

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 199 of 2018

IN THE MATTER OF:

Gemini Innovations Pvt. Ltd. ...Appellant

Vs.

State Bank of India ...Respondent

Present: For Appellant: -Mr. Nikhil Nayyar with Ms. Madhavi Nalluri and Mr. Divyanshu Rai, Advocates

For Respondent:- Mr. P.V. Dinesh with Mr. Rajendra Beniwal, Advocates.

O R D E R

16.07.2018— The Corporate Applicant preferred an application under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I & B Code' 2016) which has been rejected by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai Bench by impugned order dated 6th April 2018.

2. The Adjudicating Authority noticed the Arbitration Award dated 12th June 2017 passed by the 'sole arbitrator' against Corporate Debtor. That award was enclosed by the Corporate Debtor to suggest that there was an award which the Corporate Debtor failed to pay and thereby default.

3. The State Bank of India, one of the secured creditor opposed the prayer, which was noticed by the Adjudicating Authority, who made following observation: -

- “9. *The Secured Creditor State Bank of India seriously opposed this application stating that ; this petition is filed as an afterthought and with ulterior motives and malafide intentions to defeat the claim of the secured creditor; to delay the enforcement of the security and recovery proceedings initiated by the bank under SARFAESI Act and RDDB Act; the corporate debtor has suppressed true and correct facts, has not come up with clean hands, the bank has got orders from the concerned court under Section 14 of SARFAESI Act to take possession of the secured property, for which the date is fixed as 31.3.18 by the commissioner appointed by CMM court, Mumbai.*
10. *The secured creditor State Bank of India further alleges that the Arbitration Award dated 12.6.17 in favour of Ms. Hetal Surendra Desai, for Rs. 30,30,57,476/- due as on 31.03.2015 with further interest @ 2% p.a. compounded monthly, is an award obtained in collusion and on the face of it, it is bogus, fraudulent and obtained with malafide intent and the petition deserves to be dismissed on this ground alone.*
11. *This Bench carefully perused the Arbitration Award dated 12.06.2017. Right from the day one, the entire transaction of advancement of loan by Ms. Hetal*

Desai to Mr. Basant Talreja, who is the Director of the Corporate of the Corporate Debtor is fishy. The Corporate Guarantee purported to have been given by the Corporate Debtor in favour of Ms. Hetal Desai for the said loan advanced to Mr. Basant Talreja, is not placed before this Adjudicating Authority. None of the particulars regarding the payment of money by Ms. Hetal Desai are documentarily produced and hence cannot be believed. The very manner in which monies were advanced and an Arbitration Award is procured itself is very unnatural and hence cannot be believed. Even the contention that a film training institute is running in the premises and the students will be disturbed cannot be taken into consideration because there is no registration and other particulars available on record. So the cumulative effect of all these unnatural and make believe actions on the part of the Corporate Debtor renders the Petition fit for dismissal.”

With the aforesaid observation, the Adjudicating Authority dismissed the application.

4. Learned Counsel appearing on behalf of the respondent State Bank of India has taken similar plea, as noticed by the Adjudicating Authority and recorded above.

5. Similar issue fell for consideration before this Appellate Tribunal in 'M/s Unigreen Global Private Limited Vs. Punjab National Bank & Anr.' in Company Appeal (AT)(Insolvency) No. 81 of 2017, wherein this Appellate Tribunal by judgement dated 1st December 2018 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.”

6. The case of the appellant being covered by the decision of this Appellate Tribunal in “*M/s Unigreen Global Private Limited*” (supra) and as the Adjudicating Authority has gone beyond the record i.e. Form 6 filed by the ‘Corporate Applicant’, we set aside the Order dated 6th April 2018.

7. The case is remitted to the Adjudicating Authority who after notice to the parties will find out whether the application is complete or not. If the application is in complete, the Adjudicating Authority will grant appropriate time to the Corporate Applicant to remove the defect(s) and if it is in order will admit the application.

8. We make it clear that we have not given any liberty to the respondent Bank to raise any other issue, the matter having decided by this Appellate Tribunal.

9. The appeal is allowed with the aforesaid observations and directions.

10. Till final decision is taken by the Adjudicating Authority on the application under Section 10, the interim order passed by this Appellate Tribunal on 10th May 2018 shall continue.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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