

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1953 of 2024

(Arising out of Order dated 30.09.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi III in C.P. (IB)-749/ND/2023 and IA-1955/2024)

IN THE MATTER OF:

Getz Cables Private Limited
Having Registered Office At:
29/230, Railway Colony, Mandawli,
Fazalpur, Delhi- 110092

...Appellant

Versus

1. State Bank of India
Having Branch Office At:
Stressed Asset Management Branch-I,
Jawahar Vyapar Bhawan,
1 Tolstoy Marg, Janpath, New Delhi-110001
2. Northern ARC Capital Limited
Having Registered Office At:
10th Floor, Phase-I, IIT-Madras Research Park,
Kanagam Village, Taramani, Chennai- 600113 ...Respondents

Present:

For Appellant : Mr. Krishnendu Datta Sr. Advocate with Ms. Udit Singh, Mr. Akhil Nene, Advocates.

For Respondent : Mr. Harshit Khare and Mr. Prafful Sain, Advocates for R1.

Mr. Harshit Gupta proxy counsel for R2.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by a Corporate Applicant, challenging order dated 30.09.2024 passed by National Company Law Tribunal, New Delhi Court III rejecting application filed by the Appellant under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) and allowing application under Section 65 of the IBC being IA

No.1955 of 2024 filed by the State Bank of India (“**SBI**”). By the impugned order, a penalty of Rs.1,00,000/- was also imposed on the Applicant/ Appellant.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- (i) M/s Shivpriya Cables Pvt. Ltd. (Principal Borrower) availed fund based and non-fund-based loan facilities to the tune of Rs.19,77,00,000/- from the SBI, wherein the Appellant executed a Corporate Guarantee in favour of the SBI. A credit facility of Rs.1,64,59,163/- was also availed by the Principal Borrower from M/s Northern ARC Capital Ltd. A Corporate Guarantee was also executed by the Appellant in favour of Northern ARC Capital Ltd. (“**Northern ARC**”) on 30.07.2019. The Principal Borrower also availed enhancement facilities from SBI and as on 16.10.2015, the sanctioned facilities was Rs.42,58,00,000/-.
- (ii) On 04.08.2022, the loan account of Shivpriya Cables Pvt. Ltd. (“**Shivpriya Cables**”) was classified as Non-Performing Asset (“**NPA**”) by the SBI. Northern ARC issued notice invoking Corporate Guarantee on 23.01.2023 and demanded payment of outstanding amount of Rs.1,64,59,163/-.
- (iii) The SBI initiated proceedings under Section 13, sub-section (2) of the SARFAESI Act, 2002 against Applicant/ Appellant, demanding in capacity of Corporate Guarantor to repay the

outstanding due of Rs.52,94,32,352.10 paisa along with interest.

- (iv) On 22.06.2023, SBI issued possession notice, conveying the Principal Borrower and the Applicant about taking possession of the immovable mortgaged property.
- (v) A Section 10 application being CP(IB) No.749/ND/2023 was filed by the Applicant on 02.11.2023 before the Adjudicating Authority. An order under Section 14 of the SARFAESI Act was also passed by the District Magistrate, Tijara, State of Rajasthan on 05.12.2023, directing the SBI to take physical possession of the immovable assets bearing Plot No.E-448, RIICO, Industrial Area, Chopanki, City Bhiwadi, Rajasthan.
- (vi) On an application filed by Northern ARC under Section 7, Corporate Insolvency Resolution Process (“**CIRP**”) against the Principal Borrower commenced on 07.12.2023.
- (vii) In application filed under Section 10, an IA No.1955 of 2024 was filed by the SBI under Section 65 of the IBC, praying for dismissal of Section 10 petition. The Adjudicating Authority heard petition under Section 10 as well as Section 65 application filed by the SBI and by the impugned order, held that Section 10 petition has been filed by the Applicant/Appellant with malicious and fraudulent intent to delay and halt the recovery proceedings initiated by the Respondent Bank. The Adjudicating Authority also imposed penalty of

Rs.1,00,000/- on the Applicant/ Appellant. Aggrieved by the impugned order dated 30.09.2024, this Appeal has been filed.

3. We have heard Shri Krishnendu Datta, learned Senior Counsel appearing for the Appellant and Shri Harshit Khare, learned Counsel appearing for SBI.

4. Learned Senior Counsel for the Appellant challenging the impugned order submits that Adjudicating Authority committed error in holding that application under Section 10 was filed by the Appellant with malicious and fraudulent intent within the meaning of Section 65 of the IBC only on the ground that proceedings under Section 13, sub-section (2) of the SARFAESI Act was initiated by the SBI against the Appellant prior to filing of Section 10 Application. It is submitted that mere initiation of proceedings under SARFAESI Act by the SBI cannot be the basis for coming to a finding that Section 10 application is filed with malicious and fraudulent intent. It is submitted that section 10 application of the Appellant has been rejected by the Adjudicating Authority invoking Section 65 of the IBC, whereas ingredients of Section 65 application were neither pleaded nor proved by the SBI. It is submitted that Section 10 of the IBC is a statutory provision, giving entitlement to a Corporate Applicant to file an application for initiation of CIRP, when a Corporate Debtor has committed a default. The right under Section 10 given to a Corporate Debtor, cannot be taken away only on the ground that proceedings under Section 13, sub-section (2) of SARFAESI Act has been initiated prior to filing of application under Section 10. It is submitted that right to file an application under Section 10 on the

ground that Corporate Debtor has committed default is a *sine-qua-non* for filing an application under Section 10. The proceedings under Section 13, sub-section (2) initiated by the SBI against the Appellant is a proof that the Appellant has committed a default and cannot be read to mean as any ineligibility of the Corporate Debtor to file Section 10 application. Section 65 is to be invoked when a person initiate an insolvency resolution process fraudulently or with malicious intent or for any purpose other than for the resolution of insolvency. Section 65 application filed by the SBI was founded only on initiation of Section 13(2) proceedings under SARFAESI Act against the Appellant prior to filing Section 10 application, which cannot be a ground to invoke Section 65 of the IBC. The Adjudicating Authority committed error in jumping on the conclusion that Section 10 application has been filed with fraudulent and malicious intent without there being any material or foundation for the said conclusion. The allegation that Northern ARC has not raised any objection to Section 10 application is also no ground to reject Section 10 application. Northern ARC has already initiated proceedings under Section 7 against the Principal Borrower, which has been admitted subsequent to filing the application by the Appellant under Section 10. The order of District Magistrate dated 05.12.2023 for taking physical possession of the immovable assets was also subsequent to filing of Section 10 application. The Adjudicating Authority committed error in rejecting Section 10 application.

5. The learned Counsel for SBI refuting the submission of learned Counsel for the Appellant submits that the intent and purpose of the Appellant was to stall the proceedings initiated by the SBI under Section 13, sub-section (2), which was initiated by issuing notice dated 24.02.2023. The SARFAESI proceedings were initiated with respect to mortgaged assets of the Appellant, which were on the verge of completion when Section 10 application was filed by the Appellant, which is nothing but an attempt to stall and delay the recovery proceedings. It is submitted that it is the SBI, which hold security interest in the mortgaged assets. Section 7 petition, which was filed by Northern ARC was not even contested by the Principal Borrower. The SBI when came to know about the filing of Section 10 application, it has filed application under Section 65 to dismiss Section 10 application. Section 65 application has been filed by the SBI on the basis of malicious and fraudulent intent of the Appellant, which is reflected in the sequence of events. It is submitted that ingredients of Section 65 were fully met in the application under Section 65 filed by the SBI. The Personal Guarantor Mr. Ajay Kumar Gupta also filed petition under Section 94 of the IBC, which has also been admitted by the Adjudicating Authority. Northern ARC has not taken any action to recovery of its money from the Corporate Debtor, even after invoking the guarantee. The Northern ARC also supported Section 10 application. In Section 10 application, SBI was not made a party, which application was filed behind the back of the SBI, whereas the Appellant was well aware that SARFAESI proceedings related to immovable mortgaged property of the Appellant is on the verge of completion. Learned Counsel for the SBI submits that Section 10

application has been rejected by the Adjudicating Authority by allowing Section 65 application as well as on the basis of other relevant facts as noticed in the judgment.

6. Learned Counsel for both the parties have placed reliance of various judgments of Hon'ble Supreme Court and this Tribunal in support of their respective submissions.

7. The main reason for dismissal of Section 10 petition has been given in paragraph 7 (xix) of the impugned order, which is as follows:

“7(xix) There is no quarrel over the fact that Section 10 vests rights on the Corporate Applicant to resolve their insolvency. However, one cannot lose sight of the fact that this protective umbrella over the assets of the Corporate Applicant is not misused or abused in a manner so as to become a tool for deriving undue advantage at the cost of insolvency resolution which objective unequivocally resonates in the preambular aspirations of the IBC. Therefore, the present Section 10 petition ought to be **dismissed** as being filed with malicious and fraudulent intent to delay and halt the recovery proceedings initiated by Respondent Bank.”

8. The main reason for dismissing Section 10 application is that Applicant has filed Section 10 application with malicious and fraudulent intent to delay and halt the recovery proceedings initiated by Respondent Bank. Application under Section 10 was filed by the Appellant. Section 10(1) and (2) provide as follows:

“10. Initiation of corporate insolvency resolution process by corporate applicant. - (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.

9. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Rule 7, deals with application, which is to be filed for initiating a CIRP against the Corporate Debtor under Section 10. Rule 7, sub-rule (1) is as follows:

“7. Application by corporate applicant.—(1) A corporate applicant, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 10 of the 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.”

10. Form-6 is statutory Form provided in the Rules itself. Item No.9 of Part-I of Form 6, provides:

Part-I		
PARTICULARS OF THE CORPORATE APPLICANT		
9.	DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION UNDER SECTION 55 (2) OF THE CODE – (i) ASSETS AND INCOME (ii) CLASS OF CREDITORS OR AMOUNT OF DEBT (iii) CATEGORY OF CORPORATE PERSON (WHERE APPLICATION IS UNDER CHAPTER IV OF PART II OF THE CODE)	

11. Part-III of the Form, deals with ‘Particulars of Financial/ Operational Debt [Creditor Wise, as Applicable]’. The copy of the application which was

filed by the Application under Section 10 has been brought on the record by Appellant as Annexure A-10. In the petition under Section 10, it is stated that the Principal Borrower has obtained financial facilities from the SBI, details of such facilities has been mentioned in the application, totaling to Rs.42,58,00,000/-. The Applicant also pleaded that Equitable Mortgage of Immovable property on the first charge basis was also created, i.e. factory land and buildings bearing Survey Number/ Plot No. E-448, RIICO Industrial Area, Chopanki, Bhiwadi, Alwar, Rajasthan, standing in the name of Corporate Debtor/ Corporate Applicant. The Applicant further stated that Principal Borrower has defaulted in repayment and account has been declared as NPA. It was also further pleaded that both the Financial Creditors have invoked the guarantee provided by the Corporate Debtor and the Corporate Applicant is not in a position to repay the aforementioned liabilities since it has not been carrying out business for the last five years. It is useful to notice the following statements made in Section 10 application at (vi) and (vii) of the synopsis, which are as follows:

- “vi) Both the abovementioned financial creditors have invoked the guarantee provided by the Corporate Debtor/Corporate Applicant herein.
- vii) The Corporate Debtor/Corporate Applicant is not a position to repay the abovementioned liabilities as it has not been carrying out business for the last five years.

Thus, in view of the above, the Corporate Debtor/Corporate Applicant has incurred financial liabilities and is not in a position to repay the same. The financial statements and other relevant documents of the Corporate Applicant clearly

demonstrate that it does not possess the ability to resolve its debts.

Therefore, the present Application under Section 10 of the Insolvency and Bankruptcy Code, 2016 ('IBC') is being preferred. It is pertinent to note that an important purpose for enactment of the IBC was to revitalise and rehabilitate the Corporate Debtor. The shareholders and the directors of the Corporate Debtor/Applicant are of the view that filing of the present application for the initiation of the Corporate Insolvency Resolution Process (CIRP) would be in beneficial interest of all stakeholders. Admission of Corporate Debtor / Applicant to CIRP would benefit the Corporate Debtor / Applicant in bringing all its creditors under the umbrella of the IBC, wherein an attempt could be made to resolve its debts rather than contesting multiple litigation with different parties. The decision taken by majority of the shareholders while passing the Special Resolution dated 30.09.2023 demonstrates the urgent need of rehabilitation of the Corporate Applicant. It is further submitted that the Corporate Applicant is not ineligible in terms of Section 11 of the IBC, thus, the instant Application is complete and is therefore liable to be allowed.”

12. Part III of the application mentions names of the Financial Creditors, i.e. State Bank of India and Northern ARC Capital Limited. Total debt of the SBI was also mentioned in terms of notice dated 22.02.2023. Part III of Item No.3 is as follows:

“PART-III PARTICULARS OF FINANCIAL/ OPERATIONAL DEBT [CREDITOR WISE, AS APPLICABLE]		
3.	TOTAL DEBT RAISED AND AMOUNT IN DEFAULT	Debt Raised is Nil being Corporate Guarantor Amount in Default:- 1. State Bank of India:

		Rs.52,94,32,352/- in terms of Notice, dated 22.02.2023. 2. Northern ARC Capital Limited: Rs.1,64,59,163/- in terms of Notice, dated 23.01.2023.”
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13. In the list of other documents, which were attached along with application, have been mentioned, which Item No.8 is as follows:

8.	LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL/ OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	1. Legal Notice, dated 23.01.2023, issued by Northern ARC Capital Limited and the same is being annexed herewith and marked as Annexure A/1. 2. Legal Notice, dated 22.02.2023, issued by State Bank of India and the same is being annexed herewith and marked as Annexure A/2. 3. Deed of Guarantee, dated 30.07.2019, executed in favour of Northern ARC Capital Limited against the Financial Facility availed by Shivpriya Cables Pvt. Ltd. and the same is being annexed herewith and marked as Annexure A/3. 4. Master Data of the Corporate Debtor and the same is being annexed herewith and marked as Annexure A/4. 5. Board Resolution dated 30.09.2023, in favour of the deponent authorizing filing of the instant Application and the same is being annexed herewith and marked as Annexure A/5. 6. Extracts of Minutes of Board Meeting, dated 30.09.2023, resolving to Corporate Resolution initiate Insolvency
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		IBC against the Corporate Process under Section 10 of Debtor and the same is being annexed herewith and marked as ANNEXURE A/6. 7. Certificate of incorporation of the Corporate Debtor and the same is being annexed herewith and marked as ANNEXURE A/7. 8. Memorandum of Association of the Corporate Debtor and the same is being annexed herewith and marked as ANNEXURE A/8. 9. Article of Association of the Corporate Debtor and the same is being annexed herewith and marked as ANNEXURE A/9. 10. Copies of Balance Sheets of the Corporate Debtor for the financial year 2021-22 and 2022-23 and the same are being annexed herewith and marked as ANNEXURE A/10 (COLLY), 11. Copy of Certificate of Copy registration of charge, dated 29.06.2015 by the Registrar of Companies in favour of State Bank of India, against the immovable property of the Corporate Debtor and the same is being annexed herewith and marked as ANNEXURE A/11. 12. Copies of Certificate of Registration, Authorization for Assignment and related party disclosure from issued by the proposed Interim Resolution Professional are being annexed herewith and marked as ANNEXURE A/12 (COLLY).”
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14. When we look into the application filed under Section 10, the Applicant has fully disclosed the debt of SBI and has also pleaded that it

is unable to discharge the debts of Financial Creditors. As noted above, application under Section 10 has been dismissed by allowing application under Section 65 of the IBC filed by the SBI. We need to notice the pleadings in Section 65 application filed by the SBI. In section 65 application, the SBI in paragraph-7 after narrating the details of financial facilities extended to M/s Shivpriya Cables Pvt. Ltd., issuance of notice under Section 13, sub-section (2) of the SBI, filing of Section 7 application by Northern ARC Capital Limited, has pleaded that application under Section 10 has been filed with malicious and fraudulent intent, which pleadings made are in paragraph-7 (m) and (n) are as follows:

- “(m) Hence, in view of the aforementioned facts and circumstances, it is pertinent to mention that while the enforcement proceedings initiated by the Applicant (SBI) against the Mortgaged Property of the Respondent No. 1 under SARFAESI Act, 2002 are on the verge of being completed, the Respondent No. 1 herein with a malafide and fraudulent intent had filed the instant captioned petition i.e. C.P.(IB) No. 749/ND/2023;
- (n) It is pertinent to note that the present Petition filed by the Respondent No. 1 is nothing but an attempt to stall the recovery proceedings by way of SARFAESI action and recovery of Bank's dues, further time loss is expected. As such the Applicant i.e. State Bank of India has already have lost plenty of time during the ongoing CIRP Process, since the Principal Borrower was under NCLT since December, 2023.”

15. Section 65 of the IBC is a provision, which empowers the Adjudicating Authority to impose a penalty under Section 65 of the IBC, which is as follows:

“65. Fraudulent or malicious initiation of proceedings. - (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 a 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.

(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) 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.”

16. Necessary ingredients, which required to be proved under Section 65, sub-section (1) are that proceedings are initiated fraudulently or with malicious intent for any purpose other than for the resolution of insolvency. Both expression – fraudulent and malicious has definite connotation. The expression ‘fraudulently’ has been explained in Advanced Law Lexicon by P Ramanatha Aiyar 6th Edition in following words:

“Person does a thing fraudulently if he does it with an intent to defraud, and so to constitute fraud two elements are necessary – deceit, and injury and loss to some person.”

17. Another expression which occurs in Section 65 is ‘malicious intent’. Advanced Law Lexicon by P Ramanatha Aiyar define the word ‘malice’ in the legal sense in following words:

“1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person’s legal rights.”

There is also a second definition, which is as follows:

“Malice in the legal sense imports (1) the absence of all elements of justifications, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause to particular harm which is produced or harm of the same general nature, or (b) the wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result.... The Model Penal Code does not use ‘malice’ because those who formulated the Code had a blind prejudice against the word. This is very regrettable because it represents a useful concept despite some unfortunate language employed at times in the effort to express it.” ROLLIN M. PERKINS & RONALD N. BOYCE, Criminal Law 860 (3d Edition 1982)”

18. The Hon’ble Supreme Court has defined ‘malice’ in **(2003) 8 SCC 567 – Chairman & MD. BPL Ltd. vs. S.P. Gururaja and Ors.** in paragraph 21, in following words:

“**21.** Malice in common law or acceptance means ill will against a person, but in the legal sense it means a wrongful act done intentionally without just cause or excuse.”

19. The question to be answered is as to whether filing of an application by the Appellant under Section 10, can be termed as initiation of proceedings with fraudulent and malicious intent. The basis for Section 65 application filed by the SBI is the fact that SBI has initiated proceedings

under Section 13, sub-section (2) of the SARFAESI Act vide notice dated 24.02.2023, prior to filing of the application under Section 10 by the Corporate Applicant. Admittedly, Section 10 application was filed by the Appellant, subsequent to initiation of proceedings under Section 13, sub-section (2) by the SBI. The pleadings of the of the SBI in proceedings under Section 13, sub-section (2) were that 13(2) proceedings were on the verge of being completed, when Corporate Applicant has filed application under Section 10 with malafide and fraudulent intent. From the pleadings in Section 65 application, we do not find any foundation to come to the conclusion that application under Section 10 was fraudulently initiated. Thus, the question remains as to whether initiation of proceedings under Section 10, can be treated with malicious intent. For proving a malicious intent, two elements are required to be proved, i.e., to commit a wrongful act with absence of any justification and intent of causing a particular harm.

20. Now, we may look into the judgments and precedents relied by the parties in support of their respective submissions.

21. The learned Counsel for the Appellant has relied on judgment of this Tribunal in ***Unigreen Global Private Limited vs. Punjab National Bank and Ors. – (2017) SCC OnLine NCLAT 566***, where this Tribunal noticing Section 7 and Section 10 of the IBC held that, two factors are common i.e. the debt is due and there is a default. In paragraphs 20 and 21, following have been held:

“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. This Tribunal further held that action under Section 13(4) of SARFAESI Act against Corporate Debtor or proceedings before Debt Recovery Tribunal, if any, are pending, cannot be a ground to rejection application under Section 10, if the application is complete. In paragraph 25, following was laid down:

“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.”

23. Another judgment of this Tribunal relied by the learned Counsel for the Appellant is ***Amar Vora vs. City Union Bank Ltd. – (2022) SCC OnLine NCLAT 276***, where the same principles were reiterated in paragraph 9, which are as follows:

“9. In view of the above provision of law the financial Creditor/Operational Creditor/Corporate Persons can file an application under Section 7, 9 & 10 of the I & B Code, 2016 before the respective Adjudicating Authorities even though in respect of same any proceeding pending before other forums on the ground that the provisions of I & B Code, 2016 is overriding effect of other laws. In view of the aforesaid reasons the Appellant cannot take a stand that the proceedings are pending before DRT and PBPT and the application under Section 7 of the I & B Code, 2016 cannot be maintained does not merit. The application under Section 7 filed by the financial Creditor before the Adjudicating Authority is very well maintained. Accordingly, the point is answered against the Appellant.”

24. Another judgment relied of this Tribunal is in ***Company Appeal (AT) (Ins.) No.593 of 2023 – SMBC Aviation vs. Resolution Professional, Go Airlines***, where an application under Section 10 filed by Go Airlines was admitted by NCLT, which was challenged in the Appeal. Challenging the order of admission, it was contended before this Tribunal that application under Section 10 was filed with fraudulent and malicious intent. This Tribunal had considered the expression ‘fraud’ as occurring in Section 10 in paragraphs 32, 33 and 34, which are as follows:

“32. The word fraudulent has been defined by “**Advanced Law Lexicon**” in following words:

“Person does a thing fraudulently if he does it with an intent to defraud, and so to constitute fraud two elements are necessary--- deceit, and injury and loss to some person.”

33. The Hon’ble Supreme Court in **(2011) 8 SCC 613 – Ramesh Kumar and Anr. Vs. Furu Ram and Anr.** had occasion to consider the definition of ‘fraud’. In paragraph 17 and 19, following has been observed:

“17. Section 17 of the Contract Act, 1872 defines “fraud” thus:

“17. ‘Fraud’ defined.—‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.”

19. Differently nuanced contextual meanings of the word “fraud” are collected in P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn., Vol. 2, pp. 1914-15). We may extract two of them:

“Fraud, is deceit in grants and conveyances of lands, and bargains and sales of goods, etc. to the damage of another person which may be either by suppression of the truth, or suggestion of a falsehood. (Tomlin)

* * *

34. ‘Fraud’ has been defined as any conduct of deceit resulting in injury, loss or damage to someone. Deceit has also been explained by the Hon’ble Supreme Court in **(2013) 1 SCC 562 – Ram Chandra Bhagat vs. State of Jharkhand**. The Hon’ble Supreme Court explaining the ‘deceit’ following has been stated in paragraph 17 and 18:

“17.Stroud's Judicial Dictionary (5th Edn.) explains “deceit” as follows:

“Deceit.—“Deceit”, deceptio, fraus, dolus, is a subtle, wily shift or device, having no other name; hereto may be drawn all manner of craft, subtilly, guile, fraud, wiliness, slight, cunning, covin, collusion, practice, and offence used to deceive another man by any means, which hath none other proper or particular name but offence’.”

Black's Law Dictionary (8th Edn.) explains “deceit” thus:

“Deceit, n.—(1) The act of intentionally giving a false impression <the juror’s deceit led the lawyer to believe that she was not biased> (2) A false statement of fact made by a person knowingly or recklessly (i.e. not caring whether it is true or false) with the intent that someone else will act upon it.”

In The Law Lexicon by P. Ramanatha Aiyar (2nd Edn., Reprint 2000),

“deceit” is described as follows: “Deceit.—Fraud; false representation made with intent to deceive; ‘Deceit, “deception of fraud” is a subtle, wily shift or device, having no other name. In this may be included all

manner of craft, subtlety, guile, fraud, wiliness, slight, cunning, covin, collusion, practice and offence used to deceive another may be by any means, which hath none other proper or particular name but offence’.”””

25. Another judgment, which was relied by learned Counsel for the Appellant is in ***Rakesh Kumar Gupta vs. Mahesh Bansal and Anr. – (2020) SCC OnLine NCLAT 419***, wherein in paragraph 13, this Tribunal again reiterated that pendency of actions under the SARFAESI Act does not create obstruction for filing an application under Section 7. The same principle will also apply to with regard to Section 10 Application.

26. Learned Counsel for the Appellant further submitted that Hon’ble Supreme Court while considering Section 7 application in ***A. Navinchandra Steels Pvt. Ltd. vs. SREI Equipment Finance Ltd. & Ors. – (2021) 4 SCC 435*** has held that Section 7 or Section 9 proceedings are independent proceedings, which are unaffected by winding-up proceedings that may be filed by the same company. In paragraph 25 of the judgment, following was laid down:

“**25.** A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 IBC is an independent proceeding which is unaffected by winding-up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding-up proceeding would then take place to NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the

country. It is, thus, not possible to accede to the argument on behalf of the appellant that given Section 446 of the Companies Act, 1956/Section 279 of the Companies Act, 2013, once a winding-up petition is admitted, the winding-up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true that Sections 391 to 393 of the Companies Act, 1956 may, in a given factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the Companies Act, 2013 is instructive and provides as follows:

“230. Power to compromise or make arrangements with creditors and members.— (1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

*Explanation.—*For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.”

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas

under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.”

27. The learned Counsel for the SBI has relied on the judgment of this Tribunal in **Wave Megacity Centre Pvt. Ltd. vs. Rakesh Taneja & Ors. – Company Appeal (AT) (Ins.) No.918 of 2022**. In the said case, Section 10 application filed by Corporate Debtor was rejected by the Adjudicating Authority and Appeal against the said order was dismissed by this Tribunal. In the above case, Section 65 application allowed by the Adjudicating Authority. In the above case, this Tribunal has found that there was sufficient ground to prove malicious intent of the Corporate Debtor. It was noted that there were 285 cases pending against the Corporate Debtor and huge amount was collected from homebuyers, which was siphoned off and First Information Reports were registered by EOW and the application was filed with malicious purpose to save the Corporate Debtor from liabilities, responsibilities and prosecution. In paragraph 12 of the judgment, following has been observed by this Tribunal:

“**12.** The First Information Report registered by EOW being FIR No.63 of 2021 was filed in August 2020 that is much before filing of Section 10 Application, which has also been noticed by the Adjudicating Authority in paragraph 22 of the impugned order. The facts brought on record and sequence of events indicate that dominant purpose and object of filing Section 10 Application was to save the Corporate Debtor from liabilities, responsibilities and prosecution. As per the pleadings, the possession of the units to the Homebuyers were to be handed over by 2016 and 90% of the amount from all the Homebuyers were realised before 2016. Filing of the Application under Section 10 took place in March 2021, which indicate that Application was filed with malicious purpose other

than resolution of the Corporate Debtor. The Adjudicating Authority has categorically returned a finding that in the garb of IBC proceedings, the Corporate Debtor has attempted to play fraud on its stakeholders. In paragraph 33, 34 and 37, following have been held:

*“33. Now a question arises, whether the CD has filed the Section 10 application with a malicious and fraudulent intent. The term malicious has not been defined anywhere under IBC, 2016. Therefore, at this juncture we refer to the Judgment of Hon’ble Supreme Court, passed in the matter of **West Bengal State Electricity Board Vs Dilip Kumar Ray, Civil Appeal 5188 of 2006** dated 24.11.2006, wherein the term ‘malicious’ has been discussed. The extracts of the Judgment are reproduced below:-*

*“Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious and this legal usage has etymology in its favour. The Latin militia means badness, physical or moral – wickedness in disposition or in conduct – not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent, or motive. But intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. **When we say that an act is done maliciously, we mean one of the two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive.**”*

(Emphasis Supplied)

34. That in view of the aforesaid discussion, we are of considered view that in the garb of IBC Proceedings the Corporate Debtor has attempted to play fraud on its Stake Holders. The IBC Proceedings cannot be utilised to make the illegal acts as legal. Hence, we conclude that the Application under Section 10 has been filed with malicious and fraudulent intent, to cause injury to the stakeholders of the Corporate Debtor.

37. That after the aforesaid discussion we have concluded that the Application filed under Section 10 of IBC, 2016 was an attempt on the part of the Corporate Debtor to play fraud on thousands of Home Buyers, Noida Authority, Government Authorities etc. Further great prejudice must have caused to them if the CIR Process was triggered. Therefore, we are imposing Rs.1 Crore penalty on the Corporate Debtor which shall be deposited in Prime Minister's Relief fund within 15 days from today.”

28. The above judgment of this Tribunal was founded on several facts, not only against the recovery initiated against the Corporate Debtor. Much reliance has been placed by the learned Counsel for the SBI on judgment of this Tribunal in ***Company Appeal (AT) (Ins.) No.1342 of 2023 – M/s Agroha Paper Industries Pvt. Ltd. vs. Bank of Maharashtra***. In the above case, this Tribunal has noted the sequence of events of proceedings taken against the CD. It was also noticed that proceedings have been initiated by the Bank and the CD in the year 2019. The possession of property was taken under Section 14 of the SARFAESI Act and sale was confirmed and all the steps preceded prior to filing of Section 10 application. In paragraphs 11 and 13, this Tribunal laid down following:

“11. Be that as it may, we also notice that much before the Section 10 application was filed by the Appellant, the Respondent Bank had issued notices to the Appellant for

personal hearing before declaring the Appellant to be a wilful defaulter. We also find that the Adjudicating Authority took notice of the fact that the Appellant Company failed to appear before the Respondent Bank in spite of notices having been issued to them twice and gave a slip to the proceedings initiated by the Wilful Defaulter Identification Committee of the Respondent Bank. Even after being declared a defaulter, the Appellant continued not to respond to the notices issued by the Respondent Bank. Moreover, while on the one hand it was dodging the notices for appearance, on the other hand, it was making strenuous efforts to enter into some sort of settlement with the Respondent Bank. We notice one such letter dated 11.03.2019 placed at page 120-121 of Appeal Paper Book (**'APB'** in short) where the Appellant Company has requested the Respondent Bank *“to either sanction additional funds to meet the aforesaid requirement or grant us a time for 6 to 12 months to arrange for the alternate sources of finance to repay the present debt as well as to meet the Company’s fund requirement for smooth business operations in order to keep it as a going concern and contribute towards Country’s economy”*. This shows that the Appellant Company was selectively approaching the Bank requesting for some reprieve but was deliberately avoiding the Bank in the proceedings being conducted for being a wilful defaulter. This glaring duplicity in the conduct of the Appellant as pointed out by the Respondent Bank has also been taken cognisance of by the Adjudicating Authority in concluding that the Appellant has come before it with unclean hands.

13. We would like to next dwell upon the SARFAESI proceedings initiated by the Respondent Bank in juxtaposition to the contention of the Appellant that the Adjudicating Authority failed to appreciate that pendency of SARFAESI proceedings cannot be a ground to reject the Section 10 application. Chronologically seen, the SARFAESI proceedings in the present facts of the case clearly preceded

the Section 10 application. The Respondent Bank had issued Section 13(2) notice under SARFAESI Act to the Appellant-Corporate Debtor on 11.01.2019. The Appellant conscious of the initiation of the SARFAESI proceedings, made a request to the Respondent Bank on 11.03.2019 to either sanction additional funds to meet their fund deficit or alternatively grant them additional time to arrange for alternate sources of finance to repay their debt. The Respondent Bank did not accede to either of the request of the Appellant and instead proceeded ahead with the SARFAESI proceedings. Possession and pre-sale notice were issued on 25.03.2019 and 15.10.2019. The e-auction notice was issued on 28.01.2020. The Bank had issued the sale auction notice by following the due procedure and cannot be faulted on this account. The Respondent Bank took physical possession of the property under Section 14 of SARFAESI Act on 24.05.2022 and sale was confirmed to the successful bidder. All these steps under the SARFAESI proceedings had therefore clearly preceded the filing of the Section 10 application by the Appellant.”

29. In the above background, this Tribunal took the view that Appellant was trying to embroil the Respondent Bank in multiple layers of litigation. In paragraph 15 of the judgment, following was held:

“**15.** When we take a holistic view of the entire conspectus of facts, it does not escape notice that the Appellant was trying to embroil the Respondent Bank in multiple layers of litigation. It is an undisputed fact that the Appellant had filed securitization application SA-365 of 2019 before the DRT, Lucknow for stay on the auction of its properties by the Respondent Bank. Apart from moving the securitization application before the DRT, the Appellant had also knocked at the doors of the Hon’ble Allahabad High Court by filing a Writ petition. Though the matter was heard on the same date

(16.07.2022) on which the auction in pursuance of the sale notice was to take place, the Hon'ble High Court did not stay the e-auction. The Hon'ble High Court only observed that the e-auction shall abide by the outcome of the application for interim relief pending before the DRT, Lucknow. Interestingly, we also notice at page 242 of APB that though the DRT, Lucknow in SA-365 of 2019 in its order dated 22.11.2022 had granted status quo in respect of the subject properties under e- auction, but by that time the assets of the Corporate Debtor had already been auctioned by the Respondent Bank. The auction had already been completed by the Respondent Bank and acceptance of the auction bid had been communicated by the Respondent Bank to the purchaser on 16.11.2022 as seen at page 235 of the APB. It is therefore clear that the Appellant made incessant efforts to put a spanner in the recovery proceedings initiated by the Respondent Bank and finally resorted to filing the Section 10 application."

30. The facts which come out in M/s Agroha Paper Industries Pvt. Ltd. contained sufficient material to come to the conclusion that CD was trying to embroil the Bank in multiple layers of litigation and the application under Section 10 was filed with the unclean hands, this fact was taken note by the Adjudicating Authority, which orders were confirmed by this Tribunal. In the present case, only basis for filing Section 65 application is that the Bank has initiated proceedings under Section 13, sub-section (2) of the SARFAESI Act, prior to filing of Section 10 application. We have noticed the judgment of this Tribunal taking the view that initiation of proceedings under Section 13, sub-section (2) of the SARFAESI Act, is not a ground to reject Section 10 Application. Section 10 application can be founded on debt and default, which can be proved from relevant facts in a

particular case. Proceedings initiated against Corporate Debtor under Section 13, sub-section (2) or application under Section 19 of the Debt Recovery Tribunal Act, 1993 can also be incidents to prove debt and default. The present is a case where Adjudicating Authority has allowed Section 65 application filed by the SBI principally based on the foundation of the SBI that Section 10 application filed at the time when proceedings under Section 13, sub-section (2) were on the verge of completion. Whether Section 10 application deserve to be admitted or not, is a decision, which has to be taken by the Adjudicating Authority on facts of each case.

31. We in the present case are considering the question as to whether rejection of Section 10 application on the ground of invoking Section 65 is justified or not. There are no other facts and ground pleaded to prove any fraudulent and malicious intent by the CD in filing Section 10 application. For allowing Section 65 application, fraudulent and malicious intent of CD has to be proved from some materials on record. Merely because proceeding under Section 13, sub-section (2) and (4) has been initiated by the creditor prior to filing of Section 10 application, cannot be a ground to hold that Section 10 application is filed with malicious and fraudulent intent. For proving fraudulent and malicious intent, something more is required to be pleaded and proved apart from initiation of proceedings under Section 13, sub-section (2) and (4) by the creditor against the Corporate Applicant.

32. In view of the foregoing discussions, we are satisfied that Adjudicating Authority committed error in allowing Section 65 application

filed by the SBI and rejecting Section 10 application. In event a proposition of law is accepted that when a creditor has initiated proceedings under Section 13, sub-section (2) against the CD, he is precluded to file Section 10 application, that proposition will be clearly against the intent and purpose of Section 10 of the IBC. However, in appropriate cases, where it is proved that initiation of Section 10 application is for purpose other than resolution of the Corporate Debtor and has been initiated with malicious and fraudulent intent, the Adjudicating Authority is fully justified in rejecting Section 10 application, which proposition has been laid down and accepted by this Tribunal in cases as noted above.

33. As observed above, the basis of rejection of Section 10 application is the finding by the Adjudicating Authority that application has been filed with malicious and fraudulent intent to delay and halt the recovery proceedings. There mere fact that application is filed, consequent of which the recovery proceedings may be halted, cannot lead to conclusion that intent and purpose of the application is malicious and fraudulent. We, thus, are satisfied that Adjudicating Authority committed error in allowing Section 65 application filed by the SBI.

34. In result, we allow the Appeal and set aside the order dated 30.09.2024 allowing IA No.1955 of 2024 and rejecting Section 10 application. The Appeal is allowed. IA No. 1955 of 2024 is dismissed. The company petition filed under Section 10 is revived to be considered and decided by the Adjudicating Authority afresh. We make it clear that we have not expressed any opinion in this order regarding merits of Section

10 application and the question as to whether the application deserves to be admitted or not is for the Adjudicating Authority to consider the submission of the parties and take decision in accordance with law in C.P. (IB)-749/ND/2023. The Appeal is allowed accordingly. There shall be no order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

NEW DELHI

21st November, 2024

Ashwani