

In the National Company Law Tribunal
Mumbai Bench.

No. CP(IB)300/MB/2018

Under Section 10 of Insolvency & Bankruptcy Code 2016

In the matter of

Aircel Cellular Limited,
Opus Centre,
47, Central Road,
Opp: Tunga Paradise,
MIDC, Andheri East,
Mumbai,
Maharashtra-400 093. } Petitioner

Order delivered on: 19.03.2018

Coram:

Hon'ble Shri M.K. Shrawat, Member (Judicial)

For the Petitioner(s): : 1. Mr. Janak Dwarkadas, Sr. Advocate
2. Mr. Zal Andhyarujina, Advocate.
I/L JSA – Mr. Varghese Thomas,
Mr. Aditya Rathi,
Mr. Yahaan Limathwalla.

For the Intervener : 1. Mr. Ashish Kamat, Advocate, for GTL
Infrastructure Ltd.,
2. Ms. Raki Lodha, Advocate,
i/b LODHA LEGAL,
Mr. Soumen Ghosh, a/w
Mr. Nishant Rana,
Mr. Chaitanya Nikte, Advocate for Intervener,
Mr. Prasad Sanvankar, Advocate, for
M/s. Krystal Integrated Services Pvt. Ltd.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. This is an Application filed by a Corporate Applicant to initiate 'Corporate Insolvency Resolution Process' (CIRP) by invoking the provisions of Section 10 of I&B Code, 2016 (read with Rule 7 of I&B (Application to Adjudicating Authority) Rule 2016 on 28.02.2018. Requisite Form No.6 is submitted according to which under Part-I and under the head "PARTICULARS OF THE CORPORATE APPLICANT" the **Corporate Debtor** is Aircel Cellular Limited having Registered office at Opus Centre, 47, Central

Road, Opposite Tunga Paradise, MIDC, Andheri (East), Mumbai, Maharashtra-400093. The shareholding pattern is as under :-

- "1. Nominal Share Capital is Rs.1550,00,00,000/- divided into 105,00,00,000 Equity Shares of face value of Rs.10 each and 50,00,00,000 Cumulative Redeemable Preference Share of face value Rs. 10 each.*
- 2. Paid up Share Capital is Rs.15,117,166,000 i.e., 1,049,000,000 Equity Shares of Rs. 10 each and 462,716,600 Cumulative Redeemable Preference Shares of Rs.10 each."*

1.1 At the outset, Learned Senior Advocate Mr. Janak Dwarkadas has explained the necessity of submission of this Application by the Corporate Debtor itself, to be declared as Insolvent, by referring **12th February 2018 Guidelines issued by Reserve Bank of India (RBI/2017-18/131)** addressed to all Scheduled Commercial Banks and All India Financial Institutions. As per the Preamble of the said Guidelines, explanation tendered for issuance of the said Guidelines was that *"The Reserve Bank of India has issued various instructions aimed at resolution of stressed assets in the economy, including introduction of certain specific schemes at different points of time. In view of the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), it has been decided to substitute the existing guidelines with a harmonised and simplified generic framework for resolution of stressed assets. The details of the revised framework are elaborated in the following paragraphs."* As per the revised framework it is advised for early identification and reporting of stressed assets. As soon as a default is detected by a Lender, singly or jointly, directed to take steps to cure the default. Revised prudential norms for restructuring under IBC framework or outside the IBC have been issued for exposure to Borrowed entities against whom Insolvency Applications are filed under the IBC.

Apart from several other clauses of the said Notification, an important decision has also been communicated i.e. **"withdrawal of extant instructions"** reproduced below:-

"The extant instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets, Corporate Debt Restructuring Scheme, Flexible Structuring of Existing Long

Term Project Loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A) stand withdrawn with immediate effect. Accordingly, the Joint Lenders' Forum (JLF) as an institutional mechanism for resolution of stressed accounts also stands discontinued. All accounts, including such accounts where any of the schemes have been invoked but not yet implemented, shall be governed by the revised framework."

Learned Senior Advocate has pleaded that the **decision of RBI has a far reaching effect, directly affecting the NPA Accounts**. One more point is conveyed by Learned Advocate that the Governing Body i.e. RBI has not only acknowledged the enactment of I&B Code but also given due importance to the provisions of I&B Code. As per the said communique the Applicant is left with the option to initiate the proceedings under the Provisions of Insolvency Code. Instead the consortium of Bank could take the recourse of Insolvency proceedings the Debtor had opted to exercise the option, hence this Application is moved U/s 10 of The Code.

1.2 According to Learned Senior Advocate the conditions required to be fulfilled under section 10 for admissions of an Application are minimal that an Applicant is expected to explain the '**Debt**' and secondly to establish the '**Default**'. In this regard, an Order has been pronounced by Hon. NCLAT in the case of **Leo Duct Engineers & Consultants Limited Vs. Canara Bank** (Company Appeal (AT) (Insolvency) No.100 of 2017) **Order dated 13th December, 2017** is referred wherein the conditions for Admission of an Application under section 10 of The Code are specified. The observation is that the Adjudicating Authority, on hearing the Parties and on perusal of records, if satisfied, that there is a 'Debt' and there is a 'Default' occurred then has no option but to Admit the Application, unless the Application is incomplete. In one of the case of **M/s. Unigreen Global Private Limited Vs. Punjab National Bank** and others (Company Appeal (AT) (Insolvency) 81/2017), **Order dated**

01st December, 2017, the verdict says that AA is bound to Admit Application and not to reject on the ground of unrelated facts. Facts beyond the requirement of the said Provision are not required to be pleaded. The restriction for Admission is also prescribed in **Section 11 of The Code** that certain persons are not entitled to make Application viz. **i)** a Corporate Debtor undergoing a Corporate Insolvency Resolution Process or **ii)** a Corporate Debtor in respect of whom a Liquidation Order has been made or **iii)** a Corporate Debtor having completed Corporate Insolvency Resolution Process 12 months preceding the date of making of the Application. Since none of the above conditions are applicable on the Applicant, hence, it is prayed that the Application under consideration be 'Admitted'.

1.3

Learned Senior Advocate has also informed that as happening in the case of Aircel Limited [CP (IB)/298/MB/2018], in this case as well, a Law and Order problem is happening because of the reason that the Bank Account of the Corporate Debtor is freezed. There is a **TRA Account** which is not allowed to be operated by Aircel Cellular Limited. The Company is not making the payment to its staff and employees due to the action of the Bank authorities, not allowing to operate the said Account. All revenue generation and income is agreed upon to be deposited in **TRA account** but now it is freezed. A substantial amount has been freezed. He has vehemently pleaded that if this Petition is Admitted then the Insolvency Resolution Professional shall take charge of the affairs of the Company and the Company thereupon can run the business. Otherwise, owing to several problems created by the Financial and Operational Creditors the Company shall have no option but to shut down the business, or the business may be suspended by operation of law.

1.4

An apprehension has also been raised by Learned Sr. Advocate that due to non-operation of Bank Account and non-payment of salary to staff the **Telecom business** of the Company shall suffer or DoPT may suspend the Licence. He has urged urgency to save the Company.

2. Noteworthy to refer that an **Intervener** has approached the Court at this juncture of Admission, seeking time to represent one of the '**Operational Creditor' viz. GTL Infrastructure** of M/s Aircel Cellular Limited and to be allowed to become party to the litigation. Ld. Advocate Mr. Ashish Kamat representing the Intervener has informed that the **Intervener viz. GTL Infrastructure Limited** has filed a Petition against M/s. Aircel (O.M.P.(I)(COMM.) 40/2018 & I.A. 1214/2018) and vide an Order dated 29.01.2018 the Hon'ble Delhi High Court has restrained the Company to dispose of any of its assets or creating any Third Party Interest. Our attention is drawn that the Hon'ble Delhi High Court has further directed, quote "*It is clarified that the injunction is being passed against the Respondent taking further steps.*" unquote. Hence it is pleaded that the Respondent in the said case i.e. M/s. Aircel Limited is stopped to take any further steps, which includes filing of the impugned Application under section 10 of The Code. The Operational Creditor viz. GTL Infrastructure Limited has a huge amount to recover. That a Trade Liability is to be recovered from Aircel Limited. If the Application is admitted, then his right of recover shall get jeopardised. On admission the Financial Creditors shall constitute a Committee of Creditors and vote in their favour; instead of supporting the claim of this Operational Creditor. It is pleaded that this Petition do not deserve admission because the material fact about the pendency of High Court case has not been disclosed by the Petitioner, therefore, the Petition is malicious and defective due to non-filing of material facts. Further pleaded by Mr. Kamath that some time be granted because the Operational Creditor came to know about this Petition recently, rather only a day ago, hence has a right to respond and for that matter be adjourned for few days.

2.1 As per the columns of Form No.6 it is prescribed to furnish Particulars of Financial/Operational Debt (Creditor-wise) in Part-III. Accordingly, an Annexure is attached describing the Financial Creditors as under :-

S.No.	Bank Name	Sanctioned Amount (Aircel Group)	Amount Outstanding	20 th February 2018	
				Current	Non-Current
1	STATE BANK OF INDIA*	48,900,000,000	50,000,000	1,250,000	48,750,000
	Total	48,900,000,000	50,000,000	1,250,000	48,750,000
	INDAS Adjustment		241,166	-	241,166
	Net		49,758,834	1,250,000	48,508,834
	Balance as per financials		49,758,834	1,250,000	48,508,834

*Interest due amount includes interest accrued for 20 days of February (sic) 2018 which otherwise would become due and payable on February 28, 2018. "

- 2.2 The Corporate Debtor had also availed several other Loan Facilities and one of such Loan Facility is "**Non-Fund Based Facility**" granted by State Bank of India and the outstanding Loan figures as on 20.02.2018 is described as under:-

"NON Fund Based Facility Aircel Cellular Limited as on 20th February, 2018

Amount in Crore

Secured Facilities*	Sanctioned Amount (Air Group Facility)	ACL
		Bank Guarantees
State Bank of India	3000	46.23
Total	3000	46.23

- 2.3 The impugned Application submitted under section 10 of the I&B Code also contains list of "Operational Creditors". Volume PART-II contains a very long list of Operational Creditors running from pages 322 to 345 having about 1,033 in number, Operational Creditors. The total outstanding Operational Credit is stated to be Rs.181,40,64,953/-.
- 2.4 The summary of liability on the Corporate Debtor is listed in one of the Column as below :-

3.	TOTAL DEBT RAISED AND AMOUNT IN DEFAULT	FINANCIAL CREDITORS:
		<p>1. Long Term Facility (State Bank of India) :</p> <p>Amount Outstanding (as on 20th February 2018): Rs.5 crores.</p> <p>Default Amount (Interest on borrowings) (as on 20th February 2018: Rs.19,98,082/-.</p> <p>2. Non-Fund Based Facility:</p>

		<p>Details are annexed in the Petition according to which sanctioned secured facility from State Bank of India is Rs.3,000/- (Amount in Crores).</p> <p><u>OPERATIONAL CREDITORS</u></p> <p>Amount Outstanding (as on 20th February 2018): Rs. 181,40,64,953/-</p> <p>List of names of the operational creditors along with their respective addresses and amounts outstanding is annexed.</p>
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FINDINGS : -

3. Heard both the sides. Case records perused. As per the 'Preamble' a practical motive is intended behind the incorporation of this Code. The I&B Code. 2016 was enacted to consolidate and amend the laws relating to reorganization and Insolvency Resolution of Corporate persons, that too in a time bound manner, for maximization of value of assets of a Corporate Debtor. The purpose of CIRP is to promote entrepreneurship, side by side to balance the interest of all stakeholders. A Petition either filed under section 7, under section 9 or under section 10 is to be Admitted to achieve the said goal also to consider the objectives enshrined in the Preamble and the purpose for which this Code came into operation.

- 3.1 Although on the face of such a Petition it appears strange that why a Corporate Body itself is taking step to be declared Insolvent by moving an Application under section 10; but the answer is obvious that sometimes it becomes impossible to run the business due to pressing demand of recovery by the Creditors. It is to be made clear at this moment itself that Section 10 be not used or considered as a scapegoat for the defaulters, or that an exist route be made possible under the guise of Bankruptcy. The procedure of Section 10 is to be applied to facilitate the restructuring of the Stressed Assets as well as to reorganize the finances of a defaulted Company. For the purpose of reorganization and also for maximisation of value of assets due

procedure is laid down in The Code and to achieve the said goal, the role of the NCLT is vital. Not only as an Adjudicating Authority but sometimes, NCLT is also functioning as a Supervisory Authority so that the provisions of This Code be successfully implemented. Specially when a Resolution Plan is submitted before NCLT to record its satisfaction. The suggestions, if any, made while recording satisfaction play a crucial role for re-establishment of a stressed Company for the years to come. In this regard, Eradi Committee report, Joint Committee Report of Lok Sabha, Parliamentary Debate etc. have also been perused. My decision underneath is based upon the thorough study of the said Reports and on due consideration of the stressed finances of this Corporate Debtor.

3.2 Before considering other aspects, at first it is worth to address the objection raised by an Intended Intervener. It is objected that the right to file this Application under section 10 of The Code has already been forfeited by the Hon'ble Delhi High Court. In this regard, I have perused the relevant paragraph and specially the said line of the Order pointed out for consideration. The Petition before the Hon'ble High Court is not moved under any of the provisions of the Insolvency Code but it was moved under section 9 of the Arbitration and Conciliation Act. On perusal I have noticed that the Petitioner GTL had filed a Petition to secure the unpaid dues payable by a Group Company (Aircel) of about ₹800 crores. The said Petition therefore revolves around a Settlement Agreement 24.05.2014 and Business Transfer Agreement dated 14.01.2010. The said Interim Order was passed only to secure the Petitioner during the pendency of the litigation. The said preliminary Order was passed even before the Respondent had filed an Affidavit in Reply before the High Court. Thus as per the Interim Order the said Company (Aircel) was restrained from disposing of its assets or to create third party interest. The Injunction is against Aircel Limited 'not to take further steps'. In my humble understanding the Hon'ble Court has not directed the other Group Companies restraining to take due recourse

provided under any provision of law. Filing of the Petition under section 10 is a step towards the said direction. As far as the Corporate Debtor's filing of this Petition is concerned, this is not a case that the fact about the Order of the Hon'ble Delhi Court was concealed. Learned Counsel of the Corporate Debtor has pointed out that a conscious decision was taken by the Corporate Debtor in good faith to file this Petition under section 10 keeping in mind the Order of the Hon'ble High Court so that the Corporate Debtor can invite Resolution Plan to overcome the stressed finances. A statement has also been made, worth mentioning, that no SARFAESI or such other recovery proceedings are pending so far against the Corporate Debtor.

One more important aspect is worth to be noted is that the present step of the Corporate Debtor is not in contradiction of the observations of the Hon'ble Delhi High Court. In that case an argument of a Learned Counsel representing SBI before the Hon'ble Court was that **restructuring of the Debt is a primary motive of Consortium of Bankers** hence such a step is required to be taken hence Respondent is free to move an Application for modification of the impugned Order, which was also allowed by granting liberty to Bankers/SBI to take steps to exercise their rights as per law. Hence the Hon'ble Court was also not objecting for taking due steps if it is in the benefit of restructuring of the finances. That objective can be achieved by filing section 10 Application It is therefore not in contradiction of the Order of the Hon'ble Delhi High Court, but toeing the same line.

3.3 I am also of the view that under the changed circumstances when the **RBI has issued Guidelines dated 12.02.2018** (supra) withdrawing several Restructuring Schemes, presently the only remedy available to a Corporate Debtor is to approach NCLT. By this method as well, the ultimate motive is to restructure the stressed assets and to revive the revenue generation by inviting Resolution Plans. The procedure or the law may be different but the ultimate aim is the same. The aim is to protect the interest of all the stakeholders by reviving the finance of a Debtor Company. Because

of this reason as well, I am of the opinion that the action taken by the Corporate Debtor is meaningful and to be supervised strictly. Appointment of Insolvency Resolution Professional and his conduct is also to be scrutinized with judicial acumen. Instead of putting all stakeholders in a lurch, it is best that a consolidated litigation inviting all claimants, be dealt under one umbrella of NCLT.

3.4 A pressing urgency has also been stated for Admission of this Petition that the Banks have freezed TRA Account. It is a common practice and a general mechanism to ask the Debtor to have a Trust and Retention Account which is opened and controlled by the Lenders to protect Credit Risk i.e. the risk of Debt Service Default. In this account substantial deposit is lying, however, the Debtor Company is not allowed to use the same for running day to day business. Due to this reason, the entire revenue generation is freezed resulting into non-payment of Salary and necessary expenditure. There is an apprehension of Law and Order situation because the Vendors, employees and other small Trade Creditors are seriously agitating for their respective dues. Naturally, this situation is to be avoided as early as possible so that the business of the Company must not affect adversely.

4 The apprehension of suspension of Telecom Licence by the DoPT is also well founded, due to the overall stressed financial position. For the revival a Resolution Plan can be an appropriate answer to all these problems.

5 Prima facie it has also been demonstrated that there is a scope of revival of the Company and also betterment in revenue generation. In the connected case of the Group (Aircel Limited) the Applicant has placed certain figures of revenue generation that in the month of December 2017 GSM revenue was ₹5811 Million which had gone down in the January 2018 to ₹5148 Million. However, ABS and other revenue was better from ₹574 Million to ₹640 Million. On the same lines, the Applicant has, therefore, expressed that under the supervision of experts and Judicial Body, the gross revenue generation shall be better in the months to come. In addition to the scope of increase in revenue generation, it has also been

demonstrated that the Debtor Company has enough valuable assets to satisfy the major portion of the outstanding Debt. A provisional Assets and Liabilities drawn as on 20th February, 2018 of Aircel Cellular Limited is annexed which reflects that under the Head "Current Assets", Loans and Advances are to the tune of ₹2532,63,24,378/-. As against that the major Liability shown as Financial Borrowings to the tune of ₹665,64,50,687/-.

- 6 To conclude, considering the voluminous evidences annexed along with the Application and in the light of the provisions of Section 10 of The Code I hereby hold that the conditions as prescribed under section 10 of The Code have duly been fulfilled. Since this is a Petition of "**Corporate Debtor**", therefore, the Insolvency Process shall commence as prescribed under Section 10 of IBC 2016. On one hand the existence of Financial Debt as well as Operational Debt is proved, on the other hand the occurrence of "default" is also established. The Corporate Debtor had failed to pay the amounts due and also failed to adhere to or comply with the other terms of Facility agreements. The Financial Debts have been classified as "Non-Performing Asset" in the books of the Financial Creditor. The Petition under consideration therefore deserves "Admission".
- 7 The Corporate Debtor has intimated the name of the **IRP Mr. Vijaykumar V. Iyer**, Address: Deloitte Touche Tohmatsu India LLP, Indiabulls Finance Centre, Tower 2, 27th Floor, Senapati Bapat Marg, Elphinstone Road (West), Mumbai – 400 013, email: viyer@deloitte.com, Registration No. IBBI/IPA-001/IP-P00261/2017-18/10490 in Part-II of Form No.6 and the said IRP has given his consent in Form No.2, placed on record.
- 8 The Petition is hereby "Admitted". As a consequence, the Moratorium shall commence as prescribed under section 14 of the I&B Code which prohibits as under :-
- (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 (SARFAESI Act);
- (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.
- (e) That supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during Moratorium period.
- (f) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (g) That the order of Moratorium shall have effect from the date of this order till 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 debtor under section 33, as the case may be.
- (h) That the public announcement of the corporate insolvency resolution process shall be acted upon immediately as specified under section 13 of the Code.

9 **DIRECTIONS TO IRP** : That this Bench thus hereby appoints Mr. Vijaykumar V. Iyer, Registration No. IBBI/IPA-001/IP-P00261/2017-18/10490 as **Interim Resolution Professional (IRP)** to carry out the functions as mentioned under Insolvency & Bankruptcy Code. The so appointed IRP shall perform the duties as assigned under Section 18 and under section 15 of the Code. The IRP shall inform the progress of the Insolvency Proceedings and submit the report of the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.

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10 The preliminary pronouncement made in the case of Aircel Limited (CP (IB)/298/MB/2018) on the date of hearing shall also be part of this Order and for ready reference reproduced below:-

"

1. The Applicant is admittedly a Corporate Debtor and in that capacity moved the impugned Application dated 28.02.2018 by invoking the provisions of Section 10 of Insolvency & Bankruptcy Code, 2016. Stated therein that huge Loan Facilities were availed, however admittedly defaulted. In support, a list of the Financial Creditors comprising State Bank of India, J&K Bank, etc. as well as Loan Agreements are annexed. Seeking "Admission" of the Application and consequent thereupon, commencement of Insolvency Proceedings against the Applicant itself.
2. One of the Operational Creditors viz. GTL Infrastructure Limited represented by Learned Counsel pleaded to join as an Intervener before admission of section 10 Application. Referred a decision of Hon'ble Delhi High Court dated 29.01.2018 titled as GTL Infrastructure Limited Vs. M/s. AIRCEL Limited (O.M.P.(I)(COMM.)40/2018 & I.A. 1214/2018.
3. On hearing Learned Senior Counsel Mr. Janak Dwarkadas for the Petitioner and Learned Counsel Mr. Ashish Kamat for the impugned Intervener, it is appropriate to formulate a question of law that "whether an Operational Creditor be allowed as an Intervener while adjudicating the "Admission" of an Application filed under section 10 of I&B Code moved by a Corporate Debtor?
4. Considering the facts and the provisions of The Code, the answer to the above question is in negative. The Operational Creditor at this preliminary stage is not allowed to be made as an Intervener. The conscientious view is that the Application filed under section 10 of The Code deserves "Admission". Ordered accordingly. Reasoned Order shall follow. The Promoters/Directors/CMD are hereby directed not to leave the country without permission or till further Orders.
- 11 That the directions contained and pronounced on 08.03.2018 shall remain in operation in this case as well. As a consequence, the Promoters / Directors / CMD / Members of the Board are hereby advised not to leave the country without permission.
- 12 The Operational Creditors are not remediless under the Insolvency Code and hereby given liberty to lodge the Claim before the appointed IRP or any other remedy if available under the Insolvency Code.

Handwritten signature

13 Accordingly, **this C.P.(IB)-300/NCLT/MB/MAH/2018 stood admitted.**

14. The Corporate Insolvency Resolution Process (CIRP) is commenced from the date of this order.

Date : 19.03.2018

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Sd/-

M.K. SHRAWAT
Member (Judicial)