

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1498 of 2023 & I.A. No. 5379,
5380, 5381 of 2023

IN THE MATTER OF:

Fedex Express Transportation and Supply
Chain Services (India) Pvt. Ltd. ...Appellant(s)

Versus

Zipker Online Services Pvt. Ltd.
...Respondent(s)

Present:

For Appellant : Mr. Asav Rajan & Ms. Charu Trivedi,
Advocates.

For : Mr. Himanshu Harbola & Mr. Rohit Rajliwal,
Respondents Advocates.

O R D E R
(Hybrid Mode)

Per: Justice Rakesh Kumar Jain: (Oral)

01.05.2024: The Appellant is aggrieved against the order dated 05.09.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench) by which an application filed by the Appellant as an Operational Creditor, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code'), against Zipkar Online Services Pvt. Ltd. (Corporate Debtor) for the resolution of an amount of Rs. 18,34,120.93/- has been dismissed because the name of the Corporate Debtor

had already been struck off by the Registrar of Companies (in short 'RoC') from the register maintained by him.

2. In brief, the Appellant, namely, Fedex Express Transportation and Supply Chain Services (India) Pvt. Ltd. is a provider for integrated and turnkey services in shipping, logistics, supply chain management and project.

3. The Corporate Debtor, namely, M/s Zipker Online Services Pvt. Ltd., availed shipping and logistics services from the Appellant.

4. In lieu of the service, the Appellant raised certain invoices from 07.05.2019 to 08.10.2019 but the Corporate Debtor failed to honour the same and thus the Operational Creditor sent a demand notice, under Section 8 of the Code, for payment of Rs. 18,34,120.93/- with interest but did not receive any response from the Corporate Debtor and hence, filed the application under Section 9 of the Code for the resolution of the aforesaid amount mentioned in the demand notice.

5. The application, filed under Section 9 of the Code, by the Appellant has been dismissed by the Adjudicating Authority, vide its order dated 05.09.2023, on the ground that since the name of

the Corporate Debtor has already been struck off by the RoC, therefore, the application under Section 9 cannot be further prosecuted.

6. Aggrieved against this order, the present appeal has been preferred by the Appellant under Section 61 of the Code.

7. Counsel for the Appellant has submitted that striking off the name of the Corporate Debtor from the register maintained by the RoC is not a bar to initiate Corporate Insolvency Resolution Process (in short 'CIRP') against the Corporate Debtor and a separate application is not required for restoration of the name of the Corporate Debtor. In support of his submissions, he has relied upon two decisions of this Court i.e. Hemang Phophalia Vs. The Greater Bombay Co-Operative Bank Ltd. & Anr., (2019) SCC OnLine NCLAT 1220, CA (AT) (Ins) No. 765 of 2019 decided on 05.09.2019 (three members bench) and Elektrans Shipping Pte. Ltd. Vs. Pierre D'Silva (2019) SCC Online NCLAT 1169, CA (AT) (Ins) No. 754 of 2019 decided on 06.09.2019 (three members bench).

8. It is also submitted that even if the name of the Company/Corporate Debtor is struck off, its liability shall still

continue towards its creditors in terms of Section 248(7)&(8) and Section 250 of the Companies Act, 2013 (in short ‘the Act’). It is also submitted that once the application under Section 7 or 9 is filed, either by the Financial Creditor or the Operational Creditor, within the period of 20 years from the date when the name of the Company was struck off under Section 248(5) of the Act, the Corporate Debtor and its directors, officers etc. shall be automatically restored in terms of Section 252(3) of the Act, once the application under Section 7 or 9 is admitted.

9. He has also submitted that as per Section 2(94A) of the Act, the “winding up” means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016 as applicable.

10. On the other hand, Counsel for Respondent has submitted that after striking off the name of the Appellant, the Corporate Debtor ceased to exist as a Company and since CIRP can be initiated only against the Corporate Debtor which is defined under Section 3(8) of the Code as a corporate person which is further defined under Section 3(7) as a company and which is further defined in clause 20(2) of the Act as the “company” means a company incorporated under this Act or under any previous company law, therefore, the company has to be in

existence for the purpose of admitting the application filed either under Section 7 or 9 of the Code to initiate CIRP under the Code but in the present case, the company ceased to exist in terms of Section 248 (5) of the Act as its name was struck off from the register of the RoC.

11. It is further submitted that the effect of company, notified as dissolved in Section 250 of the Act and right to sue in respect of the liability of the Company under Section 248(7)&(8) and exception in Section 250 has nothing to do with the filing of Section 9 of the Code which is not meant for the recovery proceedings but for the resolution. He has further submitted that with the filing of application under Section 7 of the Code the company will not be automatically restored in terms of Section 252(3) rather the order passed by the RoC under Section 248(5) has to be specifically challenged by way of an appeal provided under Section 252(3) to prove before the Adjudicating Authority that at the time when its name was struck off, the company was carrying on business or was in operation or otherwise it is just that the name of the company be restored to the register of companies.

12. It is further submitted that the Company takes birth with its incorporation in terms of Section 7 of the Act and ceased to exist/dissolved in terms of Section 248(5) and remain as such till it is restored in appeal filed either under Section 252(1) or 252(3) of the Act.

13. It is further submitted that the judgments relied upon by the Appellant in the case of Hemang Phophalia (Supra) and Elektrans Shipping Pte. Ltd. (Supra) are not applicable rather it is submitted that the said judgments are per in curium because this Tribunal has not referred to various provisions of the Act and the Code.

14. We have heard Counsel for the parties and perused the record.

15. In order to appreciate the arguments raised by both the Counsel for the parties and to arrive at a logical conclusion, we shall refer to various provisions of the Act and the Code at the first instance.

16. We would first refer to the provisions of the Act. The object of the Act is to consolidate and amend the law relating to companies and as per Section 1(4)(a) of the Act, the provisions of

the Act applies to the companies incorporated under the Act or under any previous company law.

17. Section 2(20) of the Act defines “company” which means a company incorporated under the Act or under any previous company law.

18. The procedure for incorporation of a company is provided under Section 7 of the Act. Section 7 of the Act is reproduced as under:-

“7. Incorporation of company.—

(1) There shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the following documents and information for registration, namely:—

(a) the memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed;

(b) a declaration in the prescribed form by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with;

(c) [a declaration] from each of the subscribers to the memorandum and from persons named as the first

directors, if any, in the articles that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;

(d) the address for correspondence till its registered office is established;

(e) the particulars of name, including surname or family name, residential address, nationality and such other particulars of every subscriber to the memorandum along with proof of identity, as may be prescribed, and in the case of a subscriber being a body corporate, such particulars as may be prescribed;

(f) the particulars of the persons mentioned in the articles as the first directors of the company, their names, including surnames or family names, the Director Identification Number, residential address, nationality and such other particulars including proof of identity as may be prescribed; and

(g) the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

(2) The Registrar on the basis of documents and information filed under sub-section (1) shall register all the documents and information referred to in that sub-section in the register and issue a certificate of

incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

(3) On and from the date mentioned in the certificate of incorporation issued under sub-section (2), the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

(4) The company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.

(5) If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under section 447.

(6) Without prejudice to the provisions of sub-section (5) where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under clause (b) of sub-section(1) shall each be liable for action under section 447.

(7) Without prejudice to the provisions of sub-section (6), where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed

or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,—

(a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or

(b) direct that liability of the members shall be unlimited; or

(c) direct removal of the name of the company from the register of companies; or

(d) pass an order for the winding up of the company; or

(e) pass such other orders as it may deem fit:

Provided that before making any order under this subsection,—

(i) the company shall be given a reasonable opportunity of being heard in the matter; and

(ii) the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.”

19. According to the aforesaid provision, for the purpose of incorporation of a company, certain documents and information are filed with the Registrar, mentioned in Section 7(1)(a)to(g).

20. The Registrar, on the basis of the documents and information, filed under sub-section 7(1), shall register all the documents and information received, in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under the Act.

21. As per section 7(3) of the Act, on and from the date mentioned in the certificate of incorporation, issued under sub-section 7(2), the Registrar has to allot to the company a corporate identity number, which shall be its distinct identity which shall also be included in the certificate.

22. The effect of registration is also provided in Section 9 of the Act which is reproduced as under:-

“9. Effect of registration.—From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession 1*** with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.”

23. As per above provision, the subscribers to the memorandum and all other persons, as may, from time to time become members of the company from the date mentioned in the certificate of incorporation and the company becomes a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under the Act, having perpetual succession with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued by the said name.

24. Having delved into the conspectus of incorporation of company, we shall now deal with the provisions pertaining to removal of the name of the company from the register of RoC.

25. Section 248 of the Act gives the power to the Registrar to remove the name of the Company from the register of RoC. The said provision is reproduced as under:-

“248. Power of Registrar to remove name of company from register of companies.—

(1) Where the Registrar has reasonable cause to believe that— (a) a company has failed to commence its business within one year of its incorporation;[or]

* * * * *

(c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under [section 455; or]

[(d) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under sub-section (1) of section 10A; or

(e) the company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.]

he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

(2) Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:

Provided that in the case of a company regulated under a special Act, approval of the regulatory body

constituted or established under that Act shall also be obtained and enclosed with the application.

(3) Nothing in sub-section (2) shall apply to a company registered under section 8.

(4) A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

(5) At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

(6) The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

(7) The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company

dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.
 (8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.”

26. As per Section 248(1) of the Act, the Registrar should have reasonable cause to believe four aspects for taking action to remove the name of the Company from the RoC which are mentioned in Section 248(1)(a)to(e) of the Act and in this regard, is required to send a notice to the company and all the directors of the company, requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

27. Section 248(2) of the Act deals with the right of company itself to get its name removed from the Register.

28. As per Section 248(4) of the Act, the Registrar is required to publish the notice, issued under Section 248(1)and(2) of the Act, in the prescribed manner in the Official Gazette for the information of the general public and as per Section 248(5) of the Act, the Registrar, until some cause is shown to the contrary, after the expiry of time mentioned in the notice, strike off the name of the company from the register of companies, and shall

publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of the notice, the company shall stand dissolved. However, as per Section 248(6) of the Act, the Registrar, before passing an order under sub-section 248(5), has to satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and as found necessary, shall obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company. It is further provided that notwithstanding the undertakings referred to in sub-section 248(6), the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies. Section 248(7) of the Act fasten the liability upon every director, manager or other officer who was exercising any power of management, and every member of the company, dissolved under sub-section 248(5), shall continue and may be enforced as if the company had not been dissolved. Section 248(8) of the Act further provides that nothing mentioned in section 248 of the Act shall affect the power

of the Tribunal to wind up a company, the name of which has been struck off from the register of companies.

29. Once, the company stand dissolved under Section 248 of the Act, what shall be the effect is provided under Section 250 of the Act, which is reproduced as under:-

“250. Effect of company notified as dissolved.—Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.”

30. As per the aforesaid provision, the Company stood dissolved under Section 248, shall on and from the date mentioned in the notice issued under Section 248(5), cease to operate as a company and the certificate of incorporation issued to it shall be deemed to be cancelled from such date. However, there is an exception in this Section which provides for the realisation of the amount either due to the company and for the payment or discharge of the liabilities or obligation of the Company.

31. Whenever, an order under Section 248(5) is passed by the Registrar, a right of appeal is provided under Section 252 of the

Act before the Adjudicating Authority to challenge the same.

Section 252 of the Act is reproduced as under:-

“252. Appeal to Tribunal.—(1) Any person aggrieved by an order of the Registrar, notifying a company as dissolved under section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies:

Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned:

Provided further that if the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company.

(2) A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.

(3) If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.”

32. Section 252 has two parts. Section 252(1) provides a right of appeal to any person aggrieved by the order of the Registrar. The appeal may be filed before the Adjudicating Authority within a period of three years from the date of the order of the Registrar and if the Adjudicating Authority is satisfied that the name of the company has been wrongly removed in the absence of ground on which the order is passed then the registrar can restore the name of the company in the register of the RoC. The first proviso to Section 252(1) of the Act talks about the opportunity of hearing to be given to the Registrar and second proviso to Section 252(1) of the Act gives the power to the Registrar to file an appeal itself

within a period of three years, if he comes to the conclusion that the name of the company has been inadvertently struck off on the basis of an incorrect information furnished by the Company or its directors.

33. Section 252(3) of the Act is an another form of a right of appeal which is provided to a company, or any member or creditor or workman if they feel aggrieved against the striking off the name of the company from the register of companies. The said application can be filed before the expiry of twenty years from the publication in the Official Gazette of the notice issued under subsection 248(5) and in order to succeed in the said application, the Applicant/Appellant has to satisfy that (a) the company, at the time when its name was struck off, was carrying on business (b) was in operation (c) otherwise it is just that the name of the company be restored to the register of companies. The power has been bestowed upon the Tribunal to pass an order for the restoration of the company and placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

34. Section 271 of the Act deals with the circumstances in which a company may be wound up by the Adjudicating Authority. The said provision is also reproduced as under:-

“271. Circumstances in which company may be wound up by Tribunal.—A company may, on a petition under section 272, be wound up by the Tribunal,—

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.]”

35. Chapter XX of the Act deals with the winding up by the Adjudicating Authority of a company.

36. Now we will advert to the provisions of the Code. The object of the Code is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

37. Section 2(a) provides that the provision of the Code shall apply to any company incorporated under the Companies Act, 2013 or under any previous company law.

38. Section 3(8) of the Code provides the definition of the Corporate Debtor which means a corporate person who owes a debt to any person. Since, we have to deal with the contention of the Respondent that the Application under Section 7 or 9 can be filed only against a corporate debtor and an application under Section 10 can be filed by the Corporate Debtor, therefore, the definition of Corporate Debtor assumes importance and

significance. In this definition, three words have been used (a) corporate person (b) debt (c) person.

39. Corporate Person is defined in Section 3(7) of the Code which means a company as defined in clause (20) of section 2 of the Companies Act, 2013. Debt is defined under Section 2(11) of the Code which means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. Person is defined under Section 2(23) of the Code which read as under:-

“"person" includes— (a) an individual; (b) a Hindu Undivided Family; (c) a company; (d) a trust; (e) a partnership; (f) a limited liability partnership; and (g) any other entity established under a statute, and includes a person resident outside India;”

40. Since, there is a reference of claim in the definition of debt, therefore, it would be appropriate to refer to the definition of claim as well which is provided in Section 3(6) of the Code which is reproduced as under:-

“(6) "claim" means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced

to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured”

41. The Financial Debt and Operational Debt are defined in Section 5(8) and 5(21) of the Code which are reproduced as under:-

“(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non- recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

(21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

42. The Code is divided into various chapters in which chapter II deals with CIRP. Section 6 of the Code defines the person who may initiate the CIRP and the said section is reproduced as under:-

“6. Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.”

43. Since, it is an application filed under Section 9 of the Code, therefore, it is relevant to refer to Section 8 of the Code under which the operational creditor, on the occurrence of default is required to deliver a demand notice of the unpaid operational debt to the Corporate Debtor. Section 8 is reproduced as under:-

“8. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the repayment of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.”

44. Since the application under Section 9 has been filed, therefore, Section 9 is also reproduced as under:-

“9. (1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the

operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

(d) such other information as may be specified.

(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.

(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—

(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—

(a) the application made under sub-section (2) is complete;

(b) there is no repayment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—

(a) the application made under sub-section (2) is incomplete;

(b) there has been repayment of the unpaid operational debt;

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional:

Provided that Adjudicating Authority, shall before rejecting an application under sub- clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section.”

45. As per Section 13 of the Code, the Adjudicating Authority, after admission of the application, either filed under Section 7, 9 or 10 of the Code, shall pass the order for (a) declaration of moratorium for the purposes referred to in Section 14 (b) cause a public announcement of the initiation of CIRP and call for the submission of claims under section 15 (c) appoint an IRP in the manner as laid down in Section 16 and as per Section 13(2) of the Code, the public announcement which is provided in Section 31(b) shall be made immediately after the appointment of the IRP.

46. From the reproduction of the various provisions of the Act and the Code as well as narration of the said provisions in context of its applicability, we have tried to highlight that CIRP can be initiated only against a corporate debtor which may be either by the financial creditor, operational creditor or the corporate debtor itself. The corporate debtor, defined under Section 3(8) of the Code, means a corporate person who owes a debt to any person. The corporate person is defined under Section 3(7) to mean a company as defined in clause 20 of Section 2 of the Act. The Company is defined under Section 2(20) of the Act, a company

which is incorporated under the Act or under any previous company law. The incorporation of company is provided in Section 7 of the Act much less in Section 7(2) of the Act when the Registrar register all the documents and information filed in terms of Section 7(1) and issue a certificate of incorporation in the prescribed manner and further also allot to the company a corporate identity number. The incorporation of the company comes to an end with the publication of notice by the Registrar in terms of Section 248(5) of the Act and the effect of the company so dissolved under Section 248(5) of the Act is in Section 250 of the Act as per which the company cease to operate as a company and the certificate of incorporation issued to it is deemed to be cancelled from the such date. Section 252(1) is a right of appeal to any person who is aggrieved against the order of RoC passed under Section 248 of the Act with a caveat of limitation of three years and Section 252(3) is right of appeal to a company or any member or creditor or workmen with a caveat of filing the appeal within a period of 20 years from the date of publication under Section 248(5) of the Act subject to the condition that it shall satisfy the Adjudicating Authority (NCLT) that the company was, at the time of its name was struck off, carrying on business or

was in operation or otherwise it is just that the name of the company be restored to the register of the RoC.

47. These are the factual aspects which have to be pleaded and proved before the Adjudicating Authority in an appeal filed under Section 252(3) and nothing is automatic that as soon as an application is filed under Section 7 or 9 by a creditor (financial creditor or operational creditor), the order of the Registrar passed under Section 248(5) is set aside and the name of the company is restored to the register of the RoC.

48. Having said that, we have two decisions of this Court passed one after the other i.e. on 05.09.2019 and 06.09.2019 by three members bench in which it has been held that even if the name of the company has been struck off, the application under Section 7 or 9 of the Code for initiation of CIRP is maintainable.

49. In the first case, namely, Hemang Phophalia (Supra), the Greater Bombay Co-operative Bank Limited filed an application under Section 7 of the Code against the Corporate Debtor for resolution of an amount of Rs. 9,11,08,439.37/- with interest. The said application was admitted on 12.06.2019 and the order of admission was challenged by Hemang Phophalia, ex-director and

shareholder of the CD. On whose behalf it is argued that since the name of the CD was struck off from the register of RoC under Section 248 of the Act, therefore, the application under Section 7 against a non-existent company is not maintainable. It was also argued by the Appellant in that case that the CD has become non-functional from last many years and there is no employee working in company and even assets are not there, therefore, the RP cannot make the CD a going concern. In the said case, this Court after framing the question in para 6, referred to Section 248 of the Act and concluded in para 12 that “from sub-section 8 of Section 248, it is clear that Section 248 in no manner will affect the power of the Tribunal to wind up a company, the name of which has been struck off from the register of Companies.” Thereafter, reference has been made to Section 250 and 252 of the Act. Though, it is observed that “Instead of liquidation, the first step to be taken is to ensure that in a time bound manner the value of assets of Corporate Debtor/ Company is maximized and to promote entrepreneurship, availability of credit by balancing the interest of all the stakeholders; within an active legal framework for timely resolution of insolvency and bankruptcy. Liquidation of assets of the ‘Corporate Debtor’/

Company is not the object, but object is revival and rehabilitation of the 'Corporate Debtor'/ Company by way of 'Resolution' and maximization of the value of assets of the 'Corporate Debtor' and balancing the interest of all the stakeholders." Yet it has been held that "In such a case and in view of the provisions of Section 250 (3) read with Section 248 (7) and (8), we hold that the application under Sections 7 and 9 will be maintainable against the 'Corporate Debtor', even if the name of a 'Corporate Debtor' has been struck-off." Finally, it has been held that if the application under Section 7 or 9 of the Code is filed then the name of the company which is struck off from the register of RoC is deemed to be restored in terms of Section 252(3) and in this regard a finding has been recorded in para 23 which is reproduced as under:-

"23. In view of the aforesaid provision, we hold that the Adjudicating Authority who is also the Tribunal is empowered to restore the name of the Company and all other persons in their respective position for the purpose of initiation of 'Corporate Insolvency Resolution Process' under Sections 7 and 9 of the I&B Code based on the application, if filed by the 'Creditor' ('Financial Creditor' or 'Operational Creditor') or workman within twenty years from the date the name of the Company is struck off under sub-section(5) of Section 248. In the present case, application under Section 7 having admitted, the 'Corporate Debtor' and its Directors,

Officers, etc. deemed to have been restored in terms of Section 252(3) of the Companies Act.”

50. In the second case, namely, Elektrans Shipping Pte. Ltd. (Supra) an application was filed under Section 9 by the Pierre D'Silva against Elektrans Shipping Pte. Ltd. which was admitted on 10.04.2019. The Appellant, being a shareholder filed the appeal against the order of admission. It was submitted on its behalf that the name of the company (CD) was struck off by the RoC in terms of Section 248 of the Act, therefore, the application under Section 9 of the Code was not maintainable. This Court while referring to the provisions of Section 248, 250, 252 and relying upon the decision rendered by it in the case of Hemang (Supra) dismissed the appeal.

51. The aforesaid two decisions are on the same issue on which the present appeal has been filed as to whether the application filed under Section 9 of the Code for initiation of CIRP, is maintainable against the CD if the name of the CD has been struck off from the register of RoC?

52. After taking into consideration the various provisions of the Act, mentioned and reproduced hereinabove and the provisions of the Code also referred to in the earlier part of this order, we are of

the considered opinion that the judgments relied upon by the Appellant in the case of Hemang (Supra) and Elektrans (Supra) are not laying down the correct law and are per incuriam.

53. The reason for expressing this opinion by this three-member bench is that the Hon'ble Benches in the aforesaid two cases have not referred to various provisions of the Code as well as the Act and has not even appreciated as to who would be the Corporate Debtor, for the purposes of initiation of CIRP, on an application either filed under Section 7 or 9 of the Code.

54. The question which arises for consideration is as to whether the application under Section 9 is filed for winding up or for initiation of CIRP.

55. In layman's words, winding up is the process by which a company is dissolved and its assets are liquidated to pay off its creditors and any remaining assets are distributed to its shareholders. The winding up of a company can be initiated voluntarily by the company's shareholders by passing a resolution and appointing liquidator to oversee the process and winding up can also be by an order of the Court wherein the Court appoints the liquidator and the process is governed by the

Rules set up in the Act and other applicable laws. This process is initiated when the company is unable to pay its debts or when it is just and equitable to do so. The circumstances under which a company may be wound up by the Tribunal includes (a) if the company has by special resolution resolved that it be wound up by the Tribunal (b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting (c) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year (d) if the company is unable to pay its debts (e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up. In the definition of winding up under Section 2(94) winding up means winding up under the Act or liquidation under the Code as applicable.

56. Thus, the mechanism of winding up is applied for the recovery of debt. On the other hand, it has been repeatedly held by the Hon'ble Supreme Court that the Code is not a debt recovery mechanism but a mechanism for revival of a company fallen in debt. It has been held that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation. The CIRP is not

intended to be adversarial to the CD but is aimed at protecting the interests of the CD. The primary focus of the legislation is thus to ensure the revival and continuation of the CD by protecting the CD from its own management and from a corporate death by liquidation. The preamble of the Code speaks of maximisation of value of assets of the CD and balancing the interests of all the stakeholders with an object to keep the CD as a going concern.

57. Thus, in our humble opinion, the Hon'ble Benches, while delivering the aforesaid two judgments relied upon by the Appellant, have not appreciated the provisions of the Code and the Act in its true sense that it shall apply only to the CD which means a company duly incorporated and shall not apply to a company which cease to exist in terms of Section 248(5) and 250 of the Act and is thus no more a Corporate Debtor.

58. Even if a right of recovery is provided from the asset of the company under Section 248(6) or from the director etc. under Section 248(7) or even as per the exception in Section 250, the application under Section 7 or 9 shall still not be maintainable because it would lead to another form of recovery which shall be on the basis of the provisions of the winding up.

59. Thus, in our considered opinion, the finding recorded in para 21 of the judgment in the case of Hemang (Supra) is not correct and is per incuriam. It is held by the Hon'ble Supreme Court in the case of Government of A.P. and Anr. Vs. B. Satyanarayana Rao by LR's. And ors. (2000) 4 SCC 262 that "the rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue".

60. Last but not the least, Section 252(3) travels into an altogether different direction rather than the way it has been observed in the case of Hemang (Supra) because Section 252(3) gives a right of appeal to a company, member, director or workmen to challenge the order of the Registrar passed under Section 248 (5) on the three grounds, namely, while its name was struck off it was carrying on business, or was in operation or otherwise it is just which has to be established by pleadings and evidence before the Tribunal and only then the order can be passed which shall again be a subject of an appeal in terms of Section 61 of the Code but in our humble opinion, there is

nothing like automatic restoration on the filing of the application under Section 7 or 9 of the Code.

61. Thus, in view of the aforesaid facts and circumstances, we do not find any error in the order of the Adjudicating Authority which requires any interference by this Court and hence, the appeal is hereby dismissed though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

[Indevar Pandey]
Member (Technical)

Sheetal/Ravi