

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH C-IV**

IA-2721/2023

IN

CP (IB) No. 50/MB/2021

Under section 10 of IBC, 2016

In the matter of

Xylem Integrated Solutions

Private Limited,

(CIN U74999MH2016PTC286518)

4th floor, AJ House, Marol Maroshi Road, Andheri
(East), Mumbai - 400059, Maharashtra India.

... Corporate Applicant

Order delivered on: 14.07.2023

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicants:

Mr. Ashish O. Lalpuria PCS a/w Mr.
Gaurav Gadodia, Ld. Authorized
Representative,

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This present Interlocutory Application is filed under Rule 11 read with Rule 154 of the National Company Law Tribunal Rules, 2016 read with section 10 of the Insolvency and Bankruptcy Code, 2016 for recalling the order dated 21/03/2023 by rectifying the accidental omission of the proviso to sub-section (4) of section 10 of Insolvency and Bankruptcy Code, 2016 resulting in deprivation of a right contemplated by the law for correction of defects before dismissal of the Company Petition CP(IB)50/MB/2021. It is stated that the present Application is filed for rectification of the accidental omission and for restoring the Company Petition (IB)50/MB/2021 by recalling the order dated 21/03/2023 and afford an opportunity to the Applicant for removal of defects for the final determination by this Hon'ble Tribunal.

2. The Applicant submits that the Company on account of continuous financial losses was in default to various creditors since the financial year 2018-19. Further, the company suffered severe losses as a result of adverse business climate in the aftermath of the COVID-19 and resultant travel restrictions and weak business demand for an extended period of time, whereby the liabilities continued to rise while sources of revenue completely dried up.
 - 2.1. Therefore, the Board of Directors decided that best course of action available to the Company would be to apply under section 10 of the Insolvency and Bankruptcy Code, 2016. Accordingly, Board of Directors of the Company at their meeting held on 25th October 2020 passed the resolution for filing of petition before the Tribunal under section 10 of the Insolvency and Bankruptcy Code, 2016 which was subsequently

approved by the Shareholders of the Company at their meeting held on 28th October, 2020.

2.2. The Applicant Company thereafter filed CP (IB) 50/MB/2021 under section 10 on the grounds more specifically narrated in the said Petition and seeking prayer for Corporate Insolvency Resolution Process under section 10 of the Insolvency and Bankruptcy Code, 2016.

2.3. That the Hon'ble Tribunal after hearing the Applicant dismissed the said petition on the ground that the Applicant has not filed Form MGT-14 with Registrar of Companies and connected ancillary documents.

2.4. The Applicant after receiving the copy of the Order dated 21 March 2023 passed by the Hon'ble Tribunal, the Applicant was exploring the legal remedies available to the applicant under the law. Upon seeking advice it was pointed out to the Applicant that the Hon'ble Tribunal seems to have accidentally missed sub-section 4 of section 10 of Insolvency and Bankruptcy Code, 2016 which contemplates that before rejecting the Application under section 10, the Hon'ble Tribunal ought to have granted time to the Applicant to remove all defects. Further an advice was also given that the Hon'ble Tribunal may not have any powers of recalling the orders passed by them and therefore the only recourse available with the applicant was to once again file a petition under section 10 of Insolvency and Bankruptcy Code, 2016,

2.5. The Applicant based on the legal advice filed Company Petition having No. CP/IB/492/2023. The said petition was unfortunately based on erroneous belief that the Applicant could file a fresh petition based on the

same cause of action thereby the said petition was suffering from several defects.

2.6. As the aforementioned Petition was taking time to be numbered, the Applicant decided to take another legal opinion in the matter. It is stated that the Applicant was informed that as the Hon'ble Tribunal while passing impugned order dated 21/03/2023 had failed to consider the procedural requirement of Section 10(4) of Insolvency and Bankruptcy Code, 2016 before dismissing the CP/IB/50/2021, the Hon'ble Tribunal was empowered to recall their order. Further, it was also advised to the applicant to file MGT-14 to remove the defects as pointed out by Tribunal in its order dated 21/03/2023.

2.7. The Applicant accordingly attempted to file the e-Form MGT-14 on the MCA portal, however on account of technical glitches, the said form was finally filed on 15th June 2023.

2.8. The Applicant therefore decided to withdraw the CP/IB/492/2023 filed before the Hon'ble court and instead file the present Application. Accordingly, the Applicant withdrew the CP/IB/492/2023 on 19th June 2023 and informed the court that they would file appropriate interlocutory application for restoring the Company Petition (IB)50/MB/2021.

2.9. After completing the formalities, the present Application is filed under Rule 11 read with Rule 154 of NCLT Rules, 2016 to restore the Company Petition (IB)50/MB/2021 by recalling the order dated 21/03/2023 and thereafter grant an opportunity to the Applicant to remove any or all defects as may be found by Hon'ble NCLT

- 2.10. The Applicant states that section 10(4) contemplates that any Petition ought to be rejected only after giving an opportunity to the Applicant to remove the defects in the petition.
- 2.11. That the proviso to section 10(4) of Insolvency and Bankruptcy Code, 2016 is a mandatory requirement and that the Hon'ble Tribunal ought to have given an opportunity to the Applicant to remove the defects, if any before dismissing the Petition.
- 2.12. Since, Hon'ble Tribunal failed to provide an opportunity to the Applicant as stated in section 10 of Insolvency and Bankruptcy Code, 2016, the said dismissal of petition would not be in accordance to the procedure laid down in the Insolvency and Bankruptcy Code, 2016, thereby violating the fundamental rights of the Applicant of Equality before law and Equal Protection of Law.
- 2.13. The Applicant states that under such circumstances the only fair and right course of action would be that the Hon'ble Tribunal exercises its power under Rule 11 read with Rule 154 of the NCLT Rules, 2016 to recall the impugned order dated 21/03/2023 passed in CP/IB/50/2021 and implement the procedure as contemplated under section 10 of the Insolvency and Bankruptcy Code, 2016 before taking the final decision on the fate of the Petition.
3. This Bench heard the Counsel and perused the material available on record.
- 3.1. Rule 154 of NCLT Rules, 2016 provides that “*Any clerical or arithmetical mistakes in any order of the Tribunal or error therein arising from any accidental slip or omission may, at any time, be corrected by the Tribunal on its own motion or on application of any party by way of rectification.*” However, this Bench is

of considered view that Rules 154 allows rectification of only clerical or arithmetical errors and not all errors. The words “*arising from any accidental slip or omission*” are to be read in conjunction of the words “*clerical or arithmetical errors*”, and cannot be read independent of such words appearing before it. Further, this Bench finds that the order dated 21.03.2023 was passed after finding that the contention of the Corporate Applicant that it had passed special resolution is not corroborated from the filing on MCA portal. Hence, it can not be said that there arose any accidental omission in this regard. Hence, this bench does not find any merit in the present application.

4. This Bench finds that, in the case of ***Union Bank of India Vs. Dinkar T. Venkatasubramanian & Ors. (2023) ibclaw.in 381 NCLAT***, it was held by 5 member Bench that “*The power to review is not conferred upon this Tribunal but power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the Tribunal as has been declared by Rule 11 of the NCLAT Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of a judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment; for example; necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. There may be other grounds for recall of a judgment. Well known ground on which a judgment can always be recalled by a Court is ground of fraud played on the Court in obtaining judgment from the Court. We, for the purpose of answering the questions referred to us, need not further elaborate the circumstances where power of recall can be exercised.*”

- 4.1. The Rule 11 of NCLAT Rules, 2016 is in pari-materia of NCLT Rules, 2016 which provides that “Nothing in these rules shall be deemed to limit

or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.” Accordingly, this Bench is of considered view that this Tribunal also has inherent powers to recall its orders when its attention is drawn to any procedural error committed by it in delivering the earlier judgment.

- 4.2. Though, this Bench finds that sufficient opportunity was granted to the Corporate Applicant to represent its case, but it was never asked to produce copy of MGT-14 form, which it could have filed, if asked to do so, and produced it before this Bench, thus curing the defect in the application. It is further noticed that, filing of MGT-14 form is not mandatory, however, it is an evidence to substantiate the passing the Special Resolution, which is sine qua non for filing of an application u/s 10 of the Code.
- 4.3. The Applicant now contends in this application that MGT-14 has been filed, and accordingly, the fact of passing of special resolution dated 28th October 2020. In view of this, this Bench considers it appropriate to recall its order dated 23.03.2023, and pass fresh order as follows –
5. On reading the Petition and the supporting documents annexed with the Petition, this Bench is of the view that the Corporate Applicant has committed default and the Petition contains the particulars as required u/s 10 of the Code and that the Corporate Debtor is not disqualified U/s 11 of the Code. Consequently, this Bench hereby **admits** the petition i.e. CP(IB) No. 50/MB/2021, declaring moratorium with consequential directions as mentioned below:

- (i) That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Applicant including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the Corporate Applicant any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Applicant in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Applicant.
- (ii) That the supply of essential goods or services to the Corporate Applicant, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (iii) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (iv) That the order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Applicant under Section 33, as the case may be.

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- (v) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under Section 13 of the Code.
- (vi) That this Bench hereby appoints the proposed Resolution Professional after perusing the written communication in Form 2 dated 22.09.2022 by the RP, Mr. Sunil Gajanan Nanal , having address Kanj And Associates, 3-4, Aishwarya Sankul, 17 G.A. Kulkarni Path, Opp. Joshi's Railway Museum, Kothrud ,Pune, Maharashtra ,411038 having IBBI Registration No. - IBBI/IPA-002/IP-N00194/2017-18/10560 and Email- sunil.nanal@kanjcs.com as Interim Resolution Professional to carry the functions as mentioned under the Code.

6. The IA 2721/2023 in CP (IB)/50(MB)/2021 is **Partly Allowed**.

7. The Registry is hereby directed to communicate this order to the Applicant. The Learned Counsel for the Petitioner shall deliver a copy of this order to the Interim Resolution Professional forthwith within 10 days of the order being uploaded on the website.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

14.07.2023

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)