NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 765 of 2019

(Arising out of Order dated 12th June, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP 1661 (IB)/MB/2017)

IN THE MATTER OF:

Mr. Hemang Phophalia
Having Address at P.O. Box Number 7109,
C/o Wadala Post Office,
Wadala West, Mumbai – 400031. .... Appellant

Vs

1. The Greater Bombay Co-operative
   Bank Limited
   GBCB House, 89, Bhuleshwar Road,
   FanasWadi, Kalbadevi,
   Mumbai – 400 002.

2. M/s. Penguin Umbrella Works
   Private Limited
   Through Mr. Vijay Pitamber Lulla,
   (Interim Resolution Professional)
   [IBBI/IPA-001/IP-P00323/2017-18/10593]
   B-12/13, Chinnar, 1st Floor,
   R.A. Kidwai Road, Mumbai – 400031. .... Respondents

Present:

For Appellant:	**Mr. Arun Kathpalia, Senior Advocate with Mr. P.V. Dinesh, Mr. R.S. Lakshman, Mr. Ashwini Kumar, Mr. Sindhu, Advocates.**
For Respondents:	**Mr. Shridhar Y. Chitale, Advocate.**
	Mr. Sumit Shukla, Advocate for Respondent No.2.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

First Respondent – The Greater Bombay Co-operative Bank Limited (hereinafter referred to as the 'Financial Creditor') filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code') for initiating 'Corporate Insolvency Resolution Process'

against Penguine Umbrella Works Private Limited ('Corporate Debtor'), alleging default in repayment of Rs.9,11,08,439.37/- including interest and other charges. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench by impugned order dated 12th June, 2019 having admitted the application, the present Appeal has been preferred by Mr. Hemang Phophalia, Ex-Director and Shareholder of the 'Corporate Debtor'.

2. Learned Counsel appearing on behalf of the Appellant submitted that name of the 'Corporate Debtor' was struck-off from the Register of the Companies under Section 248 of the Companies Act, 2013 (hereinafter referred to as the 'Companies Act'), therefore, the application under Section 7 against non-existent Company ('Corporate Debtor') is not maintainable.

3. It was further submitted that the application under Section 7 preferred by 1st Respondent Bank – 'Financial Creditor' was barred by limitation.

4. Learned Counsel appearing on behalf of the Appellant submitted that in view of the initiation of 'Corporate Insolvency Resolution Process', now, the 'Resolution Professional' will ask the Appellant, Ex-Director and others to handover the records and assets of the 'Corporate Debtor', which are not available. However, in absence of any such order passed by the 'Resolution Professional' or the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, we are not inclined to decide such issue.

5. Learned Counsel for the Appellant also submitted that Company is non-functional since number of years and there is no employee working in company and even assets are not there. Therefore, according to him, the 'Resolution Professional' cannot make the 'Corporate Debtor' a going concern. Therefore, the application under Section 7 is not maintainable. However, on the ground that there is no employee working, or the Shareholder(s) or Director(s) ceased to be Shareholder(s) or Director(s), cannot be a ground to reject application under Sections 7 or 9 of the I&B Code.

6. The question arises for consideration is whether an application under Section 7 or 9 for initiating 'Corporate Insolvency Resolution Process' is maintainable against a Company/ 'Corporate Debtor', if the name of the Company/ 'Corporate Debtor' is struck-off from the Register of the Companies.

7. For deciding the issue, it is necessary to refer the relevant provisions of the Companies Act, 2013, as also the reasons and manner in which the name of a Company is struck-off.

8. Chapter XVIII of the Companies Act deals with **"Removal of Names of Companies from the Register of Companies"**. The Registrar of Companies is empowered under Section 248 of Companies Act to remove the name of the Company from the Register of the Companies, which reads as follows: -

"CHAPTER XVIII

REMOVAL OF NAMES OF COMPANIES FROM THE REGISTER OF COMPANIES

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,

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"

9. As per sub-section (6) of Section 248, before passing an order under sub-section (5) (removing the name from the Register of Companies), the Registrar is to satisfy himself that sufficient provision has been made for realization of all amount due to the company and for the payment or discharge of its liabilities and obligations 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.

10. As per proviso thereof, notwithstanding the undertakings referred to in sub-section (6), *the assets of the Company are to be made available for payment or discharge of its liabilities and obligations even after the date of the order removing the name of the Company from the Register of Companies*.

11. From sub-section (7) of Section 248, it is also clear that 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) of Section 248, shall continue and ***may be enforced as if the company had not been dissolved***.

12. 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***.

13. Section 250 of the Companies Act, 2013 relates to effect of Company notified as dissolved and reads as follows: -

> ***"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 realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company."*

14. Therefore, it is clear that after removal of the name of the Company from the Register of the Company for the purpose of right of realization of all amount due to the Company and for the purpose of payment or discharge of its liabilities or obligations of Company continues.

15. Section 252 relates to 'Appeal to Tribunal' against order of Registrar, notifying a Company as dissolved under Section 248. As per Section 252 (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.

Section 252 (3) reads as follows:-

> ***"252. Appeal to Tribunal.—***
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> *xxx xxx xxx*
>
> *(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."

16. From sub-section (3) of Section 252, it will be evident that the Tribunal, by the order, before expiry of twenty years from the publication in the Official Gazette of the Notice under sub-Section (5) of Section 248, on an application made by a creditor or workman, may pass order and give such other directions and make such provisions as deemed just for placing the name of 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.

17. The Tribunal is the Adjudicating Authority in terms of Section 60(1) of the I&B Code. Hence, on one side it plays role of 'Adjudicating Authority' and on the other 'Tribunal' under the Companies Act. Therefore, if an application is filed by the 'Creditor' ('Financial Creditor' or ('Operational Creditor') or workman ('Operational Creditor') before the expiry of twenty years from the publication in the Official Gazette of the Notice under sub-section (5) of Section 248, it is open to the Adjudicating Authority to give such directions and make such provisions as deemed just for placing the name of the Company and all other persons in the same position nearly as may be as if the name of the Company had not been struck off from the Register of Companies.

18. As per amended Clause (94-A) of Section 2 of the Companies Act, 2013 "winding up" means '*winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable*'. Therefore, it is clear that the Company, whose name has been removed from the Register of the Companies can be liquidated under the I&B Code.

19. In terms of Part II of I&B Code, for the purpose of liquidation, except 'Voluntary Liquidation of Corporate Persons' under Section 59 of the I&B Code, procedure of 'Corporate Insolvency Resolution Process' is to be followed, if a proceeding is initiated under Sections 7 or 9 of the I&B code.

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.

20. The name of the 'Corporate Debtor' (Company) may be struck-off, but the assets may continue. Whether in the present case, there are assets of the 'Corporate Debtor' or not can be looked into only by the 'Interim Resolution Professional'/ 'Resolution Professional'.

21. The name of the Company having been struck-off, the Corporate Person cannot file an application under Section 59 for Voluntary Liquidation. 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.

22. So far as, liability of the Ex-Directors or Shareholders or Officers are concerned, Section 248 (7) of the Companies Act being clear, we are not expressing specific opinion, till any order is passed by the Adjudicating Authority or demand is made by the 'Interim Resolution Professional'.

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.

24. We find no merit in this Appeal, it is accordingly dismissed. No cost.

[Justice S. J. Mukhopadhaya]
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

NEW DELHI

5th September, 2019

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