

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 39 of 2018

IN THE MATTER OF:

Birender Kumar

...Appellant

Vs

M/s Adel Landmarks Ltd.

....Respondent

Present:

For Appellants: Mr. Summet Anand, Advocate.

ORDER

02.02.2018. The Applicant has preferred the application under Section 9 of the Insolvency and Bankruptcy Code, 2016 for initiation of Corporate Insolvency Resolution Process against M/s Adel Landmarks Ltd. The Adjudicating Authority (National Company Law Appellate Tribunal), New Delhi Bench by impugned order dated 18th September, 2017 dismissed the application in view of pendency of winding up proceedings before the Hon'ble High Court, New Delhi in C.P. No.312 of 2016.

2. 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**" dated 1st December, 2017, though, that was the case relating to application by 'Corporate Applicant' under Section 10 of the 'I&B Code'. In the said case, 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."*

3. It is true that the Appellant is not covered by Section 11 of the 'I&B Code', however, 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.

4. 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 observed 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 involve in the present case, we are not deciding the issue aforesaid. It is left open to be decided in other appropriate case."

5. In the present case, we are of the view that the aforesaid observation is applicable. Learned counsel appearing on behalf of Appellant accepts that Hon'ble High Court has already initiated winding up proceedings by admitting the application under Section 433(e) of the Companies Act, 1956. In view of such position and observations made by this Appellate Tribunal in aforesaid appeals, we hold that the application under Section 9 was not maintainable. For the said reason we are not inclined to interfere with the order passed by the Adjudicating Authority. However, taking into consideration the facts and circumstances of the case, the part of the order whereby cost of Rs.10,000/-has been imposed on appellant is set aside. The appeal stands disposed of with aforesaid observation. No cost.

(Justice S. J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

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