IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH - II, CHENNAI

IBA/120/2020

(filed under Section 10 of Insolvency and Bankruptcy Code, 2016)

Along with

IA/636/2020 in IBA/120/2020

(filed under Section 60(5) of Insolvency and Bankruptcy Code, 2016)

In the matter of **M/s. Prithivraj Spinning Mill Private Limited**

M/s. Prithivraj Spinning Mill Private Limited
Old No. 29, New No.19, Om Sakthi Nagar,
Police Quarters Road, Ganapathy,
Coimbatore – 641 006

--- *Corporate Applicant*

Vs.

Indian Overseas Bank, Coimbatore
Ganapathy Branch
Sathy Road (Near Textool Bridge)
Coimbatore – 641 006

State Bank of India,
SME Branch, Overseas Branch
13 – 1 Munsif Srinivasapuram
Uthukuli Road – Tirupur 641 601

IndusInd Bank Ltd.
652 – 662, Tristar Towers
Avinashi Road,
Coimbatore – 641 037

--- *Respondents*

CORAM

R. SUCHARITHA, MEMBER (JUDICIAL)
B. ANIL KUMAR, MEMBER (TECHNICAL)

For the Applicant : Mr. A.S. Sathish Kumar, PCS

ORDER

Per: **R. SUCHARITHA, MEMBER (JUDICIAL)**

Heard and dictated in open Court on 09.12.2020

1. This is an application filed under Section 10 of IBC, 2016 before this Tribunal on 27.01.2020 to initiate Corporate Insolvency Resolution Process in relation to the Corporate Debtor viz. M/s. Prithivraj Spinning Mill Private Limited. This matter was first posted for hearing on 17.02.2020 and on the same date, it is seen from the record of proceedings that one counsel Ms. E. Chitra was present and sought time to file objection in relation to Indian Overseas Bank, one of the Financial Creditors. It was further observed that one of the Financial

Creditors (State Bank of India, the 2nd Respondent) was not represented. Hence, this Adjudicating Authority directed fresh notice to be issued to the State Bank of India / 2nd Respondent and also directed the Applicant to file full copy of the minutes of the EoGM held on 10.01.2020 along with attendance sheet of the shareholders disclosing the details of the shareholders who attended the meeting along with their signatures.

2. It is to be noted here that on 17.02.2020, the Authorized Representative for the Applicant has filed Certificate of Incorporation of in relation to the Corporate Applicant, M/s. Prithiviraj Spinning Mill Private Limited and Memorandum of Association of M/s. Prithiviraj Spinning Mill Private Limited. As per the Memorandum of Association, this Corporate Debtor has two directors on the Board viz. Mr. M. Shanmugam S/o. Mr. A. Marappan and Ms. Philomena wife of Mr. M. Shanmugam. On 24.02.2020, the Authorized Representative for Applicant has filed the notice which was sent to 2nd Respondent and

the minutes of the EoGM along with the attendance sheet of the members and Form NGT 14 which was filed before the RoC. Thereafter, the matter was taken up for hearing on 04.03.2020 and at the request of the Applicant, the matter was adjourned to 17.03.2020. Sunsequently, due to Covid-19 Pandemic and attendant lockdown imposed by the State and Central Government, the matter was listed on 20.08.2020 and the counsel for the 1st Respondent has sought time to file counter on 20.08.2020. However, on 20.08.2020, there was no representation on behalf of R1 and R2 and the matter was adjourned to 02.09.2020.

3. In the meantime, it is seen from the records that the Authorized Representative has filed a memo before this Tribunal on 19.08.2020 vide Diary No. 2350, wherein it has been stated that the Applicant Company has paid off the amounts which is due to the 2nd Respondent / State Bank of India and Form CHG 4 intimating the satisfaction of charge has also been filed with the RoC, Coimbatore. This leads us to

the question as to what drove the Applicant to settle the entire dues of the 2nd Respondent / State Bank of India alone, *de hors* the dues of the other creditors. Further, it has not been disclosed as to how the said sum was paid to the 2nd Respondent / State Bank of India, whether by obtaining a loan from another creditor and whether such a creditor is aware of the fact that the Corporate Application has filed an Application under Section 10 of IBC, 2016 before this Tribunal.

4. Subsequently, when the main Company Petitioner was pending, the Authorized Representative for the Applicant Company filed IA on 18.08.2020 which was numbered as IA/636/2020. This IA is filed under section 60(5) of IBC. A perusal of the said IA posits the fact that the name of the Corporate Applicant has been changed from M/s. Prithviraj Spinning Mills Private Limited to M/s. Marappar Textiles Private Limited and that in the 6th General body meeting held on 30.09.2019, it was approved to change the name from M/s. Prithviraj Spinning Mills Private Limited to M/s. Marappar Textile Private

Limited. The Ministry of Corporate Affairs approved the change of name by issuing fresh certificate of incorporation dated 31.03.2020. However, there was no change of address of registered office. The certificate of incorporation dated 31.03.2020 also reflects the address, as stated in Form –VI of the application.

5. Thereafter, the Board of Directors in its Board Meeting held on 05.05.2020 (i.e. after the filing of the present Application) resolved to shift / change the Registered office of the factory premises from Old No.29, New No.19, Om Sakthi Nagar, Police Quarters Road, Ganapathy, Coimbatore – 641 006 to SF No.653/2 and 654/2 Kanjapalli village, Annur, Coimbatore 6410 03. The copy of Form INC-22 along with supporting documents is filed as Exhibit A3 and A4.

6. However, it is to be noted here that when the Applicant Company has filed the present Application under Section 10 of IBC, 2016 to initiate the Corporate Insolvency Resolution Process in relation

to the Corporate Debtor, the Corporate Applicant is very much aware of the fact that the name of the Corporate Applicant is changed, however has failed to state or disclose such fact in Form – VI. This amounts to the concealment and suppression of the material fact by the Applicant Company. Further, no reasons have been adduced as to why the Applicant sought to change the registered office address, after the filing of an Application to declare the Corporate Application as Insolvent. The change in the name of the Applicant Company and its Registered Office is governed by the Companies Act, 2013 and from the documents filed along with the IA, is evident that the Applicant has followed the procedures as contemplated under the Companies Act, 2013.

7. This Tribunal is unable to fathom as to why there is a change in the name of the Applicant Company just when they are filing an Application under Section 10 of IBC, 2016. It is significant to point out here that Section 10 of IBC, 2016 is a peculiar section in which the

Corporate Applicant himself submits that he is unable to service its due to the creditors and consequently to declare him as insolvent and to initiate the Corporate Insolvency Resolution Process. Under such circumstances, if an Application is admitted then the IRP has to cause a public announcement as per Section 15 of IBC, 2016. Assuming for a moment, if the name of the Company is being changed along with its Registered Address just before this Tribunal triggers the CIRP, then the IRP has to necessarily cause paper publication in relation to the Corporate Debtor in its new avatar and as such, the creditors of the Corporate Debtor would not be in a position to identify Corporate entity in its new avatar and it would result in defeating the very purpose of causing public announcement. The change in the name of the Corporate Debtor and its Registered Office address, pending disposal of a Section 10 Application before this Tribunal, has great direct and indirect impact especially under IBC, in view of the fact that if this Application is admitted, it is binding upon the public at large. This order is a judgment in *rem* and not in *personem*. All the stakeholders, secured and unsecured creditors are not party to this application, however they would be kept in dark as to the change in name of the Corporate Debtor and would be unable to file their claim before the IRP and as such their rights would be either directly or indirectly be affected. Hence this Adjudicating Authority is duty bound to protect the rights of public at large.

8. Further, as already alluded *supra*, the Applicant has filed the present Application under Section 10 of IBC, 2016 to declare him as insolvent and to initiate CIRP. Section 10 of IBC, 2016 can be very well discerned from Section 7 and 9 of IBC, 2016. In an Application filed under Section 7 or 9 of IBC, 2016 the Corporate Debtor is a Respondent. <u>However, in Section 10 of IBC, 2016, the Corporate Debtor is an Applicant and the status of the Corporate Debtor is that of a person who submits himself to the jurisdiction of this Tribunal to declare him as Insolvent and in such a case, **it should be construed that on the date of filing of the Application before this Tribunal**</u>

under Section 10 of IBC, 2016, the Board of the Corporate Debtor is deemed to be virtually suspended, since according to the Applicant Company it requires only an order of moratorium which is required to be passed by this Tribunal, besides satisfying its debt and default. In other words, after filing of an Application under Section 10 of IBC, 2016, the Applicant Company is required to maintain a *status quo* in relation major decisions being taken, let alone keeping the Company as a going concern. Further, the Corporate Applicant, after filing of an Application under Section 10 of IBC, 2016 is required to restrain itself from making any change to the constitution of the share holding pattern, list of secured/ unsecured creditor stake holders, selling, encumbering properties, buying and all related activities are required to be kept in abeyance.

9. Thus, it is imperative on the part of the Applicant to come with clean hands before this Tribunal and the Applicant ought to have brought to the knowledge of this Tribunal the change of name of the

Applicant Company, while filing of the Section 10 Application itself, since the matter is *sub-judice* and any action done by the Applicant Company without the knowledge of this Tribunal would have severe repercussion. Further, the intention of the Applicant Company to change its name and then immediately file an Application under Section 10 of IBC, 2016 would lead to an irresistible conclusion that the Application has been filed by the Applicant Company with a malicious intention to defraud the creditors, since the creditors would not be able to identify the Applicant Company in its new avatar once the public announcement has been made in the newspapers.

10. The IA/636/2020 is an application with a prayer to amend Form – VI which was filed by the applicant to give effect of change of name and change of the Registered Office. The Petitioner has sought for amendment of Form-VI which is pivotal for this application. However, the Applicant has not filed the amended copy of Form-VI along with this application. The IA was not accompanied by the amended Form-

VI which is mandatory. A question was put to the Authorized Representative for the Applicant, as to whether the Applicant has filed Amended copy of the Application and necessary corrections were carried out in the main application, to which the Authorized Representative for the Applicant stated that he has not filed amended copy of the application along with the IA/636/2020.

11. It is to be noted here that when this matter was taken up for hearing on 02.09.2020, the Authorized Representative for the Applicant was given an opportunity to file the amended copy in the Registry and Orders were reserved as well as in the main application. However, the amended copy of the Form-VI is not filed till date. It is pertinent to mention here that the orders were originally reserved on 02.09.2020 by NCLT Chennai Bench, Court-II comprising of Smt. R. Sucharitha, Member (Judicial) and Mr. S. Vijayaraghavan Member (Technical). However, the Hon'ble Member (Technical) demitted office on 21.10.2020 and as per Rule 152(4) of NCLT Rules, 2016, this matter is

required to be de-reserved and for such purpose it was posted for clarification. Thereafter Special Bench was constituted on 02.11.2020 to take up only urgent application, however considering the time frame stipulated under the IBC, 2016 this matter was listed on 11.11.2020 and it was brought to the notice of Authorized Representative for the Applicant Company that copy of amended Form-VI has not been enclosed and hence order could not be finalized.

12. It is pertinent to mention here that as per the records of this Adjudicating Authority, the name of the Corporate Debtor is still reflecting as M/s. Prithviraj Spinning Mills Private Limited. The matter was listed on 11.11.2020 for the purpose of de-reserving and was subsequently adjourned to 17.12.2020. However, the Authorized Representative for the Applicant Company till date has not taken any steps to file copy of the amendment of Form-VI as sought for.

13. In the meantime, against the order dated 11.11.2020, the Applicant Company went on Appeal before the Hon'ble NCLAT and the Hon'ble Appellate Tribunal vide order dated 03.12.2020, in the name of M/s. Marappan vs. IOB & another in Company Appeal (AT)(Insolvency) No. 1030 – 1031 of 2020 directed this Tribunal to prepone the case from 17.12.2020 and to list and dispose of this matter within a period of one week. The copy of the orders passed by the Hon'ble NCLAT was forwarded by the Authorized Representative for the Applicant Company on 04.12.2020. However, the certified copy of the order is yet to be received by the Registry. Accordingly, this matter was listed for hearing today (i.e. 09.12.2020) and is being disposed of by dictation in open court.

14. It is to be noted here that after the orders have been reserved in IBA/120/2020, the Applicant has filed two IA's and the same is yet to be numbered by the Registry and still pending at the SR stage. First

IA/SR/No.1042/2020 was filed on 16.10.2020 to avoid payment of dues to Tamil Nadu Electricity Board (TNEB).

15. Further, the Authorized Representative for the Applicant Company has filed another Application which is also yet to be numbered by the Registry and is pending at SR stage vide IA/SR No.1167/2020 dated 06.11.2020 and the Applicant in that Applicant has sought for the relief as follows;

a) *Pass Ad-interim Order restraining the Respondent from invoking the provisions of the SARFAESI Act, 2002 till disposal of the application filed by the Applicant u/s 10 of the Code in IBA/120/2020, which has been reserved for Orders on Sep 02, 2020.*

b) *Admit the application filed by the Applicant in IBA/120/2020 which was reserved for Orders at the last hearing held on Sep 02, 2020 and pass order to that effect without any delay;*

The Applicant in IA/SR No.1167/2020 has sought to invoke the jurisdiction of this Tribunal in order to restrain the creditors of the

Applicant Company to invoke their rights under the provisions of the SARFAESI Act, 2002. It is time and again reiterated by the Hon'ble NCLAT and it is no longer *res integra* that the proceedings under the SARFAESI Act, is a recovery proceeding and the proceedings under IBC, is for the Resolution of the Corporate Debtor and one proceeding cannot act in derogation of another. Both the proceedings are independent and ultimately it is the decision of the creditors to exercise their discretion as to which proceedings they want to proceed and this Tribunal cannot interfere in the rights exercised by the creditor in this regard.

16. The above two applications filed by the Applicant Company was not brought to the notice of this Tribunal by the Authorized Representative when the matter was taken up for hearing on 11.11.2020 and the said fact was suppressed by the Authorized Representative.

17. Now coming back to the factual matrix of the present case, it is seen that as per the records of this Adjudicating Authority, the name of the Corporate Applicant is M/s. Prithviraj Spinning Mills Private Limited. As per the Companies Act 2013, when the name of the company is changed the erstwhile name should also be reflecting for a period of two years. However, when the order of the Hon'ble NCLAT was placed before us, it is seen that the name of the Corporate Debtor is reflected as M/s. Marappar Textiles Private Limited, but the erstwhile name has not been reflected in the said order. In the said circumstances, this Tribunal is nor apprised of the fact as to whether the Applicant in the application has mentioned the erstwhile name of the company. Since the name of the Corporate Debtor in the order of Hon'ble NCLAT was reflected only as M/s. Marappar Textiles Private Limited, considerable time was spent in tracing out this application, since no application is pending before this Adjudicating Authority in the name of "M/s. Marappar Textiles Private Limited". Further, Form-VI of the Application stands in the name of M/s. Prithviraj Spinning

Mills Private Limited and the registered office does not match with the Master Data of the Ministry of Company Affairs. As already stated supra, the amended copy of the petition has not filed till date. Inspite of opportunity given to the Applicant, the Applicant has not taken steps to file the same. The change of name of the Applicant Company and the registered office has not been amended in the application pending in this Adjudicating Authority.

18. From the foregoing discussions and documents, it emerges that the Applicant after deciding to submit itself for initiation of CIRP under Section 10 of IBC, 2016, has decided to change its name, thereafter obtaining a fresh Certificate of Incorporation, decided to go another step to change the Registered Office address and also pending adjudication has settled the dues of the 2nd Respondent alone. Whether a fresh liability was incurred or paid out of its own sources is not available. However, since the Applicant is under huge debt, it might have incurred fresh debt, on the verge of going into CIRP. We have no

means to protect the recent debtor, whether they have knowledge of this pending application and its implications or not. Be it as it may, it is inappropriate on the part of the Applicant, to alter the financial status and undergo name change and address change. It is also pertinent to note that, subsequent to orders which was reserved on 02.09.2020, the Applicant filed an Application stating that Electricity Board is pressuring for electricity charges, and as such requested to pass an early order in Section 10 of IBC, 2016 followed by Moratorium, which shall help the Applicant to avoid payment of electricity charges for period consumed prior to CIRP. This leads to a question that, pending this Application, the Applicant showed undue urgency to settle the dues of the 2nd Respondent / State Bank of India, if so why the Applicant want to take advantage of IBC, to avoid payment of electricity charges. Then, another IA was filed to direct the Secured Creditor not to proceed against the secured assets for outstanding dues. This is a case, wherein Section 10 of IBC, 2016 is being misused by the Applicant Company.

19. From the flow of event as to the present case, it is necessary to relook at the provisions of Section 10 of IBC, 2016 and tighten the same to avoid misuse as done in the present case. We suggest that, if a Company chooses to file an Application under Section 10 of IBC, 2016, the Company ought to maintain *status quo* as on date of filing of Section 10 of IBC, 2016 Application. At the same time, the *status quo* shall not prevent the creditors and others to proceed against the Corporate Debtor till the disposal of the Application by an order of the Adjudicating Authority.

20. At this juncture, it is relevant to refer to Section 10 of IBC, 2016

> 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.

21. Section 10(4)(b) of IBC, 2016 contemplates that this Adjudicating Authority has the right to reject the Application if it is incomplete. As already stated supra, inspite of opportunity being granted, the Form – VI as filed by the Applicant is incomplete in all respects. Further, this Adjudicating Authority also cannot pass an order of CIRP as against

M/s. Prithviraj Spinning Mills Private Limited since the name of the Company is not in existence as on date.

22. Hence, for the reasons set out *supra,* the IBA/120/2020 filed by the Applicant Company stands **dismissed**. All the connected Application stands **closed**. No costs.

23. Let a copy of this order be communicated to IBBI by the Registry of this Tribunal.

-sd-
(ANIL KUMAR B)
MEMBER (TECHNICAL)

-sd-
(R. SUCHARITHA)
MEMBER (JUDICIAL)

Raymond