

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Ins) No. 471 of 2020

IN THE MATTER OF:

Pondicherry Extraction Industries Pvt. Ltd.

J K Towers, 1st Floor

100 Feet Road

Pondicherry 605 013

...Appellant

Versus

Bank of Baroda

1, 100 Feet Road

Ellaipillai Chavady

Near Rajiv Gandhi Square

Pondicherry 605 013

...Respondent

Present: -

For Appellant: Mr. AS Satish Kumar and Mr. Gautam Singh, Advocates

For Respondent: Mrs. Madhusmita Bora, Advocate for R-1.

JUDGMENT

JARAT KUMAR JAIN. J:

1. This appeal has been preferred by the appellant Pondicherry Extraction Industries Pvt. Ltd. (Corporate Applicant) against the order dated 11/2/2020 passed by the Adjudicating Authority (NCLT, Division Bench-I, Chennai) whereby the application preferred by the appellant under section 10 of the Insolvency & Bankruptcy Code, 2016 (In brief I&B Code) in Form 6 of the Insolvency and Bankruptcy (Application to

the Adjudicating Authority) Rules 2016 (in Brief the Adjudicating Authority Rules) has been rejected.

2. Brief facts of this case is that the Corporate Applicant (appellant therein) is a Guarantor to the Financial creditor (Respondent herein) to secure the amount borrowed by one JR Foods Ltd. (the borrower) from the Financial creditor i.e. Bank of Baroda. The borrower defaulted in its repayment obligations to the financial creditor and accordingly on 30/03/2019 the accounts of the borrower were classified as NPA by the financial creditor. A demand notice under section 13(2) of the SARFAESI Act 2002 was issued by the financial creditor to the borrower, the appellant and another guarantor viz. JKS The Banyaan Pvt. Ltd. Thus, the existence of debt and default is established. The shareholders of the Corporate Applicant at the Extraordinary General Meeting (EGM) held on 12/9/2019 approved initiation of corporate insolvency resolution process (CIRP). Therefore, the Corporate Applicant filed an application under Section 10 of I&B Code before the adjudicating authority.
3. The financial creditor (respondent herein) in the memo of objection stated that the corporate applicant has failed to mention details of the collateral securities given by the borrower and there are certain discrepancies in the amount mentioned in the application thus the application is incomplete. Apart from this, the application is filed with the intention to defeat the SARFAESI measure initiated by the financial creditor.

4. The Adjudicating Authority noted that Rule 7 of Application of Adjudicating Authority Rules empowers the Adjudicating Authority to ascertain whether the documents filed along with the application are in order. Exercising such powers, the Adjudicating Authority held that there are various discrepancies in audited balance sheets as on 31/03/2018, 31/03/2019 and for the period ending on 15/09/2019. It is further held that there is a depletion in the amount of general reserve as on 31/03/2018 as compared to 15/09/2018. The reason for drain in reserve could not be explained by the Corporate Applicant. With this finding, Adjudicating Authority held that the application filed by the corporate applicant is surrounded with doubts, therefore, rejected the application.

5. Being aggrieved with this order, the appellant (Corporate Applicant) filed this appeal.

6. Ld. Counsel for the appellant submitted that the Adjudicating Authority has acted beyond its scope by getting into details of the financial statements of the appellant though this Appellate Tribunal in *Leo Duct Engineers & Consultants Ltd vs. Canara Bank and Standard Chartered Bank CA (AT) (Ins. 100/2017)* has laid down the prerequisites for admission i.e. existence of debt, occurrence of default and the corporate applicant not suffering from any disqualifications laid down under Section 11 of the I&B Code. In such a situation the Adjudicating Authority has no option but to admit the application unless it is incomplete. In case the application is incomplete the corporate applicant is to be granted time to rectify the defects. Ld. Counsel

appearing on behalf of the appellant further submits that the appellant has established the existence of debt, occurrence of default and the shareholders have accorded their approval for initiation of CIRP. The application under section 10 is complete, there is no defect therein. It is further submitted that no winding up proceedings are pending against the appellant and the appellant is not covered by the ineligibilities provided under Section 11 of I&B Code. The appellant has therefore satisfied all the conditions under Section 10 of the code.

7. It is further submitted that the Adjudicating Authority without any material on record erroneously gave a finding that the appellant has filed the application with ulterior motive. Therefore, the impugned order is liable to be set aside and remit the case back to the adjudicating authority with direction to admit the application under Section 10 of I&B Code and proceed.

8. Per contra ld. Counsel for the respondent submits that ld. Adjudicating Authority has rightly held that Rule 7 of Adjudicating Authority Rules empowers the Adjudicating Authority to ascertain whether the documents filed along with the application are in order. Ld. Adjudicating Authority after examining the documents found that there are discrepancies in financial statements. However, the appellant was unable to explain the same. The application was incomplete and the corporate applicant could not rectify the defects even after granting time. In such a situation the Adjudicating Authority has no option but to reject the application. For this purpose, ld. counsel for the appellant placed reliance on the judgment of this appellate tribunal in the case of

Unigreen Global Pvt. Ltd. VS. Punjab National Bank & Ors. CA(AT) (Ins. 81/2017). Thus, the appeal is liable to be dismissed.

9. After hearing ld. counsel for the parties we have perused the record.
10. The question for our consideration is that whether Rule 7 of Adjudicating Authority Rules empowers the Adjudicating Authority to examine the documents filed with the application under section 10 of I&B Code.
11. Firstly, we have considered what are the requirements for admitting an application under section 10 of I&B Code. For this purpose, it is useful to refer the judgment of this appellate tribunal in *Unigreen Global Pvt Ltd.* (supra). In this judgment it is held that:

“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 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. Nondisclosure 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 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."

12. With the aforesaid the moment the Adjudicating Authority is satisfied that there is a debt and a default has occurred, the application must be admitted unless it is incomplete. Section 10 of I&B Code 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 Adjudicating Authority Rules.

13. Ld. Adjudicating Authority assumed that Rule 7 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules 2016
Company Appeal (AT) (Ins) No. 471 of 2020

empowers the authority to ascertain whether the documents annexed with the application under Section 10 of I&B Code are in order. It is useful to refer Rule 7 which reads as under:

“(1) A corporate applicant, shall make an application for initiating the corporate insolvency resolution process against the corporate debtor under section 10 of I&B Code in Form 6, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

“(2) The applicant under sub-rule (1) shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the Corporate Debtor.”

14. Aforesaid Rule 7 provides the procedure for filing the application under Section 10 of I&B Code. It does not empower the Adjudicating Authority to examine the financial statements annexed with the application. Ld. Counsel for the respondent has placed reliance on the judgment of *Unigreen Global Pvt. Ltd.* There is no ratio of this judgment that Rule 7 of Adjudicating Authority Rules empowers the Adjudicating Authority to examine the documents annexed with the application under Section 10 of I&B Code. Thus, this judgment is not helpful to the respondent. Ld. Adjudicating Authority has analyzed the financial statements of the corporate applicant and held that there are discrepancies in financial statements. We are of the view that Ld. Adjudicating Authority exceeded

its jurisdiction in analyzing the financial statements of the Corporate Applicant.

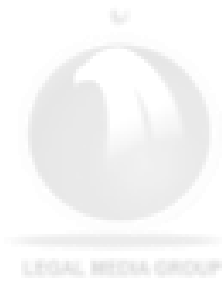
15. As we held in the case of *Unigreen Global Pvt. Ltd.* (supra) that if any action has been taken by the financial creditor under SARFAESI Act 2002, against the Corporate Debtor or a suit is pending against the corporate debtor under Section 19 of DRT ACT before a Debt Recovery Tribunal or appeal pending before the Debt Recovery AT cannot be a ground to reject an application under Section 10 of I&B Code. In the present case the financial creditor has initiated proceedings under SARFAESI Act against the borrower. The applicant being a guarantor has filed the application under Section 10 of I&B Code hence the Adjudicating Authority has drawn an inference that the corporate applicant has filed the application under Section 10 with an intention to defeat the SARFAESI measures initiated by the financial creditor. Thus the application is filed with an ulterior motive. We are unable to agree with the finding of Id. Adjudicating Authority and hold that this fact is unrelated and beyond the requirement under I&B Code or forms prescribed under the Adjudicating Authority Rules. Therefore, the application cannot be rejected on this ground.

16. With the aforesaid, we are of the view that the existence of debt and default is established and no winding up proceedings against the appellant and appellant is not covered by the ineligibilities provided under Section 11 of the I&B Code. However, the adjudicating authority has rejected the application on extraneous grounds. Therefore, the impugned order is set aside.

17. The case is remitted back to the adjudicating authority (NCLT, Chennai) to admit the application under Section 10 after notice to the parties if there is no defect. In case of any defect, appellant may be allowed time to remove the defects. The appeal is allowed with the aforesaid observations however there is no order as to costs.

**[Justice Jarat Kumar Jain]
Member (Judicial)**

**[Balvinder Singh]
Member (Technical)**



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

New Delhi.

20th January, 2021.

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