

IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH

Company Petition No.(IB)/110/ALD/2017

*(Under Section 10 of the I & B Code, 2016
Read with Rule 7 of the I & B Code
Application to Adjudicating Authority Rules, 2016)*

IN THE MATTER OF

SHREE BHAWANI PAPER MILLS LIMITED

Shree Bhawani Paper Mills Limited, 33,
Dyanand Marg, Allahabad-211002, Uttar Pradesh.

.....(Corporate Debtor)

JUDGMENT/ORDER DELIVERED ON 13.02.2018

Coram : **Hon'ble Shri H.P. Chaturvedi, Member (J)**

For the Petitioner : Sh. Navin Sinha Senior Advocate alongwith
Sh. Rahul Chaudhary, Advocate.

For the Objector : Sh. Arun Prakash, Advocate for Bank of Baroda
Sh. Abhishek Anand, Advocate for JMFARC Pvt.
Ltd. (Secured Creditor)

ORDER

The present petition is preferred before this Court under Section 10 of the Insolvency and Bankruptcy Code, (for brevity the "Code") with such prayer for initiation of Insolvency Resolution Process against the Applicant Company and to issue necessary directions for effecting the moratorium under Section 14 of the Code.

2. Brief facts of the case which are necessary for disposal of the present petition are stated as under:

1. During the FY 2005-06, the Corporate Debtor undertook modernization and expansion project costing Rs.65 Crores by availing Term Loan from the Indian Bank and the Bank of Baroda, for installation of a new 170

TPD waste paper based pulp mill and similar capacity new paper machine (PM-3) which was financed by the term loan (TL-III) of Rs.24 crores was sanctioned by Indian Bank and 24 crores as sanctioned by the Bank of Baroda, balance from Rights Issue of Rs.13 crores and internal accruals in 2005. The Indian Bank had reset the interest rate from time to time upto December, 2011 to 11.50% p.a. but increased the interest rate from November, 2010 to 14.50% p.a., in contravention with the agreed terms of the aforesaid loan.

2. The total cost of project, after time and cost overrun was Rs.79 crores as against Rs.65 crores as funded by banks Term Loan II & IV of Rs.24 crores, Rs.2.50 crores each Bank of Baroda & Indian Bank totalling to Rs.53 crores and balance Rs.26 crores from Rights Issue, Promoters and internal accruals. The new Paper Machine and Waste Paper De-Inking Plant were commissioned during the year 2007 and the production started in 2008. At the same time, the price of International Newsprint was @ USD 900/- pmt and Customs duty was prevailing @ 5% thereon. In July, 2008, the Government removed customs duty on newsprint. However, by the time, production of Newsprint could stabilize, international price of newsprint fell from USD 900 to USD 450 by February, 2009, causing unrestricted import and glut in domestic market. The price of domestic newsprint fell down which resulted in sales price becoming lower than the cost of production.
3. Due to collapse of Lehman Brothers in 2008, the global economy fell into the severe recession which drastically affected the newsprint market and paper industry thereby leading the Corporate Debtor also into severe economic crisis. During that period, the imports of paper products

were cheaper than the domestic prices of the same, which lead to unnecessary pile up of newsprint in the domestic market.

4. In April, 2010, due to Pollution Control Board (PCB) directives, the Corporate Debtor had to shut down operations of its existing 50 TPD agro pulp mill which adversely affected the overall production of the Corporate Debtor in FY11, FY12 and FY13. As per the PCB directives, a Chemical Recovery Plant (CRP) of 120 TDP was successfully installed in July, 2012.
5. In May 2011, in order to stabilize the finances of the Corporate Debtor, the Promoters divested 50% of their stake to the new co-promoters i.e. Shri O.P. Goenka & others and infused Rs.25 crores in the form of equity and debt. However, due charge of high interest rates by the banks, substantial amount of the said infused money was used in paying the accumulated dues of the Banks. Out of Rs.25 crores, Rs.17 crores was used in the clearing bank dues and only remaining amount of Rs.8 crores was left with the Corporate Debtor for running its operations. Owing to non-payment of bank dues, the bank of Baroda & the Indian Bank declared the Corporate Debtor's account as a Non performing Asset (NPA) on 31.12.2012 and thus suspended the account.
6. In view of the above mentioned circumstances, the Corporate Debtor had earlier filed a reference application (numbered as Case No.29/2013) under Section 15(1) of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) in January, 2012 before the Hon'ble BIFR seeking for declaration of the unit as a Sick Industrial Company. In its hearing dated 26.09.2013, the BIFR pleased to declared the Corporate Debtor, as a sick industry under Section 3(1)(o) of SICA and appointed the Bank of

Baroda as the Operating Agency (OA) U/s 17(3) under the provision of the Act for preparation of rehabilitation scheme for the Corporate Debtor.

The BIFR further pleased to issue following directions: -

- i) The Corporate Debtor shall prepare a fully tied up draft rehabilitation scheme (DRS) within four weeks and submit the same to OA, with a copy to the Board.*
- ii) The OA shall examine the DRS prepared by the Corporate Debtor within further six weeks' time and hold a joint meeting of all the stakeholders to consider the Corporate Debtor's DRS and submit a report with a fully tied up DRS, if it emerges.*
- iii) The Corporate Debtor shall not dispose of any of its assets as per provisions of Section 22 of SICA without prior approval of the Board.*

7. Accordingly, the Corporate Debtor Company prepared a draft rehabilitation Scheme (DRS) and submitted to the operating agency and other stakeholders on 24th October, 2013, and a copy marked to the BIFR.
8. It is contended that the Indian Bank has already sold its loans to JM Financial ARC Private Limited in March, 2014 by entering into a formal agreement on 28th March, 2014. Thereafter, the Corporate Debtor Company received a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2012 on 4th July, 2016 from JM Financial ARC Private Limited and from the Bank of Baroda on 5th July, 2016.
9. During the year 2015, the Uttar Pradesh Government came up with a new rehabilitation policy for revival of Sick Industrial Units registered and declared sick by the BIFR since 1993 vide its Order (GO) no.1701/77-1-2015-10(BIFR)/09TC dated 7th December, 2015. The Pradeshiya Industrial & Investment Corporation of Uttar Pradesh Limited (PICUP) was nominated as Nodal Agency for such purpose. As the Corporate

Debtor Company was eligible for aforesaid rehabilitation package of Uttar Pradesh Government, hence, it submitted a detailed Rehabilitation Scheme to PICUP and to the Bank of Baroda as well as to the JMFARC on 8th April, 2016.

10. As per the averments made in the present petition the accounts department and certain properties of the Corporate Debtor Company were seized by the SDM, Rae Bareli on 26.09.2016 in order to secure the payment of electricity and other labour dues. Hence, the Corporate Debtor Company filed a Writ Petition No.51891 of 2016 and accordingly, the demand notices were kept in abeyance by the Hon'ble High Court of Allahabad, however, the SDM, Rae Bareli did not release the Corporate Debtor's properties.
11. It is contended that J M Financial ARC Pvt. Limited also filed an O.A. 393 of 2017 by seeking for issuance of a recovery certificate for an amount of **Rs.176,45,44,828.43/- (Rupees One Hundred Seventy-Six Crores, forty-five lacs, forty-four thousand, eight hundred and twenty-eight and forty-three paise only)** before Debts Recovery Tribunal, Allahabad on 03.06.2017. Thereafter, the Bank of Baroda also filed an O.A. 502 of 2017 by seeking for the issuance of a recovery certified for an amount of Rs.150,90,09,351/- (Rupees One hundred fifty crores, ninety lacs, nine thousand, three hundred and fifty-one only) on 17.07.2017 before Debts Recovery Tribunal, Allahabad.
12. It is submitted that in absence of any cash flows and due to the aforesaid reasons, the Corporate Debtor Company does not possess necessary financial reserves for making repayment of the debt owed by it.

13. For the aforesaid reasons and facts and circumstances, of the Corporate applicant/corporate debtor company, it has to file the present application for initiation of the Corporate Insolvency Resolution Process in respect of the Corporate Debtor under Section 10 of the I & B Code, 2016.
14. As per the part II of the present Application filed in Form-6 and under Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, Ms. Anju Agarwal has been nominated as the proposed Interim Resolution Professional, the details of Part II of the application are being reproduced here as under:

PARTICULARS OF PROPOSED INTERIM RESOLUTION PROFESSIONAL	
1.	<p>NAME ADDRESS, EMAIL ADDRESS, IDENTIFICATION NUMBER AND THE REGISTRATION NUMBER OF THE PROPOSED INTERIM PROFESSIONAL</p>
	<p><u>Name:</u> Ms. Anju Agarwal</p> <p><u>Address:</u> 166, SFS DDA Flats, Hauz Khas, New Delhi - 110016</p> <p><u>Email:</u> anju@asegroup.in</p> <p><u>Registration Number:</u> IBB/PA-001/IP-P00106/2017-2018/102013</p>

PART - III

PARTICULARS OF FINANCIAL/OPERATIONAL DEBT [CREDITOR WISE, AS APPLICABLE]	
1.	<p>NAME(S) OF FINANCIAL/ OPERATIONAL CREDITOR(S)</p>
	<p>The names of the Financial Creditors are annexed herewith as Annexure (F).</p> <p>The names of the Operational Creditors are annexed herewith as Annexure (G).</p>
2.	<p>ADDRESS OF CORRESPONDENCE OF THE FINANCIAL/OPERATIONAL CREDITOR(S)</p>
	<p>The addresses of correspondence of the Financial Creditors are annexed herewith as Annexure (H).</p>
3.	<p>TOTAL DEBT RAISED AND AMOUNT IN DEFAULT</p>
	<p>The details of the total amount of debt raised and the amount in default with respect of Financial Creditors is annexed herewith as</p>

		Annexure (I).	
4.	DATE WHEN THE FINANCIAL/OPERATIONAL DEBT WAS INCURRED	The dates when the financial and operational debts were incurred by Corporate Applicant is annexed herewith and marked as Annexure (K).	
5.	PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR	The particulars of security held, the date of its creation, its estimated value as per the creditor and the copies of the certificate of registration of charges issued by the Registrar of Companies, Kanpur. CERTIFICATES OF REGISTRATION OF CHARGE AS FILED WITH THE MINISTRY OF CORPORATE AFFAIRS is annexed herewith and marked as Annexure (K-1).	
6.	DETAILS OF RETENTION OF TITLE ARRANGEMENTS (IF ANY) IN RESPECT OF GOODS TO WHICH THE OPERATIONAL DEBT REFERS	Not Applicable	
7.	RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY	Not Applicable	
8.	LIST OF DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL/OPERATIONAL DEBT AND THE AMOUNT IN DEFAULT	S.No.	Particulars of documents
		1.	Copy of the notice under 13(2) of the SARFAESI Act, 2002 issued by J M Financial ARC Private Limited is annexed herewith as "Annexure (L)".
		2.	Copy of the notice under 13(2) of the SARFAESI Act, 2002 issued by Bank of Baroda is annexed herewith as "Annexure (M)".

	3.	Copy of Invoices/Demand Notices served by the Operational Creditors on the Corporate Debtors is annexed herewith as "Annexure (N)" .
	4.	Copies of the Ledger showing the dues/default of Power Corporation, Unsecured Creditors, Loans and Advance from Related Parties, Security Deposit (Dealers), ESI Payable, PF Payable, Creditors for Chemicals, Creditors for Wastepaper, Contractors Account, Creditors for General Store, New Project Advances, Creditors for Imported Wastepaper, Retention Money, Creditors for Services, Creditors for Spares, Transporters, Creditors for Wheat Straw, Advertisement and Publicity, Creditors for Bagasse, Interest Payable on Ledger Account, Creditors for Packing Materials, Creditors for Raw Materials, Dues of Bhusi, Creditors for Power and Fuel, Dues of VAT & Service Tax payable under RCM is annexed herewith as "Annexure (O)" Collectively .
	5.	Copies of the Audited Financial Statements (Balance Sheet) of last two years is annexed



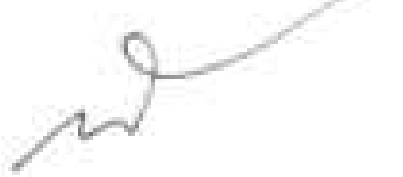
		herewith as "Annexure (P)".
	6.	Copies of Provisional Financial Statements (Balance Sheet) of last 14 days of the current financial year is annexed herewith as "Annexure (Q)".
	7.	Statements of Affairs as on 24 th August, 2017 is annexed herewith as "Annexure (R)".

15. During the course of hearing this Court felt appropriate to invite comment of the other creditors of the Corporate Debtor Company/Applicant in respect of admission of the present petition.
16. The learned counsel appearing for Secured Creditor M/s JMFARC during the course of hearing, informs such that the Secured Creditor M/s JMFARC is having no objection for admission of the present I & B petition.
17. Notwithstanding the above the Financial Creditor Bank of Baroda has raised some objections in respect of the *up-to-date valuation report of the secured immovable assets, which is reported as has not been filed along with the present application. It was further contended that the corporate applicant/debtor is required to furnish the total debt raised and the amount in default while filing of the present application. It is also stated that in the present case, the amount in default has been wrongly mentioned by the applicant as the amount in default due to Bank of Baroda by the applicant (Annexure No.1, page 101) is mentioned as Rs.121,74,83,629/-, whereas, the actual amount in default as per the*



present objector Bank of Baroda (as in O.A. 502 of 2017 filed by it on 17.07.2017) before Debt Recovery Tribunal, Allahabad, is to the tune of Rs.150,90,09,351/-. Moreover, even the procedural mandate as per Form 6, Part-III under Section 10 of the Code read with Rule 7 of the Rules, the applicant is required to mention about the date as to when the financial/operational debt incurred, which allegedly is not complied with.

18. In contra to the above stated objections of the Bank of Baroda the Corporate Applicant filed its Rejoinder Affidavit contending that the Corporate Applicant has properly furnished all relevant details of debts which are required in support of an Application to be filed under Section 10 of the I & B Code, 2016. The corporate debtor has also provided the valuation and details of the movable and immovable assets of the properties as required, whereas, the issue of up to date valuation is concern, it is by the IRP, who is expected to prepare it in terms of the Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and as per the order/s of this Tribunal may pass in view of the Regulation 27 of Regulation, 2016.
19. It is further contended that the petitioner has mentioned about the details of debts cautiously as per the Balance Sheet maintained by the Corporate Applicant, whereas, the difference in the total amount is found due to the sole reason that the Banks have imposed heavy penal interest causing variation which are not acceptable to the Corporate Applicant/Corporate Debtor Company.



20. The malice on the part of the objector bank can also be seen from such facts that, in its notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dated 29th July, 2016, it mentioned the total debt as Rs.1,15,18,09,528.42/- which was increased exorbitantly to Rs.1,50,90,09,351/- just within the period of one year. Moreover, the Statement of Affairs filed by the petitioner as Annexure R to the present Company petition clearly mentions the claimed amount by the bank as Rs.1,50,90,09,351/- therefore there is no irregularity in filing of the present application by the petitioner under Section 10 of the Insolvency and Bankruptcy Code, 2016.
21. It is submitted that the corporate applicant has provided all the relevant information as required in form 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, whereas, the Statement of Affairs filed by the petitioner as Annexure R to the Company petition clearly mentions the date on which the debts incurred in terms of Rule 7 of the Rules, 2016 and further the Charge Registration Certificate issued by the Registrar of Companies annexed as Annexure K-1, corroborates the same beyond any doubts.
22. The petitioner by moving a Misc. Company Application sought a liberty from this Tribunal to bring on record a chart showing particulars of Security, Date of its Creation and the Estimated Value so as to add-on the Statement of Affairs for ready reference of this Hon'ble Tribunal. A copy of the chart showing Particulars of Security, Date of its Creation and the Estimated Value has been filed and marked as Annexure No. RA-1 to this affidavit.



23. During the course of hearing and having heard the learned counsel for both parties this Court vide its order dated 14.12.2017 felt necessary to seek some more clarification in respect of the present application, those are necessary for its disposal, hence, are stated as under.

1. *As per the present application the amount of debts towards Bank of Baroda by the applicant (Annexure No.1, page 101) has been stated by applicant as Rs.121,74,83,629/-, whereas, the amount in default as mentioned by the objector Bank in O.A. 502 of 2017 on 17.07.2017 before Debt Recovery Tribunal, Allahabad, is to the tune of Rs.150,90,09,351/-. Since there is material discrepancy between such amounts of defaults whether it would attract the proposition laid down by the principal Bench in the Unigreen Global Private Limited?*
2. *As per material available on record Shri Girish Tandon and Shri Alankar Tandon being the directors of the Corporate Applicant Company, stood as individual Guarantor to secure the loan/ debts. Whether they are legally required to disclose their personal assets and properties in relation to secured debts related to objector Bank of Baroda in the light of Hon'ble Hon'ble Allahabad High Court Judgement in the matter of Sanjeev Shriya Vs State Bank of India wherein it has been held personal guarantors are also covered by Section 10 and 14 of the Code, therefore whether the details of the assets of the such guarantors must be incorporated in the application preferred under Section 10 of the I&B Code or otherwise.*

Further whether the personal assets of director of company are to be disclosed keeping in the view of Hon'ble Supreme Court's directions issued to director of corporate debtor company in the matter Chitra Sharma Vs Union of India.
3. *In the present matter Valuation Report is filed in the rejoinder affidavit of the applicant in reply to the objections raised by Bank of Baroda. Till such report is admitted in the record as annexure to the application and regularized by court, whether application can be found as complete?*

24. In response to the above mentioned queries Mr. Girish Tandon as being the Managing Director to the Corporate Debtor Company filed his rejoinder affidavit, clarifying the objection and query raised and

provided the information's sought for by this Court which is reproduced hereunder:

"That in compliance whereby the applicant petitioner craves liberty of this Hon'ble Tribunal to clarify the queries raised by this Tribunal vide order dated 14.12.2017 as the following:

- a. In reply to the Query No.1 and No.3 as regards to the discrepancy in the liability outstanding towards the Bank of Baroda, as alleged by them in Counter Affidavit is concerned it is wholly irrelevant for the purpose of present proceedings, moreover, the said discrepancy has been sufficiently explained in para no.5 of the Rejoinder Affidavit forming integral part of the present company petition.*
- b. To reiterate in part III of the Application U/s 10 of the Insolvency & Bankruptcy Code, 2016 the applicant has mentioned the liability outstanding towards Bank of Baroda as Rs.1,21,74,83,629/- and odd, this is as against the notice given U/s 13(2) of SAREESI Act, 2002, dated 29.06.2016 wherein the liability has been mentioned as Rs.1,15,18,09,528.42/- & odd. In para 5 of Rejoinder Affidavit the applicant has disputed their enhanced amount claimed in Original Application before DRT but attributing the increase to arbitrary by addition of interest, still in the statement of affair at page 438 of application (Annexure R) the amount payable to bank has been shown as Rs.1,50,90,09,351/-.*
- c. Besides the above in so far as proceedings U/s 10 of the Code, 2016 it is beyond dispute that the liability exceeds the prescribed statutory limits. Moreover, the Debt Recovery Tribunal has also determined the liability of the applicant.*
- d. Whether Annexures and contents of the Rejoinder Affidavit can be treated as part of main application, regarding valuation of the security referable to column 5 of part III of the application regards may be supplied that as per the estimation of the creditor alongwith the copies of the certificates of registration of charges issued by the Registrar of Companies, Kanpur.*
- e. The applicant has duly furnished the details of securities as alongwith certificate of chares Annexure No.K-1 at page no.153 to 224.*
- f. As regards to valuation reference may be made to paragraph 6 of the rejoinder affidavit and annexure no.RA-1 in rejoinder affidavit.*
- g. As on the date when the application was pressed and the matter was considered by this NCLT the valuation required stood furnished, on affidavit though not essentially a part of the application even if it is assumed to be omission in the application, the said omission stood rectified & complied with in RA-1 to the Rejoinder Affidavit also being part of record and the requirement has been substantially complied with, he procedural omission would not lead to dismissal of the application. Furthermore, even for the purpose of the application, valuation of the assets have no relevance as the*

exercise is to be followed by the IRP in terms of Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 within 7 days of its appointment.

- h. In addition to the above it is relevant to mention here that the Judgment of the Unigreen Global Pvt. Ltd. v/s Punjab National Bank & Ors. came to be challenged before the Hon'ble National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No.81 of 2017 which has been decided in terms of the order dated 01.12.2017 whereby the order dated 08.05.2017 passed by the Principal Bench was set aside and the case has been remitted back to the adjudicating authority to decide a fresh. Copy of the Judgment dated 01.12.2017 passed in Company Appeal (AT) (Insolvency) No.81 of 2017 by Hon'ble National Company Law Appellate Tribunal, New Delhi is being filed herewith and marked as Annexure No.CL-1 to this Affidavit.*

Query No.2

- i. In so far as the personal assets of the Guarantors of the company are concerned the prescribed form does not require any such information to be furnished such information might become relevant as and when provisions of Insolvency and Bankruptcy Code become applicable and are invoked against the Guarantors. Even today despite DRT having determined the liability same is liable to be modified, altered, reduced or increased in the event of any plan being submitted and approved by the IRP and such a plan if accepted by the creditors, members, guarantors and other stake holders reference may kindly be made to the S.31 of the Insolvency and Bankruptcy Code, 2016.*
- j. In so far as the order passed by the Hon'ble Supreme Court in Chitra Sharma case is concerned, it was an order passed in the matter of JAL (Jaiprakash Associates Ltd.) on the application of the flat allottees.*
- k. That order is not referable to any proceedings under the Insolvency and Bankruptcy Code, 2016 but was passed by Hon'ble Supreme Court under its plenary powers which flow from the Constitution of India only in Supreme Court and such powers have yet not been vested or conferred upon the NCLT under the Insolvency and Bankruptcy Code.*
- l. In Chitra Sharma's cases the order was passed against the Directors as the company had failed to comply with the direction for the deposit of specific amount of money in specific period.*
25. The Corporate Applicant further in its rejoinder affidavit replying to the objections raised in counter affidavit of the Objector Bank of Baroda has stated that such objections are not maintainable in the eyes of law and fact of the present case is that the Corporate Applicant has been

conscious enough to bring on record all big/small and relevant information in the present company petition which gets fortified from the facts that the Corporate Applicant itself has filed a copy of the Original Application filed by the Bank of Baroda before the DRT in order to show its bonafides. Therefore, such objection as raised by the Objector Bank is for the sake of objection only without bringing on record the details of such information which are not filed by the applicant and are mandatory for the disposal of the present application. The Corporate Applicant further gave such explanation that it has now provided the declaration and immovable assets of the properties as required whereas upto date valuation to be prepared by the IRP in terms of the Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016, after an appropriate order is passed by this Tribunal. It has been contended that there is a malice on the part of Objector Bank from such facts that it has already issued notices U/s 13(2) of SARFAESI Act for making recovery of amount of more than **Rs.1,15,18,09,528.42/-** despite the pendency of its O.A. in the DRT, which cannot be treated as a conclusive amount of debts. Therefore, such objection are not tenable. The Corporate Debtor further submits that it has furnished relevant information through the rejoinder affidavit annexure RA-1 to meet the requirement of the item no.5 part 3 of the prescribed form no.6 of the main application and made such request by filing necessary misc. application to treat this as a part and parcel of pleadings of the main application which suffice the very purpose of the present application. In support of its contention the Corporate Applicant has placed reliance on the judgment of the Hon'ble Supreme Court's in the matter of Macquarie Bank Limited v/s Shilpi Cable Technologies Ltd. (Civil Appeal



No.15135/2017) and Surendra Trading versus J.K. Jute Mills Company Ltd. & Ors. (Civil Appeal No.8400 of 2017).

For the sake of convenience, the relevant portion of above mentioned judgment are being reproduced herein below:

Surendra Trading versus J.K. Jute Mills Company Ltd. & Ors. (Civil Appeal No.8400 of 2017).

- 21) *Let us examine the question from another lens. The moot question would be as to whether such a rejection would be treated as rejecting the application on merits thereby debarring the application from filing fresh application or it is to be treated as an administrative order since the rejection was because of the reason that defects were not removed and application was not examined on merits. In the former case it would be travesty of justice that even if the case of the applicant on merits is very strong, the applicant is shown the door without adjudication of his application on merits. If the later alternative is accepted, then rejection of the application in the first instance is not going to serve any purpose as the applicant would be permitted to file fresh application, complete in all aspects, which would have to be entertained. Thus, in either case, no purpose is served by treating the aforesaid provision as mandatory.*

Further, the Hon'ble Supreme Court in the matter of *Macquarie Bank Limited v/s Shilpi Cable Technologies Ltd. (Civil Appeal No.15135/2017)*

has pleased to observe as such:

- 5) *Shri Mukul Rohtagi, learned senior advocate appearing on behalf of the appellant, referred us to various provisions of the Code. According to learned senior counsel, on a conjoint reading of Section 9(3)(c), Rule 6 and Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('Adjudicating Authority Rules'), it is clear that Section 9(3)(c) is not mandatory, but only directory and that, in the said section, "shall" should be read as "may". He cited a number of judgments for the proposition that when serious general inconvenience is caused to innocent persons or the general public without really furthering the object of the particular Act, the said provision should not be read as mandatory, but as directory only.....*
- 20) *Even otherwise, the important condition precedent is an occurrence of a default, which can be proved, as has been stated hereinabove, by means of other documentary evidence. Take for example the case of an earlier letter written by the corporate debtor to the operational creditor confirming that a particular*


operational debt is due and payable. This piece of evidence would be sufficient to demonstrate that such debt is due and that default has taken place, as may have been admitted by the corporate debtor. If Dr. Singhvi's submissions were to be accepted, despite the availability of such documentary evidence contained in the Section 9 application as other information as may be specified, such application filed under Section 9 would yet have to be rejected because there is no copy of the requisite certificate under Section 9(3)(c). Obviously, such an absurd result militates against such a provision being construed as mandatory.....

- 37) *The argument then made was that when Parliament wishes to include a lawyer for the purposes of litigation or to a pre-litigation stage, it expressly so provides, and this not being so in the Code, it must be inferred that lawyers are excluded when it comes to issuing notices under Section 8 of the Code. We are afraid that this argument must be rejected, not only in view of what has been held by us on a reading of the Code and on the harmonious construction of Section 30 of the Advocates Act read with the Code, but also on the basis of a judgment of this Court in *Byram Pestonji Gariwala v. Union Bank of India*, (1992) 1 SCC 31 at 47-48. In this judgment, what fell for consideration was Order XXIII Rule 3 of the Code of Civil Procedure, 2908 after its amendment in 1976. It was argued in that case that a compromise in a suit had, under Order XXIII Rule 3, to be in writing and "signed by the parties". It was, therefore, argued that a compromise effected by counsel on behalf of his client would not be effective in law, unless the party himself signed the compromise. This was turned down stating that Courts in India have consistently recognized the traditional role of lawyers and the extent and nature of the implied authority to act on behalf of their client, which included compromising matters on behalf of their clients. The Court held there is no reason to assume that the legislature intended to curtail such implied authority of counsel.....*
- 38) *Just as has been held in *Gariwala (supra)*, the expression "an operational creditor may on the occurrence of a default deliver a demand notice..." under Section 8 of the Code must be read as including an operational creditor's authorized agent and lawyer, as has been fleshed out in Forms 3 and 5 appended to the Adjudicatory Authority Rules.*
- 39) *For all these reasons, we are of the view that the NCLAT judgment has to be set aside on both counts. In as much as the two threshold bars to the applications filed under Section 9 have now been removed by us, the NCLAT will proceed further with these matters under the Code on a remand of these matters to it. The appeals are allowed in the aforesaid terms.*

26.

It is a matter of record that this Court during the course of hearing through its order dated 06.02.2018 duly considered Misc. CA. No.3/2018

and by placing reliance on the above stated judgements allowed the same in terms of its prayer clause and has held that "Annexure-IA-1 to the Civil Misc. (Interlocutory) Application (Annexure-RA-1 of the rejoinder affidavit to be read as Annexure to the item 5, part III of the (Form 6) of the main petition/application as being part and parcel of the pleadings of the main petition.

27. In view of the above, we find that the clarification as sought for by this Court through its order dated 14.12.2017 stands properly replied and by further filing of application IA No.03/2018 for bearing into record the above referred annexure as a part and parcel of the pleadings of the main application, which satisfy the requirement of the provision of the Insolvency & Bankruptcy Code, 2016.
28. Further, it has now been well settled legal position by placing reliance on the above referred judgements of Hon'ble Supreme Court that if it is a case where some procedural formalities are not found to be completed in the strict sense of the prescribed provision, even then such may not be treated as valid reason to reject an I & B petition, if necessary proof evidence in this respect are already available in record in form of some other evidence/documents etc. As, it may be seen in the aforesaid judgments, the Hon'ble Supreme Court pleased to restore the I & B Petitions which were rejected by the Adjudicating Authority.
29. Hence, this Court, being bound by the law declared by the Hon'ble Supreme Court, do not find any cogent reason to not treat the present application as complete. Because Corporate Applicant has properly replied to the query raised by this Court vide our order dated 14.12.2017 and this Court allowed the documents produced by the Corporate
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Applicant/Debtor to be taken on record and passed an appropriate order on 13.02.2018 (in respect of above stated Misc. Application no.03/2018) which are now a part and parcel of pleadings. Therefore, in our view the objection of the Bank of Baroda is not sustainable in the eyes of law, in the light of the above stated proposition laid down by the Hon'ble Supreme Court.

30. It is further a matter of record that during the course of hearing of final arguments, the Corporate applicant preferred two applications CA No. 01/2018 as well as CA No. 3/2018. The arguments of Ld. Sr. Advocate Sh. Navin Sinha and Sh. Rahul Chaudhary, Advocate were heard in respect of clarifications as sought for by this court as well as on CA No.3/2018 and orders in such CA No.3/2018 were reserved.
31. Later on, the learned counsel for the petitioner Shri Rahul Chaudhary orally expressed need to issue of notice to the non-applicants about the prayer sought for in the CA No. 01/2018 in respect of seeking for stay of the operation of the show cause notice before issue of an arrest warrant which is reportedly issued by the Deputy Commissioner, office of the Commercial Tax Division, Allahabad, against the Corporate Debtor Company, in this regard, we felt that since the argument in respect of the main petition have already been heard and our order is reserved. Hence, it would not be appropriate at this stage to issue fresh notice in this company application No. 1/2018 to the Respondent Dy. Commissioner of Commercial Tax Commissioner as in our humble view this would amount to reopening of the case since it bears question of law as to whether this court possess necessary jurisdiction under the provision of I & B Code over the Commercial Tax Authorities to determine the issue

involved in this CA and possess necessary power for grant of stay of and operation of the show cause notice before issue of an arrest warrant as proposed by the non-applicants. Further, the issue in this application not necessary have direct bearing with the issue involved the in the Main I & B petition. Hence, this proceeded bonafidely for passing of the order in the main petition and adjourned the matter to 2nd February, 2018. That day order could not be prepared. Hence, the matter was further adjourned to 06.02.2018 for passing necessary order in respect of the IA No.03/2018, that day appropriate orders were passed and thus the matter was further listed to 13.02.2018.

32. Subsequent thereto the Registry of this Court came to know about the order dated 25.01.2018 passed (in the Writ Petition No.3061/2018) by the Hon'ble Allahabad High Court by issuing a direction to this Tribunal to decide the above mentioned I.A. No.1/2018 as early as possible and further pleased to grant some relief in favour of the petitioner. As an Internet copy of such order is placed before us through the Registry of this Tribunal. Hence, proceed to consider the CA No.1/2018 also for its disposal alongwith this order in the main application.
33. We examined the contents of the above CA and duly considered the prayer sought for therein. However, we do not feel such application being maintainable in this Court as being Adjudicating Authority under the Insolvency & Bankruptcy Code. Hence, do not feel appropriate to issue further notice to the Collector/ Dy. Commissioner, Commercial Tax, Allahabad at this stage. Because this Court being an Adjudicating Authority cannot be legally expected to act as an Appellate Authority nor can assume power of a Revisional Authority to revised the impugned

order issued by the non-applicants under the provision of Sales Tax Act. Moreover, if this Court goes to admit the present I & B petition under Section 10 of the I & B Code and declares a moratorium under Section 14 of the I & B Code. It would suffice the purpose of the present application and would take care of relief being sought for therein. In such position this application would become infructuous. **Therefore, on this count also the present CA No.01/2018 is not tenable. Accordingly, with such observation this CA is being disposed of alongwith this order being passed in the Main Company Petition (filed under Section 10 of the I & B Code).**

34. It is also evident that in the present matter, another Secured Creditor JMFARC has already expressed its no objection for admission of the present petition under section 10 of the I & B Code irrespective of this fact that it also preferred an O.A. before the Hon'ble DRT, Allahabad for issuance of recovery certificate.
35. By considering this situation also, we do not find force in the contention of Objector Bank of Baroda for rejecting of the present petition on account of the pendency of a proceeding before the DRT & under the SARFAESI Act. It is also pertinent to mention here that the judgment in the matter of *Punjab National Bank v/s M/s Unigreen Global Pvt. Ltd.* as relied on by the Objector has now been set aside by the Hon'ble NCLAT. Hence, this may not have binding effect.
36. In addition to the above we further examined the relevant section of Insolvency and Bankruptcy Code, 2016. A plain reading of Section 10 of the I & B Code reads as under:



Section 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.

(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.

37. Further, the relevant provision meant for declaring moratorium under Section 14 of the Code, reads as under:

Section 14 Moratorium

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: —

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 corporate debtor 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 corporate debtor in respect of its property including any action under the Securitisation 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 corporate debtor.

(2) The supply of essential goods or services to the corporate debtor 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:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

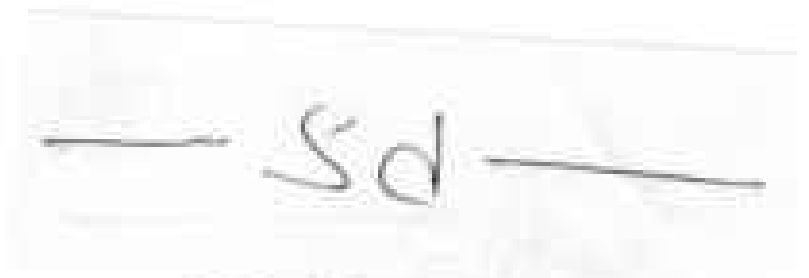
38. In the light of the above said discussion and considering the factual legal position of the present case, we find that the Corporate Debtor has statutory complied with the provision of Section 10 of the I & B Code and the application are found completed. Hence, it deserves for admission.

39. Therefore, the present I & B petition/application filed under Section 10 of the I & B Code is allowed and admitted with the following directions:

- I. That this Bench hereby appoint **Ms. Anju Agarwal**, Address: 166, SFS DDA Flats, Hauz Khas, New Delhi – 110016 Email: anju@asegroup.in Registration Number: IBBI/IPA-001/IP-P00106/2017-2018/102013 as Interim Resolution Professional to carry the functions as mentioned under Insolvency and Bankruptcy Code, 2016.

- II. That the order of moratorium u/s 14 shall have effect from **13.02.2018** till the completion of corporate insolvency resolution process or until this Bench approves the resolution plan under subsection (1) of Section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
 - III. That the Bench hereby prohibits the institution of suits or continuation of pending suit or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, Tribunal, Arbitration Panel or other Authority; transferring, encumbering, alienating or disposing of by the corporate debtor 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 Debtor in respect of its property including any action under the SARFESI Act, 2002; the recovery of any property by an owner or less or where such property is occupied by or in the possession of the Corporate Debtor.
 - IV. That the supply of essential goods or services to corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the Moratorium period.
 - V. That the provisions of Section 14 sub - section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
 - VI. That the public announcement of corporate insolvency resolution process be made immediately as specified under Section 13 of the code and calling for submissions of claim under Section 15 of the Code.
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- VII.** The Interim Resolution Professional shall perform all his functions strictly which are contemplated, *inter alia*, by Sections 17, 18, 20, 21 of the Code. It is further made clear that all the personnel connected with Corporate Debtor, its promoter or any other person associated with Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional. The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.
- VIII.** The Registry is hereby directed to communicate a copy of this order to the Financial Creditor, Secured Creditor (M/s J.M Financial Assets Reconstruction Company Ltd.) and the Corporate Debtor, after the completion of necessary formalities.
- IX.** A Copy of this order be communicated to the IRP as well as to Insolvency and Bankruptcy Board of India.
- X.** In view of the above, the Application is admitted and accordingly stands disposed of.



**H.P. Chaturvedi,
Member(Judicial)**

Date: 13/02/2018

Typed by:
Kanya Prakash Srivastava
A/c
Mohd. Zaid
(Stenographers)