

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**Company Appeal (AT) (Insolvency) No. 83 of 2018****IN THE MATTER OF:****State Bank of India****...Appellant****Vs.****Shakti Bhog Foods Limited****...Respondent****Present: For Appellant: - Mr. P.V Dinesh and Mr. Rajendra Beniwal, Advocates.****ORDER**

12.03.2018 – The Appellant- State Bank of India ('Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") for initiation of 'Corporate Insolvency Resolution Process' against M/s. Shakti Bhog Foods Limited ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 8th February, 2018 dismissed the petition as winding up proceedings is pending against the 'Corporate Debtor'.

2. Learned counsel for the Appellant submitted that 'I&B Code' is a complete Code by itself and Section 238 of the 'I&B Code' will override the other provisions, including the winding up proceedings initiated under Section 433 of the Companies Act, 1956.

3. He further submits that even after initiation of winding up proceedings, it is open to the Adjudicating Authority to restore the

Company to its first stage of Resolution Process and on failure to order final stage of liquidation.

4. Almost similar issue fell for consideration before this Appellate Tribunal in “***M/s. Unigreen Global Private Limited Vs. Punjab National Bank & Ors.— Company Appeal (AT) (Insolvency) No. 81 of 2017***”, wherein by judgment dated 1st December, 2017, this Appellate Tribunal noticed the relevant provisions and observed:

“28. *In a case where a winding up proceedings has already been initiated against a Corporate Debtor by the Hon’ble High Court or Tribunal or liquidation order has been passed in respect of Corporate Debtor, no application under Section 10 can be filed by the Corporate Applicant in view of ineligibility under Section 11(d) of I & B Code, as quoted below:*

“11. **Persons not entitled to make application -**

The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:—

- (a) a corporate debtor undergoing a corporate insolvency resolution process; or*
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or*

- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation.— For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.”

29. *In view of the aforesaid provision where a winding up proceeding has already been initiated under the Companies Act, 1956 / 2013 by the Hon’ble High Court such cases have not been transferred to National Company Law Tribunal, pursuant to “Companies (Transfer of Pending Proceedings) Rules, 2016”, framed by the Central Government.*

30. *Clause (d) of Section 11 refers to “liquidation order”, against a Corporate Debtor. The word ‘winding up’ has not been mentioned therein. For the said reason by Section 255 read with Schedule 11 of the I & B Code, in Section 2 of the Companies Act, 2013 for clause (23), the following clause has been substituted:*

“1. In section 2,—

- (a) *for clause (23), the following clause shall be*

substituted, namely:—

xxx

xxx

xxx

"(23) "Company Liquidator" means a person appointed by the Tribunal as the Company Liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act";

(b) after clause (94) , the following clause shall be inserted,

namely:—

"(94A) "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable."

31. By aforesaid amendment, the legislatures have made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as mentioned in the I & B Code.

32. In view of the provisions aforesaid, we hold that, if any winding up proceeding has been initiated against the Corporate Debtor by the Hon'ble High Court or Tribunal or liquidation order has been passed, in

such case the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up, where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10.”

5. In **“Innoventive Industries Limited Vs. Kumar Motors Private Limited– Company Appeal (AT) (Insolvency) No. 181 of 2017”**, this Appellate Tribunal by judgment dated 9th February, 2018, observed and held as follows:

*“18. It is true that the Appellant is not covered by Section 11 of the ‘I&B Code’, we are of the view that the ratio laid down in **“M/s. Unigreen Global Private Limited Vs. Punjab National Bank & Ors.”** is also applicable to the ‘Financial Creditor’/’Operational Creditor’ for the reasons recorded below. The clause (d) of Section 11 is also applicable in respect to ‘Corporate Debtor’ in respect of whom a liquidation order has been made.*

*19. The question as raised in this appeal fell for consideration before this Appellate Tribunal in **“Forech India Pvt. Ltd. Vs. Edelweiss Assets Reconstruction Company Ltd. & Anr. – Company***

Appeal (AT) (Insolvency) No. 202 of 2017”,
wherein this Appellate Tribunal by judgment dated
23rd November, 2017 held as follows:

“7. There is no provision under the I & B Code which stipulate that if a ‘winding up’ or ‘liquidation’ proceeding has been initiated against the Corporate Debtor, the petition under Section 7 or Section 9 against the said Corporate Debtor is not maintainable.

8. However, if a ‘Corporate Insolvency Resolution’ has started or on failure, if liquidation proceeding has been initiated against the Corporate Debtor, the question of entertaining another application under Section 7 or Section 9 against the same very ‘Corporate Debtor’ does not arise, as it is open to the ‘Financial Creditor’ and the ‘Operational Creditor’ to make claim before the Insolvency Resolution Professional/Official Liquidator.

9. Similarly, one may argue that in case where ‘winding up’ proceeding has been ordered by the Hon’ble High Court and thus stands initiated, where is the question of filing an application

under section 7 or 9 or initiation of Corporate Insolvency Resolution Process, which, on failure ultimately culminates into liquidation proceedings (winding up proceedings)? The argument can be that once second stage i.e. liquidation (winding up) proceedings has already initiated, the question of reverting back to the first stage of ‘Corporate Insolvency Resolution Process’ or preparation of Resolution plan does not arise. One can appreciate such stand which can be decided in an appropriate case, but such issue being not involved in the present case, we are not deciding the issue aforesaid. It is left open to be decided in other appropriate case.”

20. *In the present case, as admittedly the High Court has already admitted the winding up proceedings and ordered for winding-up of the Respondent-‘Corporate Debtor’, we hold that the question of initiation of ‘Corporate Insolvency Resolution Process’ against same ‘Corporate Debtor’ does not arise.”*

6. The case of the Appellant is being covered by the decision of this Appellate Tribunal in **“Innoventive Industries Limited (Supra)”**, we are

not inclined to interfere with the impugned order. We find no merit in this appeal, it is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member(Judicial)

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