

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 170 of 2018

(Arising out of Order dated 8th January, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in CP (IB) No. 349/KB/2017)

IN THE MATTER OF:

Edelweiss Finvest Private Limited

...Appellant

Vs

Ramswarup Industries Limited

....Respondent

Present:

For Appellant: Mr. S. Chakraborty, Ms. Kanchan Yadav, Ms. Sonia Dube, Ms. Harshita Verma and Mr. Anurag Singh, Advocates.

**For Respondent: Ms. Pooja Mahajan and Mr. Savar Mahajan, Advocates for R-1 (RP).
Mr. Aman Verma, Ms. Smriti Churiwal and Mr. Parth S. Chaudhari, Mr. Vikram Wadehra and Ms. Vidushi Chokani, Advocates for R-2.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- 'Edelweiss Finvest Private Limited' has preferred this appeal against the order dated 8th January, 2018, whereby and whereunder, the application under Section 10 of the Insolvency and Bankruptcy Code, 2016 ('I&B Code' for short) preferred by 'Ramswarup Industries Limited'- ('Corporate Applicant'/ 'Corporate Debtor') has been admitted and order of

'Moratorium' has been passed and 'Interim Resolution Professional' has been appointed.

2. The case of the Appellant is that it has filed a winding up application under Sections 433 and 434 of the Companies Act, 1956, being C.P. No. 461 of 2009 before the Hon'ble Calcutta High Court for winding up of the 'Corporate Debtor'. In the said case, the Hon'ble Calcutta High Court has passed order on 1st February, 2010, followed by the order dated 9th March, 2010 passed in C.A. No. 168 of 2010 as modified by order dated 24th August, 2012 against the 'Corporate Debtor'. The said application was filed due to default of payment committed by the 'Corporate Debtor'.

3. Learned counsel for the Appellant submitted that the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, has failed to take into consideration the aforesaid fact and admitted the application under Section 10 of the 'I&B Code' though it was not maintainable at the instance of the 'Corporate Applicant'/ 'Corporate Debtor' in view of pendency of winding up proceeding.

4. Learned counsel appearing on behalf of the Appellant submitted that the 'Corporate Debtor' failed to make the payment and accordingly the Appellant proceeded with the advertisement in two newspapers on 12th November, 2012. At that stage, the 'Corporate Debtor' made reference before the 'Board of Industrial & Financial Reconstruction' ("BIFR" for short) under Section 15 (1) of the 'Sick Industrial Companies (Special Provisions) Act,

1985' in Case No. 67 of 2012 which was taken up for hearing before 'BIFR' on 24th December, 2012. Subsequently by notification dated 25th November, 2016, issued by the Central Government, the provisions of the 'Sick industrial Companies (Special Provisions) Repeal Act, 2003' was given effect, and in effect the proceedings before the 'SICA' stood abated. Thereafter, the 'Corporate Debtor'/ 'Corporate Applicant' filed an application under Section 10 of the 'I&B Code', which has been admitted.

5. It is alleged that the 'Corporate Debtor'/'Corporate Applicant' suppressed all the aforesaid relevant facts, including the fact that winding up proceeding is pending before the Hon'ble Calcutta High Court.

6. According to the learned counsel for the 'Resolution Professional', winding up proceedings were pending for hearing. As per Section 433 of the Companies Act, 1956, on hearing of winding up petition, the Court could have passed any interim order or could have passed order for winding up of the Company with or without costs. On the other hand, as per Section 434 of the Companies Act, 1956, in case the Tribunal makes an order for the winding up of a company within two weeks from the date of the order, it could have caused intimation to the 'Official Liquidator' and the 'Registrar of Companies'.

7. It was submitted that in absence of any order of admission of the winding up petition, or order of winding up, the application under Sections 7

or 9 cannot be rejected on the ground that the winding up proceeding is pending.

8. Similar issue fell for consideration before this Appellate Tribunal in **“M/s. Unigreen Global Private Limited v. Punjab National Bank & Anr.— Company Appeal (AT) (Insolvency) No. 81 of 2017”** wherein this Appellate Tribunal observed and held as follows:

“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.”*

9. In the present case, we find that on 1st February, 2010, the Hon’ble High Court of Calcutta (Original Jurisdiction) noticed that the ‘Corporate Debtor’ has admitted the principal claim of Rs. 9,46,23,000/-. The company informed that the substantial payment has been made earlier but due to circumstances, beyond the control of the management the rest of the amount could not be paid. It was informed to the Hon’ble High Court that the rest of the amount will be paid together with interest thereon @ 6% per

annum and in case of default, it will be open to the petitioner (Appellant herein) to proceed with the proceedings under Section 138 of the 'Negotiable Instruments Act' before the Metropolitan Magistrate, Mumbai.

10. The order dated 12th January, 2011, passed by the Division Bench of the Hon'ble High Court of Calcutta, Civil Appellate Jurisdiction, is also on record. The Division Bench observed that it will be open to the Petitioner (Appellant herein) to make any statement or averment, if so advised, in the pleadings which may be filed before the appropriate court. The appeal was disposed of.

11. An application was filed by the Company for modification of the order dated 1st February, 2010 by the Hon'ble High Court of Calcutta. The Hon'ble High Court of Calcutta vide its order dated 24th August, 2012 in CP No. 461 of 2009 taking into consideration that the total amount of Rs. 15 Lakh was made over by the Company to the Advocate representing the petitioner (Appellant herein) disposed of the application for modification by permitting the company to pay off the balance amount to the petitioner (Appellant herein) in terms of the order dated 1st February, 2010. Thus, we find that the winding up petition has not been admitted nor any order of winding up has been passed.

12. In the circumstances, the case of the Appellant being covered by the decision of this Appellate Tribunal in "***M/s. Unigreen Global Private Limited***" (Supra), as quoted above, we hold that the application under

Section 10 of the 'I&B Code' filed by the 'Corporate Applicant'/ 'Corporate Debtor' was not barred by Section 11 of the 'I&B Code' and was maintainable. In absence of any merit, the appeal is dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

14th December, 2018

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