plot No. 278/279

Panchratna Industrial Estate

Opp. Armec Cold Storage, Changodar

Ahmedabad – 382 213

.. Corporate Debtor/
Appellant

Vs.

1. **State Bank of India**

2nd Floor, Paramsiddhi Complex

Opp. V.S. Hospital, Ellisbridge

Ahmedabad – 380 006

2. **Indian Overseas Bank**

Ashram Road Branch,

Chinubhai Tower

Opp. Handloom House

Ahmedabad- 380 009

3. **Central Bank of India**

Mid Corporate Finance Branch,

1st Floor, Central Bank Building,

Lal Darwaja,

Ahmedabad- 380 001

4. **Small Industries Development Bank of India**

Navjivan Amrit Jayanti Bhavan

1st Floor, Post Box No. 10

Navjivan P.O.

Ahmedabad- 380 014

.. Financial Creditors/
.. **Respondents**

Present:

For Appellant: Mr. Raghvendra Bajaj, Mr. Garvit Khandelwal and Mr. Jaitegan Singh Khurana, Advocates

For Respondents:

J U D G M E N T

(23rd December, 2020)

KANTHI NARAHARI, MEMBER (TECHNICAL)

The present appeal preferred aggrieved by the order passed by the learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad), in CP No. (IB) 61/10/NCLT/AHM/2018 dated 17th September, 2020 whereby the Adjudicating Authority rejected the Application of the Appellant filed under Section 10 of Insolvency and Bankruptcy Code, 2016 (in short **IBC**).

BRIEF FACTS:

2. The Appellant is a registered Company under the Companies Act and registered at Office of Registrar of Companies, Ahmedabad. It is stated that one of the Promoters of the Appellant, namely Mr. Sanjay Gupta, filed the Application before the Adjudicating Authority in Form -6 under Rule-7 of the IBC- Application to Adjudicating Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process (in short **CIRP**) in respect of Appellant Company under Section 10 for the reason that the Appellant Company was unable to meet its day to day financial

requirements and unable to pay its Financial Creditors for the reason that the condition of marketing is not favourable and also competing marketing scenario leads to become debt strapped company. In view of situation, the Appellant Company being unable to pay the debt due to Financial Creditors as well as Operational Creditor.

3. Learned Counsel for the Appellant contended that the Appellant Company filed Section 10 Application through its Promoters since all the Directors on Board of Directors of the Appellant Company disqualified under Section 164 of the Companies Act, 2013, thereby while preferring Section 10 Application, there was no effective Board of Directors. Therefore, the Promoters of the Company preferred Section 10 Application to initiate CIRP on their own. It is submitted that one of the Promoters, i.e. Mr. Sanjay Gupta holding 97.09 % paid-up share capital of the Company and another Promotor i.e., Mrs. Neelu Gupta holding 2.22 % paid-up share capital of the Appellant Company. It is submitted that Mr. Neelu Gupta, through Special Power of Attorney, authorised Mr. Sanjay Gupta to file Company Application before the Adjudicating Authority.

4. Learned Counsel for the Appellant further submitted that the Application was dismissed on frivolous grounds. He submitted that the Adjudicating Authority ought to have considered the legal Principles laid down by this Hon'ble Appellant Tribunal in the matter of "***M/s Unigreen Global Private Limited Vs. Punjab National Bank and Others- Company Appeal(AT)(Insolvency) No. 81 of 2017***". He

submitted that in view of rejecting the Application of the Appellant, would adversely impact on all the stakeholders including the employees of the Company.

FINDINGS:

5. We have gone through the records submitted by the Appellant along with Appeal Paper Book.

6. Learned Adjudicating Authority considered the Application filed by the Appellant and rejected the Application by passing the following Order:

...

“18. Admittedly, as also matter or record that, the applicant is not a corporate applicant as per form 6, Clause 3, the applicant is not a director and is disqualified under Section 164, wherein the name and address of the Director is shown as “presently, there is no Director on the Board of the Company due to disqualification under Section 164 of the Companies Act 2013”. However, clause 3 of form 6 further discloses that the list of promoters along with their address attached.

19. As per the list of promoters (page 7), Ms. Neelu Gupta holds 3,30,000 shares whereas as per the Special Power of Attorney (page 8) dated 5th December, 2017, Ms. Neelu Gupta, wife of Mr. Sanjay Gupta shown to be holding 4,50,000 shares and the said SPA is executed on oath. Thus, it is amply clear that the instant application is filed on

fabricated documents. Further, the applicant has not filed/disclosed the details of the unsecured financial creditors. However, as per Annexure 4 (Page No. 11 to 15), there are as many as 241 operational debtors, which includes sundry creditors for capital goods, sundry creditors for casting project, sundry creditors (Export), sundry creditors for employee, sundry creditors for contractor, sundry creditors for rolling mill, sundry creditors for trade creditors, sundry creditors for valves, sundry creditors for others, sundry creditors for consultancy, sundry creditors for goods, sundry creditors for operation etc. However, while going through the records it is found that there is no whisper about the outstanding amount. It is also pertinent to note that if the company is really insolvent why it has not opted for winding up application. Further, affairs of the company is managed by the Directors and not by the promoters. Since the promoters are already disqualified, the applicant has no authority to file the instant application.

20. *On perusal of the record it is found that there is violation of Section 10(3)(c). In the instant matter as there is no special resolution passed for filing the application. For the sake of convenience Section 10(3)(c) is reproduced herein below: -*

Section 10(3)(c)

The special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of

the corporate debtor, as the case may be, approving filing of the application.

21. On perusal of the record i.e., balance sheet as on 31.03.2016 (page 254) it is found that under the head “deferred tax liability” an amount of Rs. 10,34,37,089/- has been shown thereby meaning that no returns have been filed by the company. It is also a matter of record that objector banks have already initiated proceedings under RDDB Act, 1993 and SARFAESSI Act, 2002 and to install the said proceedings, the applicant has filed the instant application so as to initiate moratorium and to get stayed the proceedings initiated by the banks. Under such circumstances, the instant application has no merits and, therefore, requires to be dismissed.”

7. For filing an Application under Section 10 of IBC, the Corporate Debtor shall fulfil conditions as enumerated under sub Sections 3 a, b & c of Section 10.

8. We have perused the Application filed by the Appellant before the Adjudicating Authority and found that there is no Special Resolution passed by the shareholders of the Corporate Debtor or the Resolution passed by at least 3/4th of the total number of partners of the Corporate Debtor, as the case may be, approving filing of the Application. Apart from the above, we have also noticed that the Special Power of Attorney, (at page 47, Annexure-II) issued by Ms. Neelu Gupta, wife of Mr. Sanjay Gupta holding 4,50,000 Equity Shares

of Rs. 10 each by appointing Mr. Sanjay Gupta, one of the Promoters to act as her lawful attorney for initiation of CIRP before Court of law. However, from the list of Promoters at Annexure-I (page-46), it is seen that Ms. Neelu Gupta holds only 3,30,000 Equity Shares. There are other Promoters but no Power of Attorney was issued except Ms. Neelu Gupta. Further, in the Application it is clearly mentioned in Form-6, part-1, coloumn-8 that there is no director on the Board of the company due to dis-qualification under Section 164 of the Companies Act, 2013. It is also stated in the said column that the Promoters of the Company being involved in the management of Company, initiated CIRP on their own. However, as per the requirements under law, there is no Resolution passed by the Shareholders of the Corporate Debtor, though, admittedly the Applicant Company shows that there are other Promoters and the List of Promoters (copy) annexed at Annexure-I (page 46). Apart from the above, Financial Creditors, namely Small Industries Development Bank of India (**SIDBI**) and Indian Overseas Bank (**IOB**) initiated various proceeding against the Appellant-Company under the provisions of SARFAESI Act, 2002 and RDDDB Act, 1993. Learned Adjudicating Authority made note of all the proceedings initiated by the Financial Creditors and the proceedings are pending. It appears that Appellant-Company with an intention to stall the proceedings filed Application before the Adjudicating Authority with a malafide intention and not for the interest of Financial or Operational Creditors and stakeholders. It is also recorded in the Impugned Order that the account of the Appellant Company was declared as NPA on

30.04.2014 and thereafter the proceedings were initiated by the Bank under SARFAESI Act wherein the mortgaged property was sold by the Bank for a consideration of Rs. 13,68,58,600/- and the Sale Certificate was issued to the Auction Purchaser on 27.10.2017. Further it is also recorded in the Impugned Order that the Bank had also filed a Recovery Application before the Debts Recovery Tribunal at Ahmedabad being OA No. 53 of 2015 for recovery of its dues which is pending for adjudication. Despite all the efforts taken by the Financial Creditors, the Appellant Company failed and neglected to repay the loan as per the terms and conditions of the Bank. Application u/s 10 IBC in the backdrop of this factual scenario, can safely be held to have been filed only to wriggle out of liability to pay, as determined.

CONCLUSION:

9. We are of the view that the Applicant has not approached the Adjudicating Authority with a bonafide intention and we affirm that the Adjudicating Authority rightly rejected the Application of the Appellant.

10. Learned Counsel for the Appellant relied upon the judgment of this Tribunal in the matter of “***M/s Unigreen Global Private Limited Vs. Punjab National Bank and Others- Company Appeal(AT)(Insolvency) No. 81 of 2017***”. The facts of that case are different from the facts of this case. In ***M/s Unigreen Global Private Limited Vs. Punjab National Bank and Others*** the issue arises for

consideration where non-disclosure of facts beyond the statutory requirements under the IBC read with relevant forms prescribed under IBC can be a ground for dismissal of Application for initiation of CIRP.

11. In the present case, the Adjudicating Authority dealt with all aspects including the Special Power of Attorney given by one of the Promoters Ms. Neelu Gupta, and did not confine to only non-disclosure of facts beyond the statutory requirements. Therefore, the learned Counsel for the Appellant cannot rely upon the Judgment of this Tribunal passed in “***M/s Unigreen Global Private Limited Vs. Punjab National Bank and Others- Company Appeal(AT)(Insolvency) No. 81 of 2017***”. Further, this Tribunal in the matter of “***Gaja Trustee Company Private Limited & Ors. Vs. Haldia Coke and Chemicals Private Limited- Company Appeal (AT) (Insolvency) No. 137 of 2017***” held that the Application under Section 10 of IBC cannot be filed by the Board of Directors of a Company without prior approval of the shareholders in its Extraordinary General Meeting or Annual General Meeting.

12. Further, it is on record that the SIDBI and IOB, the Financial Creditors have strenuously opposed the admission of Section 10 Application by filing their Counter Affidavits. We add and express that the intention of Promoters is only to get admission and followed by imposition of Moratorium to stall all further proceedings. The IBC being a special legislation cannot be used as a tool to one’s advantage and other’s disadvantage.

13. For the aforesaid reasons, we are of the view that the Adjudicating Authority rightly rejected the Application. Accordingly, the Appeal is dismissed. No orders as to cost.

[Justice Bansilal Bhat]
Acting Chairperson

[Justice Jarat Kumar Jain]
Member(Judicial)

(Kanthi Narahari)
Member(Technical)

Pronounced by two Members of the Bench in terms of Rule 92(1) of the NCLAT Rules, 2016

[Justice Bansilal Bhat]
Acting Chairperson

(Kanthi Narahari)
Member(Technical)

New Delhi

Ahc