IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 174 of 2017

[Arising out of Order dated 14th August, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in CP No.(IB)/128/10/HDB/2017]

IN THE MATTER OF:

Neeta Chemicals (I) Pvt. Ltd. ...Appellant

Vs.

State Bank of India ...Respondent

Present: For Appellant: - Shri Alok Dhir, Ms. Varsha Banerjee, Shri Milan Singh Negi and Shri Kunal Godhwani, Advocates.

For Respondent:- Shri A. Vasisht, Senior Advocate assisted by Ms. P. Singh, Shri M. Singh, Ms. G. Shahi, Shri Manmeet Singh, Shri Anugrah Robin Frey and Ms. Geetanjali Shahi, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s Neeta Chemicals (I) Private Limited ('Corporate Applicant') filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code"). On notice and hearing the 'Financial Creditor' (State Bank of India), the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad,

dismissed the application with cost by impugned order dated 14th August, 2017 with the following observations:

> *"16. It is to be mentioned here that the loans in question were availed by the Corporate Debtor in the year 2009-10, which are collaterally secured by way of equitable mortgage by deposit of title deeds /registered mortgage. And loans in question are classified as NPA as early as on 26.12.2013. Subsequently SARFASEI proceedings as detailed supra are initiated, which are in advanced stage of E-auction. As pointed out by the Learned Counsel for the Respondent/Bank, the instant application is filed only to scuttle the proceedings of SARFAESI. The Corporate Debtor has not taken any steps to clear even a part of loan and surprisingly and mischievously trying to deny the loans in question. It is un-heard that such a stand of denial is taken where in public sector Banks and public money is involved. Financial discipline demands that there should not be denial simply for the sake of denial in case where money is taken. It is very surprising to note the attitude of the Corporate Debtor before the Bank by way of replies as stated supra and filing the instant application to misuse and abuse the process of law*

under IBC. This Bench will not be a party to permit the Corporate Debtor to misuse provisions of IBC for its selfish ends, and that too against public interest. It is relevant to point out here that Courts/Tribunal is ultimate custodian of public funds.

17. As stated supra, all the provisions of IBC have to be taken into consideration, while deciding issues raised in cases filed under provisions of IBC. Sections 60(5), 65 and 66 of IBC conferred wide powers on Adjudicating Authority to analyze the issue(s) raised in a given case, and decide it as per merits. We are not inclined to accept the contention of the learned counsel for the Corporate Debtor/Applicant that Adjudicating Authority shall admit the case, once the application is complete as averred by the applicant in the application. The Adjudicating Authority should apply law correctly, and it cannot act mechanically in entertaining application(s) under IBC, which will have serious repercussions on the parties. In the instant case, as stated supra, the public money involved is more than Rs. 324 Corers, and the Corporate Debtor is making frivolous and un-tenable contentions. We have no doubt in our mind that the present application is filed on frivolous and mischievous grounds with a

malafide intention and un-clean hands to take advantage of provisions of IBC, 2016. Therefore, it is a fit case to impose exemplary costs for invoking provisions of IBC.

19. In the above circumstances, we are of the considered view that the Corporate Debtor has failed to satisfy the Adjudicating Authority as per various provisions especially Section 10 of IBC, for admission of the case. Therefore, it is not a fit case to admit the case.

20. As stated supra, the account of Corporate Debtor was classified as NPA as early as 26.12.2013 and bank has spent sufficient time, money and energy to recover the debt from the Corporate Debtor, which could be seen from the pre-paras. In the interest of the case, we would like to narrate few important steps taken by the bank such as number of default notices issued to the Corporate Debtor, legal notices issued to the Corporate Debtor and also to the guarantors, demand notice issued under section 13(2) of the SARFAESI Act. The Demand notice got published in Deccan Chronicle and Eenadu in January, 2013, rejoinder issued on 04.032017, Possession Notice dated 17.042017 got issued under

Rule 8(1) of Security Interest (Enforcement) Rules, 2002 and again published in Indian Express and Andhra Jyothy in April, 2017, Notice Prior to Sale under Rule 8(5) and 8(6) of Security Interest (Enforcement) Rules in May 2017 and E-auction sale notice in July, 2017 etc, which involved substantial cost to the Financial Creditor / Bank. Therefore, we impose a cost of Rs. 10 lakhs on the Corporate Debtor.

21. In the result, the Company petition bearing CP (1B) No. 128/10/HDB.2017 is dismissed with a cost of Rs. Ten lakhs to be paid to SBI/Financial Creditor on or before 31st August, 2017."

2. Learned counsel for the Appellant submits that the impugned order has been passed on frivolous grounds which cannot be taken into consideration, though the application under Section 10 of the 'I&B Code' was complete in all aspects.

3. On the other hand, according to Respondent ('Financial Creditor') there is significant suppression of liability in the application filed by the Appellant under section 10 of the 'I&B Code' making it incomplete and liable to be rejected.

4. It was submitted that the Appellant has grossly understated the outstanding amount owed to the Respondent in the Form 6, while the

Appellant has admitted an amount of Rs. 324 crores as on 15th June, 2017. In fact, the Appellant owed more than the admitted amount as far back as 31st October, 2016 when the demand notice was issued by the Respondent. It was submitted that the outstanding liability amount had increased to Rs. 329,71,74,696/- as evidenced from the notice issued on 3rd August, 2017 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act").

5. The Appellant has highlighted the facts relating to SARFAESI proceedings and action taken thereunder. It is also stated that the Appellant has already filed a suit under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) in S.A. No. 240 of 2017 challenging the securitization proceedings initiated by the Respondent ('Financial Creditor').

6. Learned counsel for the Respondent submitted that there are other instances which shows malafide on the part of the Appellant.

7. Similar issue fell for consideration before this Appellate Tribunal in "***M/s. Unigreen Global Private Limited Vs. Punjab National Bank & Ors.— Company Appeal (AT) (Insolvency) No. 81 of 2017***", wherein this Appellate Tribunal, by its judgment dated 1st December, 2017 taking into consideration the provisions of Section 10 of the 'I&B Code' and other relevant provisions, observed and 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.

24. 1st Respondent –financial creditor has referred to pendency of a Civil Suit between 'Mayank Maheshwari v. Anurag Garg' and another suit between 'Sh. Jagar Nath Mehto v. Vedika Overseas Tradex Ltd.' . Pendency of such suits cannot be a ground to deny admission of an application under Section 10, if all the information in terms of Section 10 of the I & B Code and Form 6 has been supplied by a

Corporate Applicant/Corporate Debtor and the application is otherwise complete. Non-mentioning of suit(s) pending between the parties cannot termed to be suppression of facts nor can be a ground to reject the application. In fact, once the application under Section 10 is admitted, all such related proceedings, including suits for recovery of moveable or immovable property of the Corporate Debtor and other proceeding cannot proceed further in any Court or Tribunal or Authority in view of order of 'moratorium' as may be declared under Section 13 and prohibition that may be imposed under Section 14 of I & B Code.

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.

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."

8. It is not the case of the 'Financial Creditor' (State Bank of India) 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, the 'Corporate Applicant' is eligible to file application under Section 10 of the 'I&B Code', if there is a debt and default.

9. Further, as we find that the Adjudicating Authority has noticed the extraneous factors unrelated to the Resolution Process not required to be disclosed in terms of Section 10 or Form 6, we hold that the Adjudicating Authority erred in rejecting the application on the ground of suppression of facts.

10. So far as the penal action under Section 65 of the 'I&B Code' is concerned, this Appellate Tribunal in "***M/s. Unigreen Global Private Limited*** *(Supra)",* observed and held as follows:

> *"35. To decide the question, whether impugned order of penalty imposed by the Adjudicating Authority under Section 65 of the I & B Code is in accordance with law or not it is desirable to notice the provision, as quoted below:*
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> *"65. (1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*
>
> *(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."*

36. Sub-section (11) of Section 5 defines "initiation date" i.e. the date of initiation of corporate insolvency resolution process and reads as follows:

> *"(11) "initiation date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process;"*

If sub-section (11) of Section 5 is read with Section 65 it is clear that if a 'Financial Creditor', or 'Corporate Applicant' or 'Operational Creditor' makes an application to the Adjudicating authority for initiating Corporate Resolution Process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees in terms of sub-section (1) of Section 65. Similarly, if any person such as Corporate Applicant initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person

a penalty which shall not be less than one lakh rupees but may extend to one crore rupees in terms of sub-section (2) of Section 65.

37. From the aforesaid provision, it is clear that for imposition of penalty under Section 65, the Adjudicating Authority on the basis of record is required to form prima facie opinion that the person (Financial Creditor / Corporate Applicant / Operational Applicant) has filed the petition for initiation of proceeding "fraudulently" or "with malicious intent" for the purpose other than the resolution of the insolvency or liquidation or that voluntary liquidation proceedings has been filed with the intent to defraud any person.

38. No such penalty under sub-section (1) or (2) of Section 65 can be imposed by the Adjudicating Authority without recording opinion for coming to the conclusion that a prima facie case is made out to suggest that the person "fraudulently" or "with malicious intent" for the purpose, other than the resolution insolvency or liquidation or with the intent to defraud any person has filed the application."

11. There is nothing on record to suggest that the 'Corporate Applicant' has suppressed any fact or has not come with the clean hands. The

Adjudicating Authority has also not held that the application has been filed by the Corporate Applicant "fraudulently" or "with malicious intent" for any purpose other than for the resolution process or liquidation or that the voluntary liquidation proceedings have been initiated with the intent to defraud any person. In the absence of any such grounds recorded by the Adjudicating Authority, the impugned order cannot be upheld.

12. For the reasons aforesaid, the impugned order dated 14th August, 2017 passed in C.P. No. (IB)/128/10/HDB/2017 is 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.

13. The appeal is allowed. However, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member [Judicial]

NEW DELHI
22nd March, 2018
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