

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. II)
KOLKATA**

IA (I.B.C) No. 825/KB/2022

IA (I.B.C) No. 58/KB/2023

And

C.P. (I.B) No. 104/KB/2022

A Petition under section 10 of the Insolvency and Bankruptcy Code, 2016 read with rule 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations 2016.

In the matter of:

Power Max (India) Private Limited

(CIN:U31403WB1984PTC037436)

Having its registered office at: -

Stephen Court, 18A Park Street, 5thFloor Flat

No. 5J, Lift No. 03 Kolkata – 700071.

...Corporate Applicant

IA (I.B.C) No. 825/KB/2022

Cobit Engineering Private Limited

...Applicant

Versus

Power Max (India) Private Limited

...Corporate Debtor/ Corporate Applicant

IA (I.B.C) No. 58/KB/2023

Singhvi Rolling Shutters & Engineering Works represented by its

Proprietor Mr. Raj Kumar Singhvi

...Applicant

Versus

Power Max (India) Private Limited

...Corporate Debtor/ Corporate Applicant

Coram:

Smt. Bidisha Banerjee

Shri Balraj Joshi

: Member (Judicial)

: Member (Technical)

Date of hearing: 20 February, 2023

Order pronounced on: 01 May, 2023

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Power Max (India) Private Limited
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Appearances (through video conference/physical hearing)

For the Operational Creditor : Mr. Ashmita Chakraborty, Adv.
: Mr. Chhandak Dutta, Adv.
: Mr. Pranav Sharma, Adv.
: Mr. Swetank Rai, Adv.
For the Applicant : Ms. Urmila Chakraborty, Adv.
: Ms. Neelina Chatterjee, Adv.
: Mr. Suvodeep Chakraborty, Adv.
For Applicant in 825/2022 : Ms. Sharon Patole, Adv.

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. This Court convened *via* hybrid mode.
2. The present Petition has been filed by Power Max (India) Private Limited (***‘the Corporate Applicant’***), under section 10 of the Insolvency and Bankruptcy Code, 2016 (***‘the Code’***) for initiation of Corporate Insolvency Resolution Process (***‘CIRP’***) against itself. The Application has been filed through its Director Mr. Dilip Kumar Bose, DIN: 00996851, duly authorised *vide* Board Resolution dated 23 February, 2022¹.
3. The members of the Corporate Applicant have given their consent by way of a resolution passed in the Extra Ordinary General Meeting held on 23 February, 2022 to file the application under section 10 of the Code².
4. The Corporate Applicant was incorporated on 28 April, 1984 under the provisions of the Companies Act, 1956. The Corporate Applicant was involved in the business of providing integrated engineering services to various engineering, infrastructure, power and manufacturing entities. The activities of the Promoters started prior to its incorporation way back in 1977 and were subsequently converted into a corporate entity in 1984.

¹Page 58 of the Application.

²Pages 63 – 65 of the Application.

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5. The major activities of the Corporate Applicant includes boiler erection, boiler overhauling, renovation & modernizing, equipment erection, design, RUM fabrication, erection of utility pipelines/ material handling plant, basis fabrication and similar other activities. The services of the Corporate Applicant have been availed of by several types of companies such as engineering, infrastructure, power, metal, refiners and petro-chemicals, fertilizer, paper, steel, cement and many more. The operations of the Corporate Applicant were running smoothly for decades and the company gained the status of a market leader pan-India.
6. The reasons for applying for initiation of the CIRP by the Corporate Applicant are as follows: -
 - 6.1 The Corporate Applicant continuously earned profits till the year 2019-20. Net Profit earned by the Corporate Applicant during 2019-20 amounted to approximately 23-59 lakhs. However, once COVID-19 struck the country and lockdown was imposed, turmoil started happening in operations and financial positions of the Corporate Applicant. During the lockdown period, all the ongoing contracts under execution were naturally affected because of non-attendance of labourers, supervisors, engineers, and supply of materials were also affected.
 - 6.2 The Corporate Applicant consequently failed in its commitments to honor timelines for execution of its on going contracts/assignments. Furthermore, during the prolonged period of lockdown, on the other hand, release of payments from customers were totally stopped coupled with continuity in payment of salaries & wages to workers and employees completely eroded the liquidity of the Corporate Applicant.
 - 6.3 When the Corporate Applicant failed in keeping its execution timelines, the customers, went ahead ruthlessly in adjusting caution money deposits and invoking bank guarantees. The overall impact was on the Corporate Applicant Cash Credit and other facilities which became overdrawn resulting in defaults.
 - 6.4 Under this situation, the Corporate Applicant approached its sole Banker-Indian Bank (erstwhile Allahabad Bank) for long term re-scheduling/

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restructuring of its credit facilities and sanction of additional limits in order to be able to start operations at its different contract/ execution sites. However, the Bank, did not take cognizance of factors such as unparallel background of the Corporate Applicant, or its reputation as a leading engineering service provider.

6.5 Further, immediately thereafter, the Bank started sending notes of clearance of defaults vide letters/ reminders dated 09 November, 2021, 12 November 2021, 20 November 2021, 25 November 2021, 29 November 2021, 10 December 2021 and 03 December 2021. As per the last such reminder from the Bank, the Corporate Applicant was asked to clear defaults to the tune of Rs. 40.50 Crores as on 03 January 2022.

6.6 Hence, the Corporate Applicant in its endeavour to revive its operations and in order to come back in its previous glory, have passed a Special Resolution at its Extra-Ordinary General Meeting held on 23 February, 2022 to make an application under section 10 of the Insolvency and Bankruptcy Code, 2016 for the commencement of the Insolvency Resolution Process.

7. IA (I.B.C) No. 825/KB/2022

7.1 This is an Application filed by Cobit Engineering Private Limited (**'Applicant'**), one of the Operational Creditor of the Corporate Applicant, *inter alia*, praying for the following reliefs;

a. Direction on the Corporate Applicant to forthwith pay the outstanding amount of Rs.32,55,544/- (Rupees Thirty Two Lakh Fifty Five Thousand Five Hundred Forty Four only).

b. To award interest to the Applicant on the outstanding amount of Rs.32,55,544/- (Rupees Thirty Two Lakh Fifty Five Thousand Five Hundred Forty Four only).

c. To adjudicate the claim of the Applicant before allowing the Application filed under section 10 of the Code by the Corporate Applicant.

8. IA (I.B.C) No. 58/KB/2023

8.1 This is an Application filed by Singhvi Rolling Shutters & Engineering Works represented by its Proprietor Mr. Raj Kumar Singhvi (**'Applicant'**), one of the

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Operational Creditor of the Corporate Applicant, *inter alia*, praying for the following reliefs;

- a. Direction on the Corporate Applicant to release the entire amount being Rs.1,82,025/- (Rupees One lakh Eighty Two Thousand Twenty Five only) to the Applicant.
9. The Corporate Applicant has proposed the name of **Mr. Tarun Kumar Ray (Regn. No. IBBI/IPA-001/IP-P01411/2018-2019/12228)** having *email i.d.tarun.ray123@yahoo.com*, to function as the Interim Resolution Professional (IRP). **Mr. Tarun Kumar Ray** has submitted his written communication in Form 2. The written communication is annexed to the application and marked as **Annexure-H**.

Analysis and Findings

10. We have heard the learned Counsel appearing for the Corporate Applicant and have perused the documents on record.
11. To consider whether a section 10 application is maintainable by a Corporate Applicant, following factors have to be borne in mind;
 - I. ***There must be Existence of Debt and Default*** - The Hon'ble NCLAT in ***Unigreen Global Private Limited vs. Punjab National Bank and Ors*** (2017 SCC Online NCLAT 566) having compared sections 7 and 10 of the Code has held that the test laid down by the Hon'ble Apex Court with regard to applications by financial creditors under section 7 in ***M/s. Innoventive Industries Ltd. versus ICICI Bank &Anr.*** (2018 1 SCC 407) is applicable to Section 10 i.e. 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 must give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority.
Thereby, a creditor of the debtor company can raise a defence that there is no default or debt is not due or payable in fact or law as is the case in applications under section 7.

Applying the aforesaid principle, the Hon'ble NCLAT in ***Krishna Kraftex Pvt. Ltd. versus HDFC Bank & Ors.*** (2018 SCC Online NCLAT 357) set aside the judgment of the Adjudicating Authority which had rejected the application under section 10 on the ground that though the balance sheet of the debtor showed its liability, there was no evidence to show a claim had been lodged with the corporate debtor and was lying unpaid. The Hon'ble NCLAT directed the Adjudicating Authority to admit the application if it was complete.

There is no dispute from any quarter that the debt is due and payable by the Corporate Applicant to various creditors and that the Corporate Applicant is unable to pay the same [*list of Creditors – Annexure G at pages 109 – 124 of the Application*]. Hence, factor 01 is satisfied.

- II. ***Application must be complete and Disciplinary Proceedings must not be pending against the Interim Resolution Professional*** -Section 10 posits that an application may be rejected on two grounds. Firstly, if the application is incomplete i.e. it does not contain the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor approving filing of the application, the information relating to its books of account and such other documents required to be filed in terms of the Code and the relevant rules and regulations, details relating to proposed interim resolution professional etc. However, the Adjudicating Authority shall, before rejecting an application, provide 7 days to the applicant to rectify its defects. The second ground for rejection is if any disciplinary proceeding is pending against the proposed resolution professional.

In this regard, reference is made to ***Gaja Trustee Company Private Limited & Ors. vs. M/s. Haldia Coke & Chemicals Pvt. Ltd. & Ors.*** (2018 SCC Online NCLAT 331), where the Hon'ble NCLAT held that for filing an application praying for initiation of insolvency against another debtor company, the authorisation of the Board of Directors would be sufficient. However, when a debtor company was praying for initiation of

insolvency against itself under section 10, then a resolution passed by shareholders would be a mandatory requirement.

It is noted that this Petition is free from defects and complete in all aspects as required under the law. The Petition shows that the Corporate Applicant is in default of a debt that is due and payable, and the default is more than the threshold amount as stipulated under section 4(1) of the Code at the relevant time. The default stands established and there is no reason to deny the admission of the present Petition. The Corporate Applicant has proposed the name of the IRP who has submitted its written consent (section 10(3)(b)).

III. *Application not be barred under Section 11 of the Insolvency and Bankruptcy Code, 2016* - Section 11 restricts certain categories of persons from initiating corporate insolvency resolution process i.e. (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.

In *Unigreen Global Private Limited vs. Punjab National Bank and Ors.* (Supra), it was clarified that if any winding up proceeding has been initiated against the corporate debtor by the 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 a ground for rejection.

In *Ameya Laboratories Ltd vs. Kotak Mahindra Bank and Ors.* (2017 SCC Online NCLAT 536), the Hon'ble NCLAT has held that when an order for winding up has been passed and subsequently stayed by an appellate authority, but the same is pending against the corporate debtor,

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the application under section 10 of the Code at the instance of the corporate applicant is not maintainable in view of the bar imposed under Section 11(d) of the Code.

There is nothing on record to evince that bar under section 11 of the Code would get attracted.

IV. *The application must be judged only on the basis of the information required under the Code and the accompanying rules and regulations* - The Hon'ble NCLAT in *Unigreen Global Private Limited vs. Punjab National Bank and Ors. (Supra)* has held that the examination of an application under section 10 must be confined to the record i.e. the information to be provided in the terms of the Code, regulations, rules and form 6 of the Application to Adjudicating Authority Rules, 2016 and extraneous factors need not be considered. Non-disclosure of any fact other than that required as stated aforesaid will not be considered as suppression of facts nor will it amount to the debtor-not-coming-with-clean-hands syndrome, except for any disclosure with regard to disqualification under section 11 of the Code. The existence of proceedings under Section 13(4) of the SARFAESI Act, 2002 against the corporate debtor or of a suit against the corporate debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or an appeal pending before the Debt Recovery Appellate Tribunal cannot be a ground to reject an application under Section 10 if the application is complete.

In *Gemini Innovations Pvt. Ltd vs. State Bank of India* (2018 SCC Online NCLAT 920), the Hon'ble NCLAT declared that the action of the adjudicating authority in examining the genuineness of the arbitral award on which the debt of the Corporate Debtor was predicated, went beyond the scope of adjudication. The finding that the arbitral award was procured in an unnatural manner and could not be believed was found to be beyond the record i.e. beyond the information required to disclosed and examined in terms of the Code.

In *BCL Homes Ltd. vs Canara Banks & Ors* (2018 SCC Online NCLAT 134), the Hon'ble NCLAT held that the Code, Rules and Regulations do not stipulate that the debtor company has to provide details of the lands sold or assets transferred even if the same are transferred to close relatives of the directors of the debtor company prior to the filing of application under Section 10.

In *Antrix Diamond Exports Pvt Ltd vs. Bank of India and Ors.* (2018 SCC Online NCLAT 33), the adjudicating authority had dismissed the application on the ground that the application was an attempt to scuttle the SARFAESI proceedings and delay the recovery of assets by the creditors. The Hon'ble NCLAT set aside the judgment while holding that the SARFAESI proceedings were an extraneous factor and not required to be disclosed in terms of the Code or form 6.

Here, the Corporate Applicant has also filed the Special Resolution passed by shareholders in Extra Ordinary General Meeting dated 23 February, 2022 under section 10(3)(c).

V. *The debtor company must not be a profit making company* - In *Vyomit Shares Stock & Investments Pvt. Ltd. Vs. Securities and Exchange Board of India* (2019 SCC Online NCLAT 287), the Hon'ble NCLAT has held that where an applicant is generating sufficient income and profit, the application filed under section 10 may be rejected on such ground.

The Corporate Applicant has furnished the books of accounts for the relevant period under section 10(3)(a) and prima facie nothing indicates that it is still a profit-making company.

12. Therefore, in the light of the facts stated in the application, the evidence placed on record and discussion supra, this Adjudicating Authority admits this Application and orders initiation of CIRP against the Corporate Applicant under the following terms: -

- (a) The Application bearing *C.P. (I.B) No. 121/KB/2022* filed by the Corporate Applicant under section 10 of the Insolvency & Bankruptcy

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Code, 2016, is hereby admitted for initiating the Corporate Insolvency Resolution Process in respect of Power Man (India) Private Limited.

- (b) There shall be a moratorium under section 14 of the IBC.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Applicant under section 33 of the IBC, as the case may be.
- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) As per the proposal given by the Corporate Applicant, **Mr. Tarun Kumar Ray (Regn. No. IBBI/IPA-001/IP-P01411/2018-2019/12228)** having email *i.d.tarun.ray123@yahoo.com*, is appointed as the IRP for ascertaining the particulars of Creditors and convening a Committee of Creditors for evolving a Resolution Plan.
- (f) During the CIRP period, the management of the Corporate Applicant shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the Code. The officers and managers of the Corporate Person shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical reports on quarterly basis with regard to the progress of the CIRP in respect of the Corporate Applicant.
- (h) The Corporate Applicant to pay to IRP a sum of **Rs.3,00,000/- (Rupees Three Lakh only)** to meet the initial costs, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment.

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- (i) The Resolution Professional shall conduct CIRP in a time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.
- (j) Additionally, the Corporate Person shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, by all available means for updating the Master Data of the Corporate Applicant. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.
- 13.** Since, the Application being *C.P. (I.B) No. 121/KB/2022*, filed under section 10 of the Code by the Corporate Applicant, is admitted. Resultantly, the *IA (I.B.C) No. 825/KB/2022* and *IA (I.B.C) No. 58/KB/2023* becomes infructuous, and is dismissed. Further, the Applicant in the respective IA's can file their respective claims with the Interim Resolution Professional, within the stipulated time period.
- 14.** *C.P. (I.B) No. 121/KB/2022* to come up on **07 June 2023** for filing the first progress report.
- 15.** A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

The Order is pronounced on 01 day of May, 2023

SA[LRA]