

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT)(INSOLVENCY) NO.107 OF 2017
(ARISING OUT OF ORDER DATED 20TH JUNE, 2017 PASSED BY NCLT,
MUMBAI BENCH, MUMBAI IN C.P. NO.1104/I&BP/NCLT/MAH/2017)

IN THE MATTER OF SECTION 10 OF INSOLVENCY AND BANKRUPTCY
CODE, 2016

Antrix Diamond Exports Pvt Ltd,
407, Panchratna, Opera House,
Mumbai-400 004

Corporate Applicant

For Appellant:-Mr Amit Vyas, Mr Monish Panda, Ms Deepti Bhardwaj, Advocates

For Respondents: - Mr.V. Seshagiri, Mr Anchit Tripathi, Ms Anushka Sharma, Mr. Rachit Kumar, Advocates

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s Antrix Diamond Exports Pvt Ltd (corporate applicant) preferred an application under Section 10 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') for initiation of corporate insolvency process in respect of it. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai vide impugned order dated 20th June, 2017 in CP No.1104/I&BP/NCLT/MAH/2017 rejected the application on the grounds mentioned therein.

2. The corporate applicant has challenged the impugned order mainly on the ground that the Adjudicating Authority has relied on facts which are not relevant for adjudication of an application under Section 10 of the I&B Code.

3. On plain reading of the impugned order dated 20th June, 2017 it is clear that the application was preferred by the corporate applicant in the requisite form giving details of corporate debtor(s), creditors and other factors as required under Section 10 of the 'I&B Code' read with Form-6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016. The application is complete. The Adjudicating Authority has also accepted the same and observed as follows:

“Though the facts of the case fulfil the requirement for initiating a Resolution Process by a Corporate Debtor to salvage whatever can be secured and the liability of the creditors liquidated at the earliest, as also to ensure that its assets do not fall into disarray, what is noted is that to avail the loan/credit facilities from the Banks, the Corporate Debtor has offered not only its immovable properties as securities, but also the personal guarantees of its Directors and others, mortgaging several immovable properties in favour of the Banks, apart from fixed deposits and hypothecation of the stock in trade.”

4. At paragraph 6 of the impugned order while the Adjudicating Authority referred names of 10 Banks which formed the 'Joint Lender Forum' of the Financial Creditors to whom the corporate debtors owe more than Rs.428 crores, names of 12 individual personal guarantors have been mentioned therein. Apart from the same the securities offered by the corporate applicant has been noticed and recorded at paragraphs 6 of the impugned judgement.

5. The Adjudicating Authority has also noticed the list of 'operational creditors' other than 'financial creditors'. However, in spite of the same the

Adjudicating Authority has rejected the claim on the grounds as mentioned at para 8 of the impugned order and quoted below:

“8. 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 offered as securities are not enforced or taken possession of. The admission of the Petition shall 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. There is no explanation as to why the FDRs have not been liquidated to reduce the liability towards the Banks. To stay the repossession of immovable properties by Banks by resorting to the provision of Section 10 of the Code 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. 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.”

6. Learned counsel appearing on behalf of the corporate applicant submitted that the unrelated facts cannot be looked into by the adjudicating authority while considering the application under Section 10 of I&B Code.

7. However, according to learned counsel for the respondent, financial creditors proceeding under SARFEASI Act having initiated by ‘financial creditor’, the appellant preferred the application under Section 10 to scuttle such proceedings by obtaining an order of moratorium under section 14 of the I&B Code.

8. Similar issue fell for consideration before this Appellant Tribunal in “***M/s Unigreen Global Pvt Ltd Vs PNB & Others, Company Appeal (AT) (Insolvency) No.81/2017***” wherein this Appellate Tribunal vide its judgement dated 01.12.2017 held as follows:

“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 information 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 information 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.”

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32. In view of the provisions aforesaid, we hold that, if any winding up proceeding has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed, in such case the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10.

9. In the present case we find that the Adjudicating Authority has noticed extraneous factors unrelated to Corporate Insolvency Resolution Process which are not required to be disclosed in terms of Section 10 of I&B Code or Form 6.

10. It is not the case of the 'Financial Creditor' (Respondent) that a winding up proceeding under the Companies Act or liquidation proceeding under the I & B Code has been initiated against the Corporate Debtor. Therefore, we hold that the Corporate Applicant is eligible to file application under Section 10, there being a debt and default.

11. For the reasons aforesaid, the impugned order dated 20th June, 2017 passed in CP No.1104/I&BP/NCLT/MAH/2017 cannot be upheld and is accordingly set aside. The case is remitted back to the Adjudicating Authority for admission of the application under Section 10, if the application is otherwise complete. In case it is incomplete, the Adjudicating Authority will grant time to the appellant to remove the defects.

12. The appeal is allowed with aforesaid observation. However, in the facts and circumstances of the case there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

New Delhi
12.01.2018

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