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Case Comment: Go Airlines (India) Ltd - Go First's Insolvency Filing: Examining the Background, Challenges and Court Proceedings

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INTRODUCTION

GoFirst, formerly Go Airlines (India) Limited¹, has recently applied to initiate the 'Corporate Insolvency Resolution Process' under Section 10² of the IBC. This case analysis provides an overview of the facts surrounding Go First's insolvency filing, the reasons behind it, and the opposition raised against the application. It explores key issues raised in opposition, relevant laws and rules, and offers an analysis of the court's findings. The court ultimately admitted Go First's application, imposing a moratorium and appointing an Insolvency Resolution Professional.

¹ *Go Airlines (India) Limited* Company Petition No (IB)-264(PB)/2023

² Insolvency and Bankruptcy Code 2016, s 10

FACTS

The present application was filed by M/s Go Airlines (India) Limited (referred to as Corporate Applicant) under section 10³ to initiate the ‘Corporate Insolvency Resolution Process’. The company, which was incorporated on April 29, 2004, operates in compliance with the regulations specified in the Companies Act 1956⁴.

The corporate applicant operates in the aviation industry and has run a budget airline called ‘Go Air’ since November 2005, which was subsequently renamed ‘GoFirst’ in May 2021. With a history of 17 years, the applicant complies with the requirements and holds a license to conduct commercial air operations within India. It is recognized as the third-largest airline operator in the country, making significant contributions to tourism, connectivity, and employment. Notably, between 2010 and January 2021, the Company transported a substantial number of passengers, amounting to 83.8 million, through 2,290 weekly departures.

Its ‘Cost per Available Seat Kilometer’ (CASK) remained below the best industry norms until March 2022. The company recorded profitability from 2009–10 through 2018–19, and it kept a cash surplus in 2019–20, with a total annual passenger count of 12 million. Approximately 7,000 direct employees and an additional 10,000 indirect people work for the company. Flights to Leh, Port Blair, and Jammu and Kashmir depend on it greatly. But since March 2022 it has started to default payments to its creditors, vendors, aircraft lessors etc. and has received notices from them seeking the default amounts.

REASONS FOR FILING THIS APPLICATION

Due to defective engines provided by ‘Pratt & Whitney’ (hereafter P&W), a corporate applicant has been having financial problems. This has resulted in grounding aircraft and creating operational disruptions. In 2022, approximately 34% of the company's aircraft were unable to operate. Despite the Corporate Applicant's efforts to resolve the issue with P&W, the

³ *Ibid*

⁴ Companies Act 2013

latter has refused to fulfill its contractual obligations by repairing or providing replacement engines.

The Corporate Applicant acted quickly and filed an arbitration case at the 'Singapore International Arbitration Center' against P&W (SIAC). The Emergency Arbitrator made two decisions on February 3, 2023 and April 15, 2023, directing P&W to deliver 10 working engines by April 27, 2023 and an additional 10 engines each month until December 20, 2023.

P&W disregarded the arbitration process' rules. As a result, the current application has been made to maintain the moratorium specified in Section 14(1)⁵. Without this safeguard, the Corporate Applicant runs the risk of losing all of its remaining assets.

OPPOSITION TO THE APPLICATION

ISSUES

1. Whether there is any mandatory requirement of issuing notice to the Creditors before admitting an Application filed under Section 10⁶.
2. Whether an Application under Section 65⁷ can be entertained even after the commencement of CIRP.
3. Is the application filed fulfilling the ingredients under Section 10⁸ of the IBC 2016?

RULE/LAW

Sections 7⁹, 9¹⁰, 10¹¹ and 65¹² of the IBC 2016.

⁵ Insolvency and Bankruptcy Code 2016, s 14(1)

⁶ Insolvency and Bankruptcy Code 2016, s 10

⁷ *Ibid*

⁸ Insolvency and Bankruptcy Code 2016, s 65

⁹ Insolvency and Bankruptcy Code 2016, s 7

¹⁰ Insolvency and Bankruptcy Code 2016, s 9

¹¹ Insolvency and Bankruptcy Code 2016, s 10

¹² Insolvency and Bankruptcy Code 2016, s 65

Rules 4¹³, 6¹⁴ and 7¹⁵ of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016.

ANALYSIS

Issue 1

Applications were filed as per sections 7¹⁶ and 9¹⁷ of the IBC as there is a dispute between parties, and it is the right of the Respondent or Corporate Debtor to receive notice. Typically, in Section 7¹⁸ and 9¹⁹ applications, there are no additional parties involved as Respondents besides the Corporate Debtor. On the basis that they are not necessary parties to the case, the NCLAT and the Adjudicating Authority have on a few occasions refused to permit the intervention of other parties or creditors under Sections 7 or 9 proceedings.

Relying on ‘M/s. Unigreen Global Private Limited v Punjab National Bank & Ors’²⁰ it has been noted that a Creditor only has a few reasons to object to a Section 10 application, namely, ‘if the debt is not due and payable’ under applicable “law or fact”, or if the due to its ineligibility under Section 11²¹, Corporate Applicant is not qualified to submit an application or any of the current circumstance does not fit any of the aforementioned criteria.

Additionally, the court after relying on Sections 7, 9, and 10²² of the IBC 2016 and Rules 4, 6, and 7²³ of the Application to Adjudicating Authority Rules, 2016 ruled that neither the issue of notice nor the serving of a copy of the Sec 10 Application upon the Creditors is expressly required by law.

¹³ Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, r 4

¹⁴ Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, r 6

¹⁵ Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, r 7

¹⁶ Insolvency and Bankruptcy Code 2016, s 7

¹⁷ Insolvency and Bankruptcy Code 2016, s 9

¹⁸ Insolvency and Bankruptcy Code 2016, s 7

¹⁹ Insolvency and Bankruptcy Code 2016, s 9

²⁰ *M/s Unigreen Global Private Limited v Punjab National Bank & Ors* (2017) SCC OnLine NCLAT

²¹ Insolvency and Bankruptcy Code 2016, s 11

²² Insolvency and Bankruptcy Code 2016, s 9

²³ Insolvency and Bankruptcy Code 2016, r 6

Additionally, the counsel for the Lessors, Objectors, and Creditors argued that in compliance with Section 424²⁴, this adjudicating authority is required to follow the 'Principles of Natural Justice' (PNJ) and to provide the Creditors with a fair opportunity to be heard.

The court relying on *Ajit Kumar Nag v G.M (P.J) India Oil*²⁵ and *Krrish Realtech Private Limited*²⁶ court noted that hearing every creditor in line with Sec 10 of the IBC could cause an undue delay in the case's settlement, which could reduce the value of the assets and undermine the IBC's goal maximization of value and finally revitalize the Corporate Applicant.

Issue 2

The lawyers for the lessors, objectors, and creditors presented their case and stated that they intended to apply under Section 65²⁷. They argued that this application needed to take precedence and be heard before the current Section 10²⁸ Application was decided upon.

Contrarily, the applicants argued that there is no specific restriction on filing a Sec 65²⁹ after the initiation of CIRP. They argued that the Adjudicating Authority could handle any Section 65³⁰. Applications that were submitted at a later date after the Section 10 Application was admitted. They further underlined that it is not legally required to hold off on admitting a Section 10 application in anticipation of a Sec 65 application.

In the case of *Wave Megacity Centre Private Limited v Rakesh Taneja & Ors*³¹, it was not established that the requirement to adjudicate a Section 65³² Application must precede the consideration of the admission of a Section 10³³ Application. The applicant also maintained

²⁴ Companies Act 2013, s 424

²⁵ *Ajit Kumar Nag v G.M (P.J) India Oil* (2005) 7 SCC 764

²⁶ *Krrish Realtech Private Limited* (2021) SCC OnLine NCLAT 429

²⁷ Insolvency and Bankruptcy Code 2016, s 65

²⁸ Insolvency and Bankruptcy Code 2016, s 14

²⁹ Insolvency and Bankruptcy Code 2016, s 65

³⁰ *Ibid*

³¹ *Wave Megacity Centre Private Limited v Rakesh Taneja & Ors* (2023) SCC OnLine NCLAT 50

³² Insolvency and Bankruptcy Code 2016, s 65

³³ Insolvency and Bankruptcy Code 2016, s 9

that creditors do not possess the authority to object to the admission of a Section 10³⁴, Application if it satisfies all the requisite criteria. To address their complaints, creditors have the chance to submit a separate application under Sec 65³⁵. Such an application can be considered even after the admission of the Section 10³⁶ application. The applicants further argued that if creditors are permitted to raise their concerns during the admission process, there exists a potential risk of the Corporate Applicant experiencing asset loss or devaluation. This could lead to irreparable harm and impede the prospects of resolution.

The court noted that Section 65³⁷ of the IBC utilizes the term “initiates” without any explicit differentiation between the pre-admission or post-admission stages of CIRP. It is clear from reading Sub-section (1) of the provision that it is not limited to the day on which a financial and operational creditor or corporate applicant applies to start the CIRP with the adjudicating authority. Instead, it covers a longer period and, if necessary, may also include the liquidation phase.

There may be cases where fraudulent activities are discovered well after the initiation of the CIRP. If Sect 65 of the IBC is narrowly interpreted and limits its application only to the pre-admission stage, then the provision would lose its relevance. Therefore, it is asserted that Sec 65 may be used at any time, whether before or after the CIRP's admission, by a party who has been aggrieved.

Issue 3

For an application to be accepted under Section 10³⁸ of IBC 2016 it has to satisfy the Adjudicating Authority

(a) There is a debt,

(b) default has occurred,

³⁴ Insolvency and Bankruptcy Code 2016, s 10

³⁵ Insolvency and Bankruptcy Code 2016, s 65

³⁶ Insolvency and Bankruptcy Code 2016, s 14

³⁷ Insolvency and Bankruptcy Code 2016, s 65

³⁸ Insolvency and Bankruptcy Code 2016, s 14

- (c) The application is complete in terms of sub-sections (2) & (3) of Section 10, and further,
- (d) The Corporate Applicant is not ineligible under Section 11.

The Corporate Applicant has given demand notices sent by the creditors as evidence of the debt and default. These notices demonstrate that the applicant has not made payments on a debt that exceeds Rs 1 crore. In addition, the senior counsel for the lessors/objectors did not object to the obligation owed to them or the occurrence of default.

The Corporate Applicant has satisfied the prerequisites outlined in Section 10(3)(a) by submitting the balance sheets of the previous financial years, which can be found in the Application. Moreover, the Written Consent of the proposed 'Insolvency Resolution Professional' (IRP) in 'Form-2' attached to the application, complying with Section 10(2)(b) was submitted. Additionally, paragraph 13 mentions the inclusion of the Special Resolution passed by the Shareholders, as mandated by Section 10(2)(c). Consequently, it is determined that the Application complies with the provisions of Sections 10(2) and (3). Section 11³⁹ of the IBC 2016 does not disqualify the Corporate Applicant. As a result, the Corporate Applicant's Application is approved.

HELD

The court ruled that in Section 10 proceedings, it is not mandatory to issue notice to the Creditors during the pre-admission stage. Instead, the decision to provide notice to the Creditors is based on the discretion of the court, which should be exercised on the merits of each case. The issuance of notice during the pre-admission stage cannot be asserted as an absolute right when there is a demonstrable concern about the depreciation of the Corporate Applicant/assets Debtor and the greater public interest is at risk. Furthermore, the court clarified that there are no restrictions on entertaining, considering, or adjudicating Sec 65 Application even after the initiation of CIRP

Accordingly, it has admitted the Application of the Corporate Applicant. The moratorium

³⁹ *M/s Unigreen Global Private Limited v Punjab National Bank & Ors* (2017) SCC OnLine NCLAT

under Sect 14⁴⁰ is declared.

(a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including the 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 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 Corporate Debtor.

As per the request made by the Corporate Applicant, the court has approved the appointment of Mr. Abhilash Lal as the Insolvency Resolution Professional (IRP), as there were no pending disciplinary proceedings against the IRP. Additionally, the court has specified that the IRP must fulfill the disclosure requirements mandated by the IBBI Regulations, 2016 within one week of the issuance of this order.

ANALYSIS

The court's judgment in GoFirst's insolvency filing allows the initiation of the 'Corporate Insolvency Resolution Process' under Section 10 of the IBC. The court ruled that it is not mandatory to issue notice to creditors during the pre-admission stage and clarified that Section 65 applications can be entertained even after CIRP commencement. GoFirst's application fulfilled all Section 10 requirements, and an Insolvency Resolution Professional was appointed. The judgment strikes a balance between creditor interests and the Corporate Applicant's preservation, promoting effective resolution and maximizing asset value.

⁴⁰ Insolvency and Bankruptcy Code 2016, s 14

CONCLUSION

GoFirst, formerly known as Go Airlines (India) Limited, has applied under sec 10 to initiate the CIRP. The company has encountered financial difficulties due to defective engines provided by Pratt & Whitney, resulting in operational disruptions and unpaid debts to creditors. The court made it clear that it is not necessary to notify creditors before admitting an application under Section 10. Furthermore, it emphasized that an application under Section 65⁴¹ can be considered even after the initiation of the insolvency process. The court affirmed that the application fulfilled the requisites of Section 10⁴², including the existence of debt, occurrence of default, and adherence to procedural obligations. Consequently, the court accepted the application, enforced a moratorium, and appointed an Insolvency Resolution Professional.

⁴¹ Insolvency and Bankruptcy Code 2016, s 65

⁴² Insolvency and Bankruptcy Code 2016, s 14