

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT)(INSOLVENCY) NO.192 OF 2017

**(ARISING OUT OF ORDER DATED 21.08.2017 PASSED BY NCLT,
HYDERABAD BENCH, HYDERABAD IN C.P.(IB)NO.50/10/HDB/2017)**

IN THE MATTER OF

Ameya Laboratories Ltd(ALL)
A-49, Madhura Nagar,
Vengal Rao Nagar,
Hyderabad-5

Corporate Applicant

Versus

1. Kotak Mahindra Bank,
6-3-1109/1, 1st Floor, Jewelpavani Towers,
Raj Bhavan Road, Somajiguda,
Hyderabad-500082
2. IDBI Bank Ltd,
NPA Management Group,
H.No.5-9-89/1&2, 2nd floor,
Chapel Road, Hyderabad.
3. Asstt Reconstruction Company (India) Ltd,
Unit No.207, Bhuvana Towers,
S.D. Road, Secunderabad

Respondents

For Appellant:-Ms Varsha Banerjee, Mr. Milan Singh Negi, Mr Kunal Godhwani,
Advocates.

For Respondents: - Mr.Uddyam Mukherjee and Mr. Krishnayan Sen,
Advocates for Respondent No.1
Mr.R.P. Agrawal with Mr. Suny Verma, Advocates for Respondent No.3.

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

M/s Ameya Laboratories Ltd, corporate applicant preferred an application under Section 10 of the Insolvency & Bankruptcy Code, 2016 (hereinafter

referred to as the 'I&B Code') for initiation of corporate insolvency process in respect of it. The Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench, Hyderabad vide impugned order dated 21st August, 2017 passed in CP (IB)No.50/10/HDB/2017 rejected the application under Section 10 of the I&B Code on different grounds including pendency of a winding up proceedings.

2. Learned counsel appearing on behalf of the corporate applicant submitted that there is no possibility of the revival of the appellant company. He further submits that the application under Section 10 of I&B Code was complete having fulfilled all the statutory requirements in terms of Section 10 of I&B Code and Form 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016. It was also submitted that the Adjudicating Authority has looked into the question of revival of the appellant company and held that it cannot be revived. According to Appellant, the Adjudicating Authority has no jurisdiction to look into such question of revival of the Company at the stage of an admission of application under Section 10 of I&B Code.

3. It appears that the Hon'ble High Court of Andhra Pradesh has already passed order for winding up the appellant company under Section 433 and 434 of the Companies Act, 1956. It is informed that the order of the Hon'ble High Court of Andhra Pradesh has been stayed by Division Bench in view of the pendency of the matter before BIFR in Case No.85/2014. Therefore, according to learned counsel for the appellant the Adjudicating Authority wrongly came to conclusion that the appellant has already suffered liquidation.

4. Learned counsel appearing on behalf of respondent referred to an order dated 20th April, 2015 passed by Hon'ble High Court of Andhra Pradesh,

Hyderabad in CP No.33/2013. On consideration of relevant facts in the petition under Section 433 of the Companies Act, 1956, the Hon'ble High Court of Andhra Pradesh has already come to a conclusion that the appellant, corporate debtor, was unable to pay the debt and ordered to wind up the appellant company.

5. Learned counsel for the appellant submitted that against the order of winding up the appellant has preferred an appeal before the Division Bench of the Hon'ble Andhra Pradesh High Court wherein the Hon'ble High Court vide order dated 19th August, 2015 passed interim order of stay. The operative portion of the stay order is reproduced below:

“In view of the law laid down by the Supreme Court in RISHSABH AGRO INDUSTRIES LTD, all proceedings on or after 02.07.2015 shall, in view of Section 22 of the Act, be stayed. It is made clear that the stay would operate only from 02.07.2015 onwards and the proceeding prior thereof shall remain in force. Needless to say that this order shall not precludes the respondent creditor from invoking the jurisdiction of the BIFR under the provisions of the Act.”

6. According to learned counsel for the respondent the above order dated 19th August, 2015 no manner whatsoever amounts to stay of the winding up proceeding nor amounts to stay of appointment of liquidator. Reliance has been placed on the Hon'ble Supreme Court decision in **Shree Chamundi Mopeds Ltd Vs Church of South India Trust Association, reported in AIR 1992 SC 1439**, wherein the Hon'ble Supreme Court held as under:

“10. “While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order.

Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending.”

7. It was further contended that Section 11(d) of I&B Code bars the corporate applicant, in respect of whom order of liquidation has already been made, from making any petition under Section 10 of I&B Code.

8. From the facts pleaded by the parties we find that the winding up proceeding has already been initiated against the appellant though an interim order has been passed by the Division Bench of Hon'ble High Court of Andhra Pradesh. However, the fact remains that the winding proceeding already initiated by the High Court is still pending.

9. Similar issue fell for consideration before this Appellant Tribunal in “**M/s Unigreen Global Pvt Ltd Vs PNB & Others, Company Appeal (AT) (Insolvency) No.81/2017**”. This Appellate Tribunal vide its judgement dated 01.12.2017 held as follows:

“21. In an application under Section 10, the ‘financial creditor’ or ‘operational creditor’, may dispute that there is no default or that debt is not due and is not payable in law or in fact. They may also oppose admission on the ground that the Corporate Applicant is not eligible to make application in view of ineligibility under Section 11 of the I & B Code. The Adjudicating Authority on hearing the parties and on perusal of record, if satisfied that there is a debt and default has occurred and the Corporate Applicant is not ineligible under Section 11, the Adjudicating Authority has no option but to admit the application, unless it is incomplete, in which case the Corporate Applicant is to be granted time to rectify the defects.

22. Section 10 does not empower the Adjudicating Authority to go beyond the records as prescribed under Section 10 and the information as required to be submitted in Form 6 of the Insolvency and Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 subject to ineligibility prescribed under Section 11. If all information are provided by an applicant as required under Section 10 and Form 6 and if the Corporate Applicant is otherwise not ineligible under Section 11, the

Adjudicating Authority is bound to admit the application and cannot reject the application on any other ground.

23. Any fact unrelated or beyond the requirement under I & B Code or Forms prescribed under Adjudicating Authority Rules (Form 6 in the present case) are not required to be stated or pleaded. Non-disclosure of any fact, unrelated to Section 10 and Form 6 cannot be termed to be suppression of facts or to hold that the Corporate Applicant has not come with clean hand except the application where the 'Corporate Applicant' has not disclosed disqualification, if any, under Section 11. Non-disclosure of facts, such as that the 'Corporate Debtor' is undergoing a corporate insolvency resolution process; or that the 'Corporate Debtor' has completed corporate insolvency resolution process twelve months preceding the date of making of the application; or that the corporate debtor has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under the said Chapter; or that the corporate debtor is one in respect of whom a liquidation order has already been made can be a ground to reject the application under Section 10 on the ground of suppression of fact/not come with clean hand.

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25. Similarly, if any action has been taken by a 'Financial Creditor' under Section 13(4) of the SARFAESI Act, 2002 against the Corporate Debtor or a suit is pending against Corporate

Debtor under Section 19 of DRT Act, 1993 before a Debt Recovery Tribunal or appeal pending before the Debt Recovery Appellate Tribunal cannot be a ground to reject an application under Section 10, if the application is complete.

26. Any proceeding under Section 13(4) of the SARFAESI Act, 2002 or suit under Section 19 of the DRT Act, 1993 pending before Debt Recovery Tribunal or appeal pending before Debt Recovery Appellate Tribunal cannot proceed in view of the order of moratorium as may be passed.

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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.”

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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.

10. In the present case as we find that a winding up proceeding has been passed and is pending against the appellant, we hold that the application

under section 10 of I&B code at the instance of the corporate applicant is not maintainable in view of the bar imposed under Section 11(d) of I&B Code.

11. We find no merit in this appeal. It is accordingly dismissed. However, in the facts and circumstances there shall be no order as to cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

New Delhi
12.01.2018

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