

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 788 of 2018

(Arising out of Order dated 10th October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, in C.P. (IB) No. 767/KB/2017)

IN THE MATTER OF:

State Bank of India

...Appellant

Vs

Jai Balaji Industries Limited & Ors.

....Respondents

Present:

For Appellant:

Mr. Ramji Srinivasan, Senior Advocate with Mr. Ajay Gaggar, Mr. Robin Sirohi, Ms. Vineeta Singh Rathore, Ms. Sylona Mohapatra, Mr. Basudeb Biswas and Mr. Rajesh Chaubey, Advocates.

For Respondents:

Mr. Ratnanko Banerjee, Senior Advocate with Ms. Richa Sandilya and Mr. Chetan Roy, Advocates for R-2.
Mr. Upamanyu Hazarika, Senior Advocate with Mr. Dhruv Surana, Advocate for R-3.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The 'State Bank of India'- ('Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code")

for short) for initiation of the 'Corporate Insolvency Resolution Process' against 'Jai Balaji Industries Limited'- ('Corporate Debtor') alleging existence of default in repayment of loan advanced to the 'Corporate Debtor'.

2. 'Jai Balaji Industries Limited'- ('Corporate Debtor') challenged the said proceedings before the Hon'ble High Court of Chattishgarh in W.P. No. (c) 699 of 2018 wherein an interim order was passed by the Hon'ble High Court preventing continuation of the proceedings under the 'I&B Code'. However, the said interim order dated 14th March, 2018 was modified. Thereafter, the Special Leave Petition against the said order of modification was also dismissed by the Hon'ble Supreme Court by order dated 16th July, 2018.

3. Before the Hon'ble High Court, the 'Corporate Debtor' took plea that a number of winding up petitions were pending against it. However, subsequently the Hon'ble High Court by an order clarified that this order passed by the Hon'ble High Court shall not be construed to stand in the way of hearing of the application filed by the 'State Bank of India' against the 'Corporate Debtor' under the 'I&B Code'.

4. In a petition under Section 7 (registered as C.P. (IB) No. 767/KB/2017) a number of Interlocutory Applications were filed. One of such application was filed by 'Jai Balaji Industries Ltd. Contractor's & Worker's Union', another by 'Lakhotia Transport Company Pvt. Ltd.', the third application by 'Dynamic Hard Coke Manufacturing Company' etc. All

of them took plea that due to pendency of winding up proceeding before the Hon'ble High Court, the petition under Section 7 was not maintainable.

5. The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, by impugned order dated 10th October, 2018 held that application under Section 7 preferred by the 'Financial Creditor' was not maintainable in view of the pendency of the winding up petition before the Hon'ble High Court.

6. Learned counsel appearing on behalf of the Appellant- 'Financial Creditor' submitted that no winding up order has been passed by the Hon'ble High Court, therefore, the application under Section 7 is maintainable. On the other hand, according to learned counsel for the Respondents, the Hon'ble High Court of Calcutta having passed order of winding up, the application under Section 7 is not maintainable.

7. From the records following facts emerges:

A winding up petition being CP No. 822 of 2014 was filed against the 'Corporate Debtor' by 'Lakhotia Transport Company Pvt. Ltd.' before the Hon'ble High Court of Calcutta (Original Side) on 16th September, 2014. The said petition was admitted on 17th August, 2015. Subsequently on 14th September, 2015, the Hon'ble High Court directed to issue notice and to publish advertisement for winding up in the newspapers. Thereafter, the matter remained pending since long.

8. After about three years, on 7th June, 2018, when the matter was taken up, learned Single Judge noticed the following facts and observed:

“.....It is the case of the petitioner in this application that by an order dated August 17, 2015 a learned Single Judge of this Court admitted this winding-up application filed by itself against the company. By the said order the company was, however, granted an opportunity to pay the principal sum of Rs.3,87,49,003/- (Rupees Three Crore Eighty Seven Lakh Forty Nine Thousand and Three only) together with interest at the rate of 8 per cent, per annum from February 11, 2014 and costs assessed at 2,000 GMs within a fortnight, failing which the winding-up application would be advertised in the newspapers. The company carried the said order dated August 17, 2015 in appeal, being ACO No.146 of 2015, APOT No.419 of 2015, CP No.822/2014, before the Division Bench of this Court. By an order dated September 4, 2015 the Division Bench of this Court directed the company to deposit Rs. 50,00,000/- (Rupees Fifty Lac only) within September 11, 2015 as a condition for obtaining stay of operation of the order dated

August 17, 2015 passed by the learned Single Judge. The company, however, did not deposit the said amount as directed by the Division Bench and the petitioner caused advertisement of the winding-up application in newspapers. Thereafter, the company filed an application, CA 133 of 2017 before a learned Single Judge of this Court praying for, inter alia, stay of further proceedings of the winding-up application and the order dated August 17, 2015. By a consent order dated April 17, 2017 a learned Single Judge of this Court disposed of the said application CA 133 of 2017.

In terms of the said consent order dated August 17, 2017 the company was to pay Rs.3,77,88,569/- (Rupees Three Crore Seventy Seven Lakh Eighty Eight Thousand Five Hundred Sixty Nine Only) to the petitioner. The said consent order further provided that out of the said Rs.7,88,562/- (Rupees Seven Lakh Eighty Eight Thousand Five Hundred Sixty Two Only) the company would pay Rs.3,77,88,569/- (Rupees Three Crore Seventy Seven Lakh Eighty Eight Thousand Five Hundred Sixty Nine Only) to the petitioner at the time of passing of the said order

and the balance sum of Rs.3,70,00,000/- (Rupees Three Crore Seventy Lakh Only) would be payable by the company to the petitioner in monthly instalments of Rs.12,00,000/- (Rupees Twelve Lakh Only) each, starting on and from May 2, 2017 and, thereafter, on or before 7th day of each succeeding month. As per the said consent order, subject to payment of the monthly instalments by the company to the petitioner, the winding-up proceeding would remain adjourned sine die but in case of default in payment of two consecutive instalments, the petitioner would be entitled to proceed with this winding-up application as before.

According to the petitioner, in terms of the said consent order dated April 17, 2017, the company paid Rs.7,88,562/- (Rupees Seven Lakh Eighty Eight Thousand Five Hundred Sixty Two Only) and the monthly instalments of Rs.12,00,000/- (Rupees Twelve Lakh Only) each, up to the month of November 2017 and, thereafter, it failed to pay any of the balance monthly instalments. It was vehemently submitted that since the company has failed to

pay the balance monthly instalments from the month of December 2017 amounting to Rs.2,86,00,000/- (Rupees Two Crore Eighty Six Lakh Only) in terms of the said consent order dated April 17, 2017 the petitioner is entitled not only to proceed with the winding-up application but also to obtain the final order of winding-up of the company.

As mentioned earlier in spite of service of this application, none appears on behalf of the company to dispute the averments made by the petitioner in this application.

In view of the above facts urged by the petitioner, which remain uncontroverted, it is evident that the company is involved circumstances and it is unable to pay its debt under Section 433(e) of the Companies Act,1956. Thus, this Court has no option but to allow this winding up application. Accordingly, there shall be an order in terms of prayers (a) to (g) of the Judge's Summons.

The Official Liquidator is directed to forthwith take possession of all the assets and

properties of the company lying at its registered office its factories, together with its business and affairs.

Urgent certified website copies of this order, if applied for, be made available to the parties subject to compliance with all requisite formalities.”

9. The aforesaid order dated 7th June, 2018 was challenged by the ‘State Bank of India’ before the Division Bench as direction was issued to windup the Company namely— ‘Jai Balaji Industries Limited’ and direction was issued on the ‘Official Liquidator’ to forthwith take possession of all the assets and properties of the company. A Division Bench of Hon’ble High Court of Calcutta (Original Side) by judgment dated 21st June, 2018 set aside the order dated 7th June, 2018 with following observations and directions:

“..... The learned Senior Advocate appearing for some of the promoters of the company (presently in liquidation) submitted that the said promoters have filed an application for recalling of the order dated June 07, 2018 and to submit a scheme for revival of the company (presently in liquidation).

I have considered the materials on record and the arguments advanced on behalf of the applicant bank and the petitioning creditor as well. In the present case, it is a fact that when the company (presently in liquidation) failed to deposit Rs. 50,00,000/- as directed by the Division Bench on September 04, 2015 the petitioning creditor caused the advertisement of the winding up application being published in newspapers stating that application would be heard by the Court on October 14, 2015. However, when the company (presently in liquidation) was registered with the BIFR, by the order dated March 22, 2016 a learned Single Judge of this Court adjourned the hearing of the winding up application, C.P. No. 822 of 2014 sine die. Until the company (presently in liquidation) filed the said application, C.A. No. 133 of 2017 the winding up application did not appear before this Court. Even in the said application, C.A. No. 133 of 2017 the company (present in liquidation) claimed the advertisement of the winding up application published in the newspapers on September 14, 2015 to be invalid advertisement.

In the facts of the present case as discussed above, I find that in the instant case before

allowing the application C.A. 51 of 2018 and passing the order dated June 07, 2018, this Court ought to have directed publication of fresh advertisement of the winding up application in the newspapers and enable the secured creditors and the other creditors of the company (presently in liquidation) to participate in the winding up application. In the instant case the contentions raised by the petitioning creditor to oppose the prayer of the applicant bank in this application do not have any merit.

For the reasons as aforesaid, the application, C.A. No. 165 of 2018 succeeds and the order dated June 07, 2018 passed by this Court in C.A. No. 51 of 2018 is recalled.

Let, C.A. No. 51 of 2018, together with the winding up application, C.P. No. 822 of 2014 appear before this Court, under heading 'Company Matter Adjourned', on July 09, 2018 when appropriate direction will be passed for fresh advertisement of the winding up application of the petitioning creditor in the newspapers.

It is, however, made clear that since this application is disposed of without requiring the petitioning creditor to file its affidavit-in-opposition,

the allegations made against it in this application, if any, shall be deemed not to have been admitted.

With the above directions, C.A. No. 165 of 2018 stands disposed of.

There shall, however, be no order as to costs.

Urgent certified copy of this judgment, if applied for, be made available to the parties subject to compliance with all requisite formalities.”

10. On 19th July, 2018, the Division Bench of the Hon’ble High Court of Calcutta taking into consideration the submissions made by the State Bank of India made following observations and directions:

“.....The State Bank as secured creditor of the company complained to the company Court that in the light of the company petition having been adjourned sine die, which deprived the other creditors of the company to have their say at the post- advertisement stage, the company Court ought to have issued some form of notice or advertisement before hearing the matter again. At any rate, the State Bank contended before the company Court, the company could not be wound up without reference to its other creditors merely because an advertisement may have been

published some two or three years prior to the company being wound-up. In short, it was the allegation of the State Bank that a friendly creditor had been propped up to ensure the winding-up of the company by Court.

By the order impugned, the company Court perceived that in the peculiar circumstances that the petition did not appear on the returnable date indicated in the advertisements and the matter remained adjourned for a substantial period of time, a fresh advertisement should have been directed to be published before the matter was considered at the post-advertisement stage. The company Judge cannot be faulted for such perception, since creditors of a company have a say at the post-advertisement stage and the company Judge has the discretion to not wind up the company despite its proven indebtedness to the petitioning-creditor if other creditors demonstrate that the company should not be wound up. On the point of principle, the order impugned cannot be questioned.

However, instead of the company Judge issuing fresh directions for advertisements

immediately, a future date was indicated when directions for such advertisements were to be issued. In the meantime, the appellant herein preferred the present appeal. The date July 9, 2018 indicated in the order impugned by the company Court for fresh directions to be issued as to the advertisements could not adhered to, primarily, on account of the pendency of this appeal.

The order impugned does not call for any interference. However, since the date for directing fresh advertisements to be published has passed, such directions are issued hereby. The petitioning-creditor will cause advertisements to be published in the same newspapers in which the original advertisements had been published, indicating that the company petition will appear before the company Court on the first available working day two weeks after the date of the publication. The publication of the advertisements has to be simultaneous in the newspapers on a date within two weeks from today.

The department is directed to ensure that the company petition appears in the list on the returnable date.

*APO No.186 of 2018 and ACO No.22 of 2018
are disposed of.*

There will be no order as to costs.”

11. Learned counsel appearing on behalf of the Respondents enclosed a copy of the advertisement published in the newspaper 'The Statesman, Kolkata' on 24th July, 2018 wherein giving reference to the order dated 19th July, 2018, notice has been issued to the parties for winding up the company. It was intimated that the said petition is to be heard before the Hon'ble Company Judge and the parties were asked to file their respective affidavits.

12. Learned counsel appearing on behalf of the Appellant-'State Bank of India' relied on 'The Companies (Court) Rules, 1959' and submitted that after advertisement of the petition an order appointing 'Provisional Liquidator' is required to be passed in Form No. 49 in terms of Rule 106(2). It is only thereafter in terms of Rule 111, in Form No. 52, winding up order is required to be passed. Thereafter, notice of winding up is required to be issued. It is stated that till date no order of winding up has been passed by the Hon'ble High Court of Calcutta. Whatever the order of winding up earlier passed by the Hon'ble Single Judge (Company Judge) has been recalled by the Division Bench.

13. We have noticed the rival submissions of the parties, orders passed by the Hon'ble High Court of Calcutta and perused the records. The facts as

narrated and the order passed by the Hon'ble High Court clearly shows that till date the Hon'ble High Court of Calcutta has not passed any order of winding up/liquidation of the 'Corporate Debtor'. The Adjudicating Authority has failed to notice the aforesaid relevant orders passed by the Hon'ble High Court of Calcutta.

14. In **“Unigreen Global Private Limited v. Punjab National Bank & Ors. – (2018) 145 SCL 272”**, this Appellate Tribunal held:

“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.

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.”*

15. In the present case, as we find that no specific order of winding up/liquidation has been passed by the Hon'ble High Court of Calcutta and whatever the order of admission or winding up earlier issued has been recalled by the Division Bench, we hold that the application under Section 7 preferred by the 'State Bank of India' is maintainable.

16. In the present case, such application under Section 7 was filed on 27th December, 2017 and more than a year has passed. As it is not the case of the 'Corporate Debtor' that no debt is payable in law or in fact and the Adjudicating Authority has not held that application was incomplete, the Adjudicating Authority should have admitted the application and should have passed order of 'Moratorium', etc.

17. For the reasons aforesaid, we set aside the impugned order dated 10th October, 2018 and remit the matter to the Adjudicating Authority, Kolkata Bench, Kolkata with direction to admit the application under Section 7. Before such admission, intimation to be given to the 'Corporate Debtor', but no further hearing is required to be given to any person, this Appellate Tribunal having heard all the parties and having held that it is a fit case for admission.

18. The appeal is allowed with aforesaid observations and directions. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

8th February, 2019

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