

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-VI**

IB-1182/(ND)/2018

Section: Under Section 10 of the Insolvency and Bankruptcy Code, 2016 and Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

J V Restaurant Pvt. Ltd.

Registered office at:
N-63/64 and 64B,
First Floor,
Munshi Lal Building,
Connaught Circus,
New Delhi – 110001.

...Applicant

Coram:

DR. P.S.N. PRASAD
Hon'ble Member (Judicial)

DR. V.K. SUBBURAJ
Hon'ble Member (Technical)

Counsel for Applicant: Amarpreet Jaiswal, Alok Kumar Tripathi, CS
Counsel for Objectors: Gandharv Anand, Advocate

IB-1182/ND/2018
J V Restaurant Pvt. Ltd.

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ORDER

Per Dr. V. K. Subburaj (Member Technical)

Date:22.10.2019

1. This is an application filed by J V Restaurant Pvt. Ltd. seeking to initiate its own corporate insolvency resolution process (“CIRP”) under Section 10 of the Insolvency and Bankruptcy Code 2016 (“the Code”) for default on part of the Respondent in clearing the operational debt of Rs. 6,35,20,173/- owed to the Applicant. The Applicant has simply stated in its application that it is unable to pay the debts due to its financial condition and thus, it has defaulted in payment of operational debt of Rs.6,35,20,173/-.
2. Consequent to the notice issued by this Tribunal to all the major creditors of the Applicant, two operational creditors, who have leased out their property in Connaught Circus, New Delhi to the Respondent and to whom majority of the total operational debt is owed by the Respondent, filed their objections in which the following contentions are made:
 - i. The financial statements for financial year 2016, 2017 and 2018, filed by the Applicant, reveal that the major portion of the debt owed by the Respondent falls under the head “Loan from

directors, shareholders and their relatives” which is highly suspicious and indicative of sham and bogus transactions to inflate the liabilities of the Applicant Company.

- ii. As per the Companies Act, 2013 a private company is only allowed to raise loans from “members/shareholders” subject to conditions stipulated under Section 73(2) of the Companies Act, 2013. The Applicant Company has not complied with any of the conditions as stipulated under Section 73(2) of the Companies Act, 2013. No deposit repayment reserve account was maintained by the Respondent. Also, loan taken from Sunita Sukhija tantamount to “raising loan from public” is clearly illegal and prohibited for the private companies under Section 73 of the Companies Act, 2013. Further, such illegal raising of loans by the Respondent is punishable under Section 76A of the Companies Act, 2013.
- iii. Financial statements of 2018 also reveal that as 31.03.2018 no “loans from others” subsists against the Applicant Company and only “Loans from directors, their relatives and shareholders” subsists to the tune of Rs.1,55,23,000/-.
- iv. At one place of the financial statement of 2018 it is stated that “The unsecured loans from the directors, their relatives and shareholders are interest free and are not repayable within 12

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months". At another place, the same financial statement states that interest on unsecured loan to the tune of Rs.2,38,649/- is charged under the head "Finance Cost". It is apparent that such serious discrepancies have only arisen owing to the Applicant's attempt to fudge the financial statement and inflate the liabilities to defeat the claims of the genuine operational creditors.

- v. The financial statement for 2018 also states that the trade recoverable to the tune of Rs.9,00,000/- is set-off against the loan of Sunita Sukhija amounting to Rs.54,65,000/-. Since the loan from Sunita Sukhija is prohibited and a sham transaction, serious suspicion is casted over the conduct of the Applicant which has set off the actual trade recoverable from the debtor of the Applicant Company against a bogus loan transaction.
- vi. The Applicant has also stated falsities in the financial statement of 2018. The financial statement states that the Applicant company does not have any pending litigations which would impact its financial position. However, the present Objectors had filed a civil suit bearing number CS(OS) 624/2017 which was pending before the Hon'ble High Court of Delhi at the relevant point of time (as on 31.03.2018). the Applicant deliberately chose to conceal the aforesaid fact in its statutory disclosures.

- vii. The present modus operandi has been adopted by the shareholders of the Applicant with the malicious hope that if the Applicant is liquidated, the shareholders will be able to extract some unlawful gains from the Applicant under the garb of falsely projected “unsecured loans”. Such falsely projected debt of the shareholder will only be realized at the cost of the genuine operational creditors.
- viii. The financial statements of the Applicant state that Mr. Vijay Kumar and Mr. Rajesh Subramaniam have been disqualified from being appointed as directors under Section 164(2) of the Companies Act, 2013. Despite being disqualified, the present application has been filed by Mr. Vijay Kumar.
3. The Applicant has filed the following response to the objections:
- i. The transactions alleged to be sham by the Objectors are duly accounted for in the books of accounts and disclosed in the financial statements and therefore, cannot be termed as sham loans raised from related parties only to inflate the liabilities of the Applicant company.
- ii. Further, compliance or non-compliance with any provisions of the Companies Act, 2013 has no bearing on the present application so far it is complete in all respects and satisfies the

criteria laid down by the Hon'ble NCLAT in *Unigreen Global Pvt. Ltd. vs. PNB*.

- iii. The interest on unsecured loan disclosed under the head "Finance Cost" was paid to Neogrowth Financial Services Pvt. Ltd., an NBFC company. The loan from Neogrowth was duly disclosed under the head "Loan from Others" in the financial statements.
- iv. Lazeez Affair is a proprietorship of Ms. Sunita Sukhija. Ms. Sukhija has given a loan of Rs.54,65,000/- to the Applicant company and Rs.9,00,000/- was recoverable from her. Therefore, adjustment of recoverable of Rs.9,00,000/- against the loan of Rs.54,65,000/- is valid in the eyes of law.
- v. The outstanding rent of Objectors was already accounted for in the books of accounts of the Applicant company, and therefore, outcome of application by the Objector filed in the High Court was not expected to have any bearing on the financial position of the Applicant company. Therefore, details of above litigation were not disclosed in the Auditors' Report.
- vi. The statutory auditors in his report dated 22.08.2018 has disclosed that none of the directors are disqualified as on 31.03.2018 for being appointed as director in terms of Section 164(2) of the Companies Act, 2013. The present application was

filed on 01.09.2018 and on the said date Mr. Vijay Kumar was not disqualified for being appointed as a director by the Registrar of Companies.

4. The Applicant has relied on the order of the Hon'ble NCLAT in *Unigreen* and the Respondent has relied on the order of NCLT in *Iceberg Developers Pvt. Ltd.* The Hon'ble NCLAT in *Unigreen* has stated as follows:

"22. Section 10 does not empower the Adjudicating Authority to go beyond the records as prescribed under Section 10 and the information as required to be submitted in Form 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 subject to ineligibility prescribed under Section 11. If all information are provided by an applicant as required under Section 10 and Form 6 and if the Corporate Applicant is otherwise not ineligible under Section 11, the Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground.

23. Any fact unrelated or beyond the requirement under I & B Code or Forms prescribed under Adjudicating Authority Rules (Form 6 in the present case) are not required to be stated or pleaded. Non-disclosure of any fact, unrelated to Section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the Corporate Applicant has not come with clean hand except the application where the 'Corporate Applicant' has not disclosed disqualification, if any, under Section 11.

Non-disclosure of facts, such as that the 'Corporate Debtor' is undergoing a corporate insolvency resolution process; or that the 'Corporate Debtor' has completed corporate insolvency resolution process twelve months preceding the date of making of the application; or that the corporate debtor has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under the said Chapter; or that the corporate debtor is one in respect of whom a liquidation order has already been made can be a ground to reject the application under Section 10 on the ground of suppression of fact/not come with clean hand.

37. From the aforesaid provision, it is clear that for imposition of penalty under Section 65, the Adjudicating Authority on the basis of record is required to form prima facie opinion that the person (Financial Creditor / Corporate Applicant / Operational Applicant) has filed the petition for initiation of proceeding "fraudulently" or "with malicious intent" for the purpose other than the resolution of the insolvency or liquidation or that voluntary liquidation proceedings has been filed with the intent to defraud any person.

38. No such penalty under sub-section (1) or (2) of Section 65 can be imposed by the Adjudicating Authority without recording opinion for coming to the conclusion that a prima facie case is made out to suggest that the person "fraudulently" or "with malicious intent" for the purpose, other than the resolution insolvency or liquidation or with the intent to defraud any person has filed the application."

5. The relevant parts of order of the NCLT in *Iceberg* are as follows:

“8. The documents to be supplied under Section 10 and Form 6 of the Code are disclosures required to reduce the information asymmetry between the debtor and the creditors as they hold the most important stakes in the process. The idea of asking the corporate applicant to attach the audited balance sheets, the provisional balance sheet and the statement of affairs along with a statement of truth is to ensure that all the claims made by the corporate applicant are laid bare and the corporate applicant is not indulging in any suppression or malpractice to gain an undue advantage from the process. The CIRP is to be triggered only if the debtor/corporate applicant makes a true and full disclosure as required by Section 10 and Form 6 of the Code, similar to a situation under Section 7/Section 9 where a CIRP is to be triggered only if the creditor has honestly established its claim against the corporate debtor. Thus, the corporate applicant has to approach the Tribunal with clean hands to avail the benefit of the relief under the Code.

9. According to Unigreen non-disclosure of any fact unrelated to Section 10 and Form 6 cannot be termed to be suppression of facts or approaching the court with unclean hands. In the present matter, however, the facts being allegedly suppressed relate to the disclosures specifically required under Section 10 and Form 6. Further information which has been placed on record by the Objector CHD also relates to the disclosures specifically required under Section 10 and Form 6. The audited balance sheet for year ending 31.03.2016 shows that Amit Katiyal who was a director of the Corporate Applicant till January 2016 owes the Corporate Applicant

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Rs.22,51,64,435/- and his wife Deepali Katiyal owes the Corporate Applicant Rs.1,50,000/-. In the audited balance sheet of the year ending 31.03.2017 the amount of Other Loans and Advances has not decreased, however, in the provisional balance sheet for year ending 31.03.2018 the amount of Other Loans and Advances has decreased from Rs.24,41,64,435/- to Rs.99,48,463/- and the difference between the two amounts has not been accounted for in the balance sheet. Further, the documents placed on record by CHD deal with the disclosures made in the balance sheets. Amit Katiyal and Deepali Katiyal have taken the stand that no money was payable by them to the Corporate Applicant and therefore, no payment was ever made by them to the Corporate Applicant, in their reply to CHD's application under Order 21 Rule 46 of the CPC. Further, the Corporate Applicant in its reply to the application under Order 21 Rule 46 has stated that two properties reflected in its provisional balance sheet – Plot No. E-070, Brahma City, Gurgaon and Unit B-2101, Monde De Provence, Gurgaon – were transferred in favour of the Corporate Applicant for payment of Rs.16,91,88,296 as part payment of the money owed by Amit Katiyal. These documents show that the Corporate Applicant, in the provisional balance sheet, has at least suppressed the amount of Rs.1,50,00,000/- owed by Deepali Katiyal to the Corporate Applicant and the balance amount of Rs.5,59,76,139/- owed by Amity Katiyal to the Corporate Applicant, as per the previous balance sheets.

10. The disclosures discussed above are important disclosures to be made under Section 10 of the Code. The Tribunal does not merely have to check the documentation prescribed under Section 10 but also has to apply its mind to ensure that the purpose behind prescribing

the documents is fulfilled and the Corporate Applicant does not take advantage of the relief under Section 10 by suppressing relevant disclosures and approaching the Tribunal with unclean hands. The fact that the Corporate Applicant has suppressed details about its current assets and the loans owed by the previous director and his wife of the Corporate Applicant (who are also the present directors of the holding company of the Corporate Applicant - Krrish Realtech Pvt. Ltd.) creates suspicion about the Corporate Applicant's motive to initiate its CIRP. The Corporate Applicant is attempting to initiate the CIRP on basis of documents which are incomplete and false as to the material particulars. Thus, there is a reason to believe that the initiation is fraudulent for a purpose other than genuine insolvency resolution of the Corporate Applicant."

6. We have heard the arguments and gone through the pleadings of the parties. The Applicant has given satisfactory explanations to the objections raised by the Respondent. It cannot be denied that the loans advanced by the directors, shareholders and their relatives form a substantial part of the Applicant company's debt, but such debt is not the only debt on the basis of which the CIRP is prayed. A majority share of the total debts is due to the Objectors themselves and other operational creditors. Thus, default on part of the Applicant company exists even if we do not take into consideration the debt owed to the directors and shareholders.

7. Further, the Applicant company has made all the disclosures as required by Section 10 of the Code and Form 6 referred in Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. We do not find any merit in the contention that a prima facie case is made out for initiating CIRP either fraudulently or maliciously is made out from the documents submitted to this Tribunal and arguments advanced by the counsels.
8. Further, the Code has enough safeguards in place to ensure that if there are any non-compliances or any fraudulent transactions regarding the Applicant company, they will be revealed once the insolvency resolution professional takes over the management of the company and carries out the investigation mandated by the Code. Further, the CoC, consisting of the major creditors of the Applicant company have the power to keep an eye on the IRP's conduct and question his decisions, if found to be doubtful. Thus, the apprehension of the Objectors that once the CIRP is initiated the claims of the Objectors will be sacrificed for the benefit of the directors or shareholders of the Applicant company is unfounded.
9. In the above circumstances this Tribunal initiates CIRP of the Applicant company. A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:

“(a) the institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Respondent.

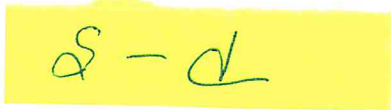
(2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central

Government in consultation with any financial sector regulator.

- (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.”

10. The interim resolution professional (“IRP”) proposed by the Applicant is Punit Handa, (email id: punithanda@gmail.com) and is being confirmed by this Tribunal. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench. Renotify this case for report of the IRP on 26.11.2019.



(Dr. V.K. SUBBURAJ)
MEMBER (TECHNICAL)



(DR. P.S.N. PRASAD)
MEMBER (JUDICIAL)

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