

**IN THE NATIONAL COMPANY LAW TRIBUNAL AT
ALLAHABAD BENCH**

CP NO.(IB)64/ALD/2017

*Section 10 of the Insolvency &
Bankruptcy Code, 2016)*

IN THE MATTER OF

M/S VARANASI AUTO SALES LTD.
J-15/65C & J-15/65C-1A,
Mohalla Alaipur, Ward Jaitpura,
District Varanasi – 221 001, Uttar Pradesh

..... CORPORATE DEBTOR/APPLICANT

JUDGMENT/ORDER DELIVERED ON 26.04.2018

CORAM : SH. V.P SINGH, MEMBER (J)
MS. SAROJ RAJWARE, MEMBER (T)

For the Applicant	: Sh. Anurag Khanna, Sr. Advocate alongwith Ms. Gunjan Jadwani, Advocate.
For the Tata Motor Finance Ltd.	: Sh. R.P. Agarwal, Advocate alongwith Sh. Krishna Agarwal, Advocate
For the Punjab National Bank	: Sh. Anil Kumar Jaiswal, Advocate
For the State Bank of India	: Sh. Prateek J. Nagar, Advocate
For the Tata Capital Financial Services Ltd.	: Sh. Nishant Mehrotra, Advocate

PER SE: SH. V.P. SINGH, MEMBER (J)

ORDER/JUDGMENT

This application is filed by the corporate applicant for initiating CIRP under Section 10 of the Insolvency & Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The corporate applicant is M/s. Varanasi Auto Sales Ltd., whose identification No. is U25112UP1977PLC004427 and Shri Amit Gupta, Principal Promoter and the Director has filed this application on behalf of the corporate applicant on the basis of board resolution dated 15.05.2017 whereby Shri Amit Gupta, Principal Promoter and the Director of the company, has

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been authorized to file necessary application under the provisions of Insolvency and Bankruptcy Code, 2016. A copy of the Board Resolution dated 15.05.2017 is annexed with the application as Annexure I- C.

2. Corporate applicant has also proposed the name of **Mr. Hemant Sharma** as Interim Resolution Professional; Registration No. IBBI/ IPA -002/IP- N 00015/2016-17/10019 and a copy of Form 2 under Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is attached herewith and annexed as Annexure II, to the present Application.

Total Debt raised and Amount of Default is reproduced herein below:

Financial Creditors:

S.NO.	NAME OF FINANCIAL CREDITOR	TOTAL DEBT RAISED	DATE OF INCURRING THE DEBT	AMOUNT IN DEFAULT
1.	State Bank of India	INR 122,300,000.00	31.03.2015	As per Corporate Debtor: INR 102,239,132.50 As per SARFAESI Notice: INR 104,179,389.50
2.	Punjab National Bank	Term Loan: INR 37,000,000.00 Cash Credit Account: INR 114,000,000.00	12.03.2015	As per Corporate Debtor: INR 176,271,546.30 As per SARFAESI Notice: INR 177,263,683.75
3.	Tata Capital Financial Services Ltd.	Total Debt Raised: Term Loan INR 44,700,000.00 Channel Loan INR 36,700,000.00	Term Loan 24.03.2014 Channel Loan 06.08.2015	As per Corporate Debtor : INR 34,099,779.63 As per SARFAESI Notice INR 39,880,740.00
4.	Tata Motors Finance Ltd.	Total Debt Raised: Channel Finance Facility INR 4.79 Crores.	08.03.2016	As per Corporate Debtor The amount of Default: INR 17,400,525.69

4. Following are the list of documents evidencing the default made by the applicant concerning Financial Creditors:

- A copy of notice U/s 13(2), SARFAESI Act, 2002 dated 12.04.2017 by Punjab National Bank.
- A copy of the notice U/s 13(2), SARFAESI Act, 2002 dated 01.05.2017 by State Bank of India.

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- iii. A copy of the notice dated 06.10.2016 U/s 25(1) r.w.s. 27 of the Payment & Settlement Systems Act, 2007 and notice dated 19.05.2017 U/s 13(2), SARFAESI Act, 2002 by Tata Capital Financial Services Ltd. & notice of publication 02.05.2017 and Court summon dated 21.02.2017 for Section 138 Negotiable Instrument Act, 1881.
- iv. A copy of the notice U/s 13(2), SARFAESI Act, 2002 dated 12.04.2017, 01.05.2017 & 19.05.2017, notice dated 06.10.2016 & 02.05.2017 & Court summon dated 21.02.2017 (S.138) is attached herewith and annexed as **ANNEXURE III-F**.

5. It is matter of record, in this matter all the Financial Creditors has objected the present Petition filed by the Corporate Debtor, however **TATA MOTOR FINANCE LIMITED** (financial creditor) has filed the detailed objection against the application alleging that the applicant has filed this application under Section 10 of the I & B Code to initiate corporate insolvency process fraudulently and with malicious intent for the purposes other than for the resolution. Shri R.P. Agarwal, Counsel for the objector TMFL, contended that the real objects of the petitioner are –

- (i) To enjoy the benefit of the moratorium and use it to protect its directors/ guarantors;
- (ii) to defraud the creditors both secured and unsecured;
- (iii) to get the company liquidated without following the process of voluntary liquidation ;
- (iv) to enforce vehicle supply contract with Tata Motors.

6. Further, he contended that in the present case, the Applicant Corporate Debtor had made specific averments made in the petition that its assets are sufficient to discharge its liabilities. Thus when the debtor according to his averment is not 'insolvent', the provisions of IBC do not apply to him given jurisdictional requirements contained in section 2. Therefore the question of filing Application under section 10 does not arise. Petitioner is admittedly not "insolvent". The alleged "default" has no nexus to "insolvency". The security

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created on the assets of guarantors, the net worth of the guarantors and the estimated value of such securities have not been disclosed. Since in the present case all the financial creditors are opposing the petition and they have filed memos **confirming that they would not support any resolution plan**, hence admission of the petition will be a fruitless exercise **and will delay the recovery of the dues of financial creditors, serve the malicious design of petitioner to defraud the creditors, and will erode the assets/ funds in the process as substantial expenditure will be incurred by way of insolvency process cost etc. to the detriment of the creditors. Hence, the said application is liable to be rejected.**



Section 10 of the I& B Code, 2016, mandates only two essential requirements – the existence of Debt and Default. Section 10(4) stipulates that once the Application is complete in all aspects and prescribed form along with requisite fee, it is liable to be accepted. The Hon'ble Supreme Court in the case of **Innoventive Industries** has held that:

“On the other hand, as we have seen, in the case of a corporate debtor who commits a default of financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that default has occurred. It is of no matter that the debt is disputed so long as the debt is “due,” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

8. Further, the Hon'ble NCLAT followed the decision of Hon'ble Supreme Court in “Innoventive Industries Ltd. And its decision in the matter of “M/s. Unigreen Global Private Limited vs Punjab National Bank and others” – Company Appeal (AT) (Insolvency) 81/2017 in the matter of Company Appeal (AT) (Insolvency) No. 100 of 2017 Leo Duct Engineers &

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Consultants Limited, Vs. Canara Bank & Standard Chartered Bank and**held as under:**

4. The similar question fell for consideration before Hon'ble National Company Law Appellate Tribunal in "*M/s. Unigreen Global Private Limited vs Punjab National Bank and others*" – *Company Appeal (AT) (Insolvency) 81/2017*. In the said case, this Hon'ble Appellate Tribunal by its judgment dated 1st December 2017 held as follows :

"20. Under both Section 7 and Section 10, the two factors are common, i.e. the debt is due and there is a default. Sub-section (4) of Section 7 is similar to that of sub-section (4) of Section 10. Therefore we, hold that the law laid down by the Hon'ble Supreme Court in *Innoventive Industries Ltd. (Supra)* is applicable for Section 10 also, wherein the Hon'ble Supreme Court observed as *"The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority"*.

21. In an application under Section 10, the 'financial creditor' or 'operational creditor', may dispute that there is no default or that debt is not due and is not payable in law or in fact. They may also oppose admission on the ground that the Corporate Applicant is not eligible to make application in view of ineligibility under Section 11 of the I & B Code. The Adjudicating Authority on hearing the parties and on perusal of record, if satisfied that there is a debt and default has occurred and the Corporate Applicant is not ineligible under Section 11, the Adjudicating Authority has no option but to admit the application, unless it is incomplete, in which case the Corporate Applicant is to be granted time to rectify the defects.

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's 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



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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.

9. Hon'ble NCLT, Mumbai Bench in its order dated 12.03.2018 in C.P. No.

(IB) 298/MB/2018 *In the Matter of Aircel Ltd.* has held that "*The procedure of Section 10 is to be applied to facilitate the restructuring of stressed assets as well as to reorganise the finances of a Defaulted Company.*"

10. Insolvency and Bankruptcy Code, 2016 do not mandate, that Liability of company should be more than its assets to invoke the provision of IBC.

Further the contention of objector that since in the present case all the



financial creditors are opposing the petition and they have filed memos confirming that they would not support any resolution plan, hence admission of the petition will be a fruitless exercise is also not tenable, as Code does not give any right to the financial creditors/ committee of creditors to opt whether to participate in the resolution process or not. On the contrary, the provisions of the Code read with the Objectives of the Code, make it mandatory for the Financial Creditors/ Committee of Creditors to work out a Resolution Plan for the Debtor Company, and the whole process is subject to the supervision of the Adjudicating Authority.

11. Further, some defects in the application have been pointed out by TATA MOTOR FINANCE LIMITED in their objections. This bench vide order dated 18.04.2018 directed Corporate Debtor /Applicant to cure the defects in the application. Defects were duly cured by Corporate Debtor by submitting an amended copy of the application on 23.04.2018.

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amended application, certificate of a charge issued by Registrar of Companies is attached at page 189 A of the amended application, and an affidavit with proper stamp paper has been attached at page 392 A of the amended application.

12. Given the above stated factual and legal position of the case we are of the view that the corporate debtor has complied with the provision of Section 10 of the Code, there is a debt and default has occurred, the application is complete, and the Corporate Applicant is not ineligible under Section 11.

13. Therefore, we admit the petition and declare Moratorium with Consequential Directions given as under:



I. That the order of moratorium u/s 14 shall have effect from the date of this order 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.

II. 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

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recovery of any property by an owner or less or where such property is occupied by or in possession of the corporate debtor.

- III. That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the Moratorium period.
- IV. That the provisions of Section 14 subsection (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- V. That this Bench at this moment appoints **Mr Hemant Sharma** Email:hemant78sharma@yahoo.com , Registration No. IBBI/ IPA - 002/IP- N 00015/2016-17/10019, as Interim Resolution Professional to carry the functions as mentioned under Insolvency and Bankruptcy Code.
- VI. That the public announcement of corporate insolvency resolution process is made immediately as specified under Section 13 of the code and calling for submissions of a claim under Section 15 of the Code.
- VII. The Interim Resolution Professional shall perform all his functions strictly which are contemplated, *interalia*, 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 a legal obligation under Section 19 of the Code extend every assistance and cooperation to the Interim Resolution Professional. IRP would be at liberty to make appropriate application to this Tribunal with a prayer



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for passing an appropriate order. The IRP shall be under a duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the I & B Code, 2016.

VIII. The Registry is at this moment directed to communicate this order to the Financial Creditors and the Corporate Debtor after the completion of necessary formalities and a copy of this order be transmitted to the IRP as well.

The IRP shall inform the progress of insolvency proceedings and submit the report of the compliance of the directions of this order by 17.05.2018 to this Bench.

List the matter on 17.05.2018 for filing progress report.

Dated:26.04.2018

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**SAROJ RAJWARE,
MEMBER (T)**

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**V.P. SINGH,
MEMBER (J)**

