IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Company Appeal (AT) (Insolvency) No. 81 of 2017
[arising out of Order dated 8th May, 2017 by NCLT, Principal Bench, New Delhi in C.P. No. (IB)-39(PB)/2017]

IN THE MATTER OF :

M/s. Unigreen Global Private Limited
467-468, Katra Ishwar Bhawan,
Khari Baoli, Delhi – 110 006 **...Appellant**

Vs.

1. **Punjab National Bank,**
   Large Corporate Branch,
   Tolstoy House, Tolstoy Marg,
   Connaught Place,
   New Delhi – 110 001.

2. **Corporation Bank,**
   M-3-4, Shopping Centre,
   Greater Kailash –II,
   New Delhi – 110 048.

3. **Vijaya Bank,**
   N-17, Ground Floor,
   Vijaya Building,
   Barakhamba road,
   New Delhi – 110 001.

4. **Oriental Bank of Commerce,**
   M – 1/2/3, Connaught Circus,
   Connaught Place,
   New Delhi - 110 001. **...Respondents**

Present:

For Appellant : Shri Dhruv Gupta and Shri P. Nagesh, Advocates

For 1st Respondent : Shri Sartaj Singh, Advocate

For 4th Respondent : Shri Kailash Sharma, Advocate

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by the appellant – Unigreen Global Private Limited (Corporate Debtor) against order dated 8th May, 2017 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi whereby and whereunder the application preferred by the appellant – Corporate Debtor under Section 10 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as the 'I & B Code') in Form 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter referred to as the 'Adjudicating Authority Rules') has been rejected. The Adjudicating Authority has also imposed penalty of Rs. Ten Lakhs on the appellant – Corporate Debtor under Section 65 of the I & B Code.

2. The questions involved in this appeal are :

i) Whether non-disclosure of facts beyond the statutory requirement under the I & B Code read with relevant form, prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016 can be a ground to dismiss an application for initiation of Corporate Insolvency Resolution Process ?

and

ii) Whether the penalty imposed by the Adjudicating Authority under Section 65 of the I & B Code is legal or not?

3. The brief facts of the case are that the appellant – Corporate Debtor / Corporate Appellant filed an application under Section 10 in Form 6 for initiation of Corporate Insolvency Resolution Process against it on the ground that it has failed to pay the debt due to financial creditors and other creditors. On notice, Punjab National Bank (Financial Creditor) appeared and alleging the suppression of facts on the ground that the appellant has not disclosed the full facts and has not furnished full particulars in relation to the assets mortgaged or the securities furnished to the financial creditors. It was also alleged that the legal proceeding in respect of certain properties includes Khari Baoli property has been entangled by the owners themselves. In view of such submission the application preferred by the appellant has been rejected.

4. Before discussing the stand taken by appellant (Corporate Debtor), it is desirable to notice the stand taken by Respondent – Punjab National Bank.

5. According to the respondent Punjab National Bank – (Financial Creditor) civil suits were deliberately engineered and instigated with a view to remove the mortgaged properties from the accountability of the creditors. The appellant kept pending the Civil Suits, such as "Mayank Maheshwari v. Anurag Garg" - csdj/0094/2017 before the learned Additional District and Sessions Judge, Tis Hazari District Courts, Delhi. The said suit has been filed seeking a declaration and mandatory and permanent injunction against one of the Directors of the Company namely Mr. Anurag Garg. It was further alleged that subsequent to the above suit, in collusion with the plaintiff a S.A. has been filed before DRT III alleging that two sale deeds dated 21.10.2016 with respect to basement and mezzanine floor of the said property as well as

two un-registered agreements to sell dated 1st September, 2011 had been executed by the said Director in the capacity as owner of the property in a petition under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) in diary No. 146/2017/DRT-III, thereby sought for recall of order dated 21st January, 2017 wherein the learned CMM, Tis Hazari Court was pleased to pass an order dated 21st January, 2017 in favour of Punjab National Bank in 'Punjab National Bank vs. M/s. Unigreen Global Private Limited' appointing a Court receiver to take possession of the property. Pursuance of the said order, the Financial Creditor – Punjab National Bank has already taken over the possession of the said property. In the circumstances, it was submitted that prayer for initiation of the Corporate Insolvency Resolution Process amounts to abuse of process of law.

6. The aforesaid submission made on behalf of the 'Financial Creditor' has been noticed by the Adjudicating Authority in the impugned order dated 8th May, 2017, relevant of which are quoted below:

> *"12. In addition to the above details which have not been fully disclosed in the petition, Learned Counsel also contends that in relation to the Defence Enclave property of its objection statement, which property is also in the personal name of the Directors of the company, is also caught in the web of legal entanglement deliberately created by the directors of the petitioner in relation to the said property, as a civil suit again for permanent and mandatory injunction being No.9398/2016, titled as Sh. Jagat Nath Mahto vs. Vedika Overseas Tradex (P) Ltd. & Ors. is pending consideration before the Learned ASCJ,*

Karkardooma Court, Delhi and that the next date of hearing is fixed for 12.05.2017 and incidentally, it is pointed by the Financial Creditor that the plaintiff in the above said suit allegedly also happens to be someone close to the directors/ promoters of the petitioner company, namely, a driver working in one of the sister concerns in which both Ms. Ritu Garg and Mr. Anurag Garg, being the Directors of the petitioner company are also involved. The claim of the said person who happens to be a driver as stated above is that he is occupying the said Defence Enclave property on tenancy and that he has also been paying rent in relation to the same and in the circumstances, his possession should not be disturbed except under due process of law. Learned Counsel for the Bank also points out that the above said suit came to be filed in collusion with the Directors of the applicant company on 10.05.2016 after the issue of notice under Section 13(2) of the SARFAESI Act, 2002 by the bank to the corporate debtor and its Directors and guarantors.

13. *A similar strategy in relation to the above Defence Enclave property too as was done as described in the earlier portion of the property at Khari Baoli in which the Bankers/ Financial creditors had obtained the physical possession also seems to have been adopted, in the sense that the plaintiff in the above suit has also approached the D.R.T. in SA No.48 of 2017 under Section 17 of the SARFAESI Act, 2002 and it is submitted that the same is also pending consideration and posted for hearing on 01.05.2017. The Bank being the financial creditor also narrates a similar set of facts in relation to property, as detailed in 3 (c) of the objection statement,*

namely, House No.D-3A, Dayanand Block, Delhi-110092 wherein it is alleged that the corporate debtor managed by its Director have not come with clean hands in the legal proceedings in which the property is entangled deliberately by the actions or at the instigation of the said Directors of the corporate debtor in order to have the properties removed from the clutches of law. The further submission of Punjab National bank, being the Lead Banker, in relation to the consortium of Banks and all of whom have made availably finances details in the paragraphs above is that the directors of the Corporate debtor have manipulated the business of the company by dealing directly with the buyers, thereby, by-passing the objection of Bank and engaging in the trading of raw-material instead of regular process, which action is a deliberate fraud and which made the accounts of Corporate debtor an NPA despite sanction by the Joint Leader Forum in relation to the approval and re-structuring of credit facilities vide another letter dated 31.3.2015. All the actions of the financial creditors, namely, Punjab National Bank, according to its submission, has been made only in line with the RBI guidelines and the Corporate debtor has come to this sorry state of affairs only due to the deliberate actions of the Directors of the corporate debtor and the way in which the Directors have managed the company. This situation has not arisen out of the business cycle as contended by the Corporate Debtor. It is also averred by the objector Bank that the Corporate Debtor is under enquiry by Department of Revenue Intelligence (DRI).”

7. Having noticed the aforesaid facts, the Adjudicating Authority observed as follows :

> *"14. From the above facts, it is averred by the Banks that it is clear that the Corporate debtor and directors also being guarantors are trying to avoid making lawful payments of the dues owed to the Bank and also thwarting the Bankers from realizing the securities by initiating several legal proceedings in different courts and Forums with the sole motive of removing their personal properties from the clutches of law and that the instant action before this Tribunal is yet another attempt in the same direction."*

8. Learned counsel appearing on behalf of the appellant submitted that the application under section 10 in Form 6 was filed with the following documents :

i) List of financial creditors and operational creditors as per the balance sheet for the year 2015-16.

ii) Details of the security created by the Directors of the Corporate Applicant for the loan obtained by the bank.

iii) the company master data

iv) books of accounts/balance sheets evidencing the default to the creditors.

v) details of identifiable assets in the name of Directors of the company who stood as guarantors to the loans obtained from the bank

vi) details of guarantee given by the guarantors in relation to the debts of corporate debtor.

vii) details of all proceedings before the Debt Recovery Tribunal between the banks and the corporate debtor and the status of the proceedings including the status of possession of the immoveable properties of the guarantors with the banks.

9. It was also submitted that the appellant dispatched the copy of the application under Section 10 by Registered Post to the Financial Creditors/banks whereinafter notice was issued in terms of Rule 7 of the Adjudicating Authority Rules, 2016. According to learned counsel for the appellant the objections of the respondent – financial creditor/banks relating to non-mentioning of the allied and collateral proceedings cannot be taken into consideration by the Adjudicating Authority as the Corporate Debtor is not involved in those proceeding/suit. It was submitted that such grounds are beyond the scope and scrutiny of initiation of Corporate Insolvency Resolution Process.

10. Further according to learned counsel for the Corporate Debtor as the aforesaid informations are not contemplated under the I & B Code or the Adjudicating Authority Rules, 2016, it is not open to the Financial Creditor/ Banks (Respondents) to raise such issue nor the Adjudicating Authority can dismiss the application on the ground of non-disclosure of facts unrelated to the Corporate Insolvency Resolution Process.

11. It was further submitted that Corporate Insolvency Resolution having not been initiated the question of imposition of penalty under Section 65 of the I & B Code does not arise.

12. Learned counsel for the Punjab National Bank has taken the similar plea as was taken before the Adjudicating Authority and referred to above. It

was submitted that the following details of the mortgaged property were supressed by the appellant :

PROPERTY	
Shop No. 467-468, Ground & First Floor, Katra Ishwar Bhavan, Khari Baoli, New Delhi.	Civil Suit titled "Mayank Maheshwari v. Anurag Garg" registered as CS DJ/000094/2017 before Ld. Tis Hazari Courts seeking declaration, mandatory and permanent injunction. An S.A. under Sec.17 of SARFAESI Act, 2002 also filed by Mr. Mayank Maheshwari in collusion with Mr. Anurag is pending adjudication before Lf. DRT. The contention of the Appellant that the suit is with respect to the basement and mezzanine floor, which are not mortgaged with the Answering Respondent proves to be false in wake of the prayer made in the afore-mentioned Civil Suit, which includes the ground floor (@ pg.377 of the Appeal)
Single storied house at 83, Defence Enclave, Vivek Marg, Delhi – 110 092	Civil Suit for permanent and mandatory injunction bearing No. 9398/2016 titled as "Sh. Jagar Nath Mehto v. Vedika Overseas Tradex Ltd." before Ld. ASCJ, Karkardooma Court, Delhi filed by Shri Mehto alleging that he was induced as tenant in the property after appointment as a driver in the company of which Sh. Anurag and Ms. Ritu Garg are directors. An S.A. under Section 17 of SARFAESI Act is also pending before Ld. DRT-II.
House No. D-3A, Dayanand Block, Delhi – 110 092	A Securitization Application filed under Section 17 of the SARFAESI Act, 2002 by Sh. Anurag Gar titled as "Anurag Garg v. Punjab National bank & Ors." Bearing S.A. No. 120/2016 pending adjudication.

13. It was further submitted that the appellant is not precluded in law to initiate proceedings under the provisions of SARFAESI Act, 2002 as has been initiated and the appellant is duty bound to bring the aforesaid facts to the notice of the Adjudicating Authority.

14. We have heard the parties, noticed the rival contentions and perused the record.

15. Before deliberating on the question involved, it is desirable to refer 'Statement of Objects and Reasons' of I & B Code, 2016, as noticed by the Hon'ble Supreme Court in *"Innoventive Industries Ltd. Vs. ICICI Bank and Ors." – 2017 SCC online SC 1025* and as quoted below :

> ***12.*** *The Insolvency and Bankruptcy Code, 2016 has been passed after great deliberation and pursuant to various committee reports, the most important of which is the report of the Bankruptcy Law Reforms Committee of November, 2015. The Statement of Objects and Reasons of the Code reads as under:*
>
> ***"STATEMENT OF OBJECTS AND REASONS***
> *There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.*

2. *The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.*

3. *The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities*

would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. *The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, Income-Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.*

5. *The Code seeks to achieve the above objectives.*

(Emphasis Supplied)"

16. Hon'ble Supreme Court also noticed the Committee Reports and objects as speed is the essence, as quoted below :

"Principles driving the design

"The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

I. *The Code will facilitate the assessment of viability of the enterprise at a very early stage.*

1. *The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to*

be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.

2. *The legislature and the courts must control the process of resolution, but not be burdened to make business decisions.*

3. *The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.*

4. *The law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.*

II. *The Code will enable symmetry of information between creditors and debtors.*

5. *The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.*

6. *The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.*

7. *The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.*

III. *The Code will ensure a time-bound process to better preserve economic value.*

8. *The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.*

IV. *The Code will ensure a collective process.*

9. *The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.*

V. *The Code will respect the rights of all creditors equally.*

10. *The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.*

VI. *The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.*

11. *The law must order the liquidation of an enterprise which has been found unviable. This outcome of the negotiations should be protected against all appeals other than for very exceptional cases.*

VII. *The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.*

12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution."

17. In the said case, Hon'ble Supreme Court while it noticed the scheme of the Code also noticed Section 7, which stands in contrast with the scheme under section 9 and observed as follows:

"27. *The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial*

creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

28. *When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence*

furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. 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. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

18. At this stage, it is desirable to compare the provisions of Section 7 with Section 10 of the I & B Code.

Section 7 is as follow:

"7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Explanation.—For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the

applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate—

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of

admission or rejection of such application, as the case may be."

19. Similar is the provision of Section 10, which reads a follows:

"10. (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to—

(a) its books of account and such other documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the

application, by an order— (a) admit the application, if it is complete; or (b) reject the application, if it is incomplete: Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section."

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.

27. It is also desirable to refer to Section 238 of the I & B Code, as quoted below :

> *"238. Provisions of this Code to override other laws - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

In view of the aforesaid provision also, I & B Code shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force including DRT Act, 1993; SARFAESI Act, 2002; money suit etc.

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.

30. Clause (d) of Section 11 refers to “liquidation order”, against a Corporate Debtor. The word ‘winding up’ has not been mentioned therein. For the said reason by Section 255 read with Schedule 11 of the I & B Code, in Section 2 of the Companies Act, 2013 for clause (23), the following clause has been substituted :

“1. In section 2,—

(a) for clause (23), the following clause shall be substituted, namely:—

xxx xxx xxx

"(23) "Company Liquidator" means a person appointed by the Tribunal as the Company Liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act";

(b) after clause (94) , the following clause shall be inserted, namely:—

"(94A) "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.”

31. By aforesaid amendment, the legislatures have made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned in the I & B Code.

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.

33. In this case, 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, the Corporate Applicant is eligible to file application under Section 10, if there is a debt and default.

34. 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 and as the suits referred to relate to dispute between third parties, and not the Corporate Debtor, we hold that the Adjudicating Authority erred in rejecting the application on the ground of suppression of facts.

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:

"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.

39. Section 424 of the Companies Act, 2013 is applicable to the proceedings under I & B Code, as held by this Appellate Tribunal in *M/s. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. in Company Appeal (AT)*

(Insolvency) No. 1 & 2 of 2017. In view of the aforesaid provision if the Adjudicating Authority *prima* facie comes to a conclusion that a case is made out to impose penalty under sub-sections (1) and (2) of Section 65, after recording its *prima facie* reasons the Adjudicating Authority is required to give reasonable opportunity of hearing to the person concerned, so as to enable the person to explain his case.

40. 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 absence of any such reasons recorded by the Adjudicating Authority the impugned order cannot be upheld.

41. Further, as the Adjudicating Authority before imposing penalty under Section 65 has not given nor served any notice to the Corporate Applicant recording its *prima facie* view and intent to punish the Corporate Applicant, the impugned order dated 8th May, 2017 cannot be upheld having been passed in violation of rules of natural justice.

42. For the reasons aforesaid, the impugned order dated 8th May, 2017 passed in C.P. No. IB-39(PB)/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.

43. At this stage, it is desirable to state that the Central Government in Form 1 or 5 or 6 of the 'Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016', has not provision for the parties to state whether any winding up proceeding has been initiated or liquidation order has been passed against the Corporate Debtor or not. No provision has been made there in for the parties to state whether any of clause of Section 11 is attracted or not.

44. Non-disclosure of such relevant facts in the relevant Form 6, may be a ground to reject the application but a person can plead that the Form does not stipulate to disclose any ineligibility under Section 11. Therefore, we are of the view that the Central Government should make necessary amendment in the relevant Form 6 appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, which will enable the Adjudicating Authority to decide at the time of admission whether any fact has been suppressed or the person has come with the clean hand or not. We hope and trust that appropriate modification of the relevant Rules and Forms shall be made by the Central Government.

45. In the meantime, the Adjudicating Authority may direct the Financial Creditors / Corporate Applicant to file an affidavit giving declaration in terms of Section 11 of the I & B Code and to state whether any winding up proceeding has been initiated or liquidation order has been passed by any High Court or Tribunal or Adjudicating Authority or not. The appeal

is allowed with the aforesaid observations. However, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

New Delhi

01 December, 2017

/ns/