

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No.106 of 2017

IN THE MATTER OF:

Krishna Kraftex Pvt. Ltd.

...Appellant

Versus

HDFC Bank & Ors.

...Respondents

Present:

For Appellant : Shri Dhruv Mishra, Advocate

For 7th Respondent: Ms. Ritu Singh, Advocate

ORDER

11.01.2018 The appellant, Krishna Kraftex Pvt. Ltd. (Corporate applicant) preferred an application under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I & B Code') for its insolvency resolution process. The Adjudicating Authority (National Company Law Tribunal), New Delhi rejected the application with the following observations :

- “8. *The Petitioner has failed to produce any evidence to show that a claim has been lodged with the Petitioner Corporate Debtor and is lying unpaid. However, Ld. Counsel for the petitioner presses his argument that on the petitioner's showing that if a liability exists as per balance sheet of the Petitioner and the*

Corporate Debtor is unable to liquidate its liability, the code provides for the insolvency resolution to be set in motion.

9. *We are unable to agree with the ld. Counsel for the applicant. It could never have been the intention of the legislature to consider a matter as serious as placing the Company in the hands of a Resolution professional in a mechanical way without due application of mind of the Adjudicative Authority. Should this have been the case, then every corporate entity, who has no assets in hand and has incurred great liabilities be it acquisition of cars or assets acquired and to personal use of Directors, would resort to a simple way of filing such an application to escape any recovery proceeding or even civil imprisonment on being declared insolvent. Taking a hyper technical view of the provisions would open the flood gates of people forming Companies, incurring expenses in the name of the company and then filing for Insolvency Resolution Process under the Code for enjoying a Moratorium. The object of the Code is not to provide for an escape route to a Company or its Directors who have incurred great debts and are unable to liquidate the liabilities after availing services and goods (stock in trade) from various suppliers, loans from banks, friends and family.”*

2. Learned counsel appearing on behalf of the appellant submits that the application under Section 10 is complete, there is no defect therein. It is

further submitted that no winding up proceedings is pending against the appellant and the appellant is not covered by the ineligibilities prescribed under Section 11 of the I & B Code.

3. Learned counsel appearing on the 7th Respondent submits that the 7th Respondent is a 'Financial Creditor' and has no objection for imitation of Corporate Insolvency Resolution Process against the 'Corporate Applicant.

4. Similar issue came 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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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. 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 15th May, 2017 passed in Company Petition No. (IB)-78(ND)/2017 and the same is accordingly set aside. The case is remitted back to the Adjudicating Authority (National Company Law Tribunal), New Delhi 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 Bansi Lal Bhat]
Member (Judicial)

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