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Jury is out on aspects of winding up and insolvency

Winding up proceedings were earlier initiated and conducted under the Companies Act, 1956. However, with the coming into force of the Companies Act, 2013, and the Insolvency and Bankruptcy Code, 2016 (IBC), the process underwent a change. The 1956 act provided a statutory right to file a winding up petition on the ground of inability to pay debts. The 2013 act does not provide a similar right as insolvency proceedings now can be initiated only under the IBC on account of default of either a financial or operational debt.

Section 434 of the 2013 act provides for transfer of proceedings pending under the 1956 act. Section 434 read with subsequent notifications issued by the central government led to ambiguity as far as initiation of proceedings under the IBC was concerned. The National Company Law Tribunal (NCLT) primarily admitted proceedings under the IBC in cases where no order of winding up had been passed by a high court and proceedings were merely pending.

The National Company Law Appellate Tribunal (NCLAT) recently settled the ambiguity, in an order in *Forech India Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd & Anr* dated 23 November 2017, and an order in *Unigreen Global Pvt Ltd v Punjab National Bank & Ors* dated 1 December 2017. The NCLAT held that where winding up proceedings stand initiated by the high court, application under the IBC is not maintainable on account of the bar under section 11(d) of the IBC. The NCLAT concluded that “winding up” under the 2013 act is synonymous with

“liquidation” under the IBC. Thus, a winding up order passed under the 1956 act has been equated with a liquidation order under the IBC and accordingly the bar under section 11(d) of the IBC was held to be applicable in such cases.

The present view of the NCLTs as upheld by the NCLAT is that mere pendency of winding up proceedings before the high court is not a ground to reject an application filed by a financial creditor or an operational creditor under section 7 or 9 of the IBC respectively.

This view is in consonance with the object and purpose of the IBC, which is time-bound resolution/reorganization of companies undergoing a financial crunch. However, the NCLAT’s finding that “winding up order” under the 1956 act is synonymous with “liquidation order” under the IBC appears to be a very broad general categorization.

On 12 January 2018, in the matter of *Ameya Laboratories v Kotak Mahindra Bank*, the NCLAT held that even in a case where a stay order for appointment of a liquidator by a division bench of the high court was implemented, the aspect of winding up proceedings is evident, and thus proceedings under section 10 of the IBC are legally untenable. With the coming into force of the IBC, the 2013 act was amended to define “winding up” to also include “liquidation order” under the IBC. Whether this amendment can be read to enlarge the scope of the term “liquidation order” as mentioned exclusively under the IBC is a question the scope and applicability of which can be a subject matter

of dispute before the Supreme Court. The IBC has been enacted with a specific objective and held to be a complete code in itself by the Supreme Court in the recent case of *Innovative Industries Ltd v ICICI Bank & Anr*.

Given that the IBC has been enacted and recognized as a complete code, to what extent can terms and words mentioned in other acts be read in the IBC to restrict the applicability of the IBC? The bar under the IBC against initiating proceedings pertains only to cases where a liquidation order has been passed. Since the term “liquidation order” has been statutorily recognized and come into force only under the IBC, it is unclear whether this term can be enlarged to include within its ambit a winding up order passed by the company court under the 1956 act.

The jury is out as to the maintainability of proceedings under the IBC in cases where petitions are pending before high courts under the 1956 act, as well as in cases where a winding up order has been passed by a high court under the 1956 act. It has been clearly held that in cases where winding up proceedings have been initiated in the form of an order by the high court, proceedings under the IBC are not maintainable.

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