

Innoventive Industries Ltd vs Kumar Motors Pvt. Ltd on 9 February, 2018

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IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL COMPANY APPELLATE JURISDICTION

Company Appeal (AT) (Insolvency) No. 181 of 2017

(Arising out of Order dated 27th July, 2017 passed by the
Adjudicating Authority (National Company Law Tribunal), Mumbai
Bench, Mumbai in Company Petition No.
1201/I&BP/NCLT/MB/MAH/2017)

IN THE MATTER OF :

Innoventive Industries Limited

...Appellant

Versus

Kumar Motors Private Limited

...Respondent

Present: For Appellant: Ms. Misha, Mr. Siddhant Kant and Ms.
Vaijayant Paliwal, Advocates.

For Respondent: Mr. Kersi Dastoor, Advocate.

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellant- 'Innoventive Industries Limited' 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 'Kumar Motors Private Limited'- ('Corporate Debtor') on the ground that the said Respondent defaulted for making repayment of Rs. 24,06,52,849.50/- along with interest.

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2. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, rejected the application on the ground of pendency of a winding-up proceedings against the 'Corporate Debtor'

and left the question open for consideration whether the application was barred by limitation or under Section 11(a) of the 'I&B Code' or due to pendency of the arbitration proceedings.

3. The question arises for consideration in this appeal is whether an application under Section 7 of the 'I&B Code' can be rejected on the ground of pendency of a winding-up?

4. The Adjudicating Authority having noticed the provisions of Section 434 of the Companies Act, 2013 and Section 255 of the 'I&B Code', as follows:

"7. So, by reading section 255 of the Code and schedule thereto, it is evident that the source for amendment for section 434 of Companies Act 2013 is from section 255 of this Code, therefore when it is evident that Section 434 is amended in such a way that High Courts, as prescribed by Central Government, can proceed with pending winding-up matters other than the winding-up matters transferred to NCLT, it has to be construed that the source for saving winding up proceedings pending before High Courts has come from section 255 of this Code."

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5. The Adjudicating Authority noticed the notifications issued by the Central Government on 7th December, 2016 and on 29th June, 2017, both issued in exercise of powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of Section 239 of the 'I&B Code'.

6. By notification dated 7th December, 2016, the Central Government framed Rules known as "The Companies (Transfer of Pending Proceedings) Rules, 2016". Rule 5 relates to "Transfer of pending proceedings of Winding up on the ground of inability to pay debts", which reads as follows:

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including Company Appeal (AT) (Insolvency) No. 181 of 2017 details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

2. All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act."

7. By the subsequent notification dated 29th June 2017, the Central Government amended the aforesaid Rule 5 and in place of the principal Rule 5, following Rule 5 was substituted with effect from the 16th June, 2017 namely: -

"5. Transfer of Pending proceedings of Winding up on the ground of inability to pay debts.□(1) All petitions relating to winding up of a company under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub- section (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the Company Appeal (AT) (Insolvency) No. 181 of 2017 records transferred in accordance with rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15 th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."

8. Taking into consideration the aforesaid provision, the Adjudicating Authority observed:

"11.The essentials of this notification are:

1. that all winding up cases pending before High Courts, where notice has not been served upon the Respondent under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to NCLT, wherein Company Appeal (AT) (Insolvency) No. 181 of

2017 information required for admission 7, 8 or 9 of the Code has to be supplied on or before 15th day of July, 2017, failing which petitions stand abated with liberty to proceed under I & B Code.

2. that there is a third proviso in these substituted Rules stating that where a winding petition not transferred from High Court to the Tribunal under this Rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act 1956 for winding up against the same Company pending as on 15th December 2016, such other petition shall not be transferred to NCLT, even if the petition has not been served on the Respondent.

12. The bottom line of entire literature is Section 255 of the Code, 11th schedule thereto and consequent notifications dated 7.12.2016 and 29.6.2017 r/w section 434 of the Companies Act 2013 and subsection (1) of Section 239 of The Insolvency and Bankruptcy Code have come into existence for transfer of proceedings from other forums to NCLT, in respect to transfer of winding up cases, two points have been clarified -- one, the jurisdiction u/s 433 (e) of the Act 1956 in respect to the matters pending before High Courts is still in force, two, the source for saving the winding proceedings u/s 433 (e) and 434 of the Act 1956 has come from section 255 of the Code through 11th Schedule to the Code."

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9. The Adjudicating Authority thereby observed that Section 238 of the 'I&B Code' will not override the effect on the winding-up proceedings saved by the 'I&B Code'.

We agree that if in a particular case order of winding up has already been passed by the Hon'ble High Court and is pending before the Hon'ble High Court, such winding up proceedings being saved by the 'I&B Code', Section 238 of the 'I&B Code' will not override the effect on such winding up proceedings.

10. For appreciation of the present case, it is desirable to refer the relevant facts relating to 'pendency of winding-up proceedings'.

11. A Company Petition No. 468 of 2013 was preferred by the Appellant- 'Innoventive Industries Limited' for winding up of 'Kumar Motors Private Limited' before the Hon'ble High Court of Judicature at Bombay. The Hon'ble Bombay High Court having noticed the stand taken by the parties passed detailed order on 4th August, 2015, relevant portion of which is quoted below:-

"14. In that view of the matter, there is absolutely no merit in any of the defences raised by the Respondent. There being no bona fide dispute concerning the Petitioner's debt and the statutory notice having not being complied with, there is a clear deemed inability to pay on the part of the Respondent Company. The Petition, accordingly, deserves to be admitted.

15. In the premises, the following order is passed:

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(i) The Company Petition is admitted;

(ii) The Petitioner shall advertise the petition in two local newspapers, viz. "Free Press Journal" (in English) and "Navshakti" (in Marathi), and also in Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of the notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959;

(iii) The Petitioner shall also deposit an amount of Rs. 10,000/- with the Prothonotary and Senior Master of this Court towards the publication charges, within a period of two weeks from the date of the default with intimation to the Company Registrar. After the advertisement are issued, the balance, if any, shall be returned to the Petitioner;

(iv) A copy of this order shall forthwith be served on the Company by hand delivery and by Registered Post AD by the Advocate for the Petitioner."

12. Learned Counsel for the Appellant submitted that there is no bar under the 'I&B Code' for filing the 'Corporate Insolvency Resolution Process' application on the ground of pendency of winding up proceedings.

13. According to counsel for the Appellant, Sections 7, 9 and 10 of the 'I&B Code' give a right to the 'Financial Creditor', 'Operational Creditor' and the 'Corporate Debtor' to initiate a 'Corporate Insolvency Resolution Process' upon a default in excess of Rs. 1,00,000/- (Rupees One Lakh Company Appeal (AT) (Insolvency) No. 181 of 2017 Only) only subject to the limitation under Section 11 of the 'I&B Code' which makes it abundantly clear that only where a "winding up order" has already been passed that the 'Corporate Debtor' would not be eligible to apply for the initiation of the 'Corporate Insolvency Resolution Process', thus, clearly depicting the intent that only those companies which have already been ordered to be wound up cannot be given a fresh start/lease of life by accessing the resolution process envisaged under the 'I&B Code'.

14. It is also submitted that if there is any perceived conflict between the right under Sections 7, 9 and 10 of the 'I&B Code' to initiate a 'Corporate Insolvency Resolution Process vis-à-vis the right of the Petitioners in a winding up proceedings before the Hon'ble High Court, then also the provisions of the 'I&B Code' shall have an overriding effect as expressly provided under Section 238 of the 'I&B Code', which clearly provides that the provisions of the 'I&B Code' will prevail over all other laws in force. Therefore, in case of any inconsistency whatsoever, the provisions of the Code shall prevail over the provisions of the Companies Act, 1956 including Section 433 (e) of the Companies Act, 1956. The said position of law with respect to overriding provisions on account of a non- obstante

clause has been settled by the Hon'ble Supreme Court of India in "Allahabad Bank v. Canara Bank, (2000) 4 SCC 406". In fact, the Hon'ble Supreme Court in the matter of "Innoventive Industries Limited v. ICICI Bank & Ors., Civil Appeal No. 8337-8338 of 1027" has categorically held that the provisions of the 'I&B Code' have an overriding effect and the non-obstante clause is to ensure that any right of the Company Appeal (AT) (Insolvency) No. 181 of 2017 'Corporate Debtor' under any other law cannot come in the way of the 'I&B Code'.

15. Therefore, according to learned counsel for the Appellant, in the present case, the provisions of the 'I&B Code' clearly override the provisions of the Companies Act, the 'I&B Code' being a Special Act enacted later in time as well as for a broader purpose of resolving the insolvency of the 'Corporate Debtors'.

16. It was submitted that only because the amendment to the Companies Act, 1956 was brought by means of Section 255 of the 'I&B Code', does not mean that the provisions of the 'I&B Code' will not have any overriding effect over the provisions of the Companies Act, 1956. The admission of an application under the 'I&B Code' will not result in two parallel proceedings.

17. 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' but 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 Company Appeal (AT) (Insolvency) No. 181 of 2017 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 Company Appeal (AT) (Insolvency) No. 181 of 2017 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:--

Company Appeal (AT) (Insolvency) No. 181 of 2017 "(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."

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 Company Appeal (AT) (Insolvency) No. 181 of 2017 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 Company Appeal (AT) (Insolvency) No. 181 of 2017 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.

21. In view of the aforesaid findings, 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) NEW DELHI
9th February, 2018 /AR/ Company Appeal (AT) (Insolvency) No. 181 of 2017