

Can IBC be Invoked Against a Company Whose Name has been Struck Off from the Registrar of Companies?

written by Rajdev Singh | October 30, 2019

“Striking off” of a company can at times be considered as an alternate mechanism to “winding up” of a company. Chapter XVII of The Companies Act, 2013 (“Act”) deals with the removal of names of companies from the Registrar of Companies (“ROC”). The Act has provided two ways of Striking off of a company. Under Section 248(1) of the Act, a company’s name can be struck off by the ROC if it fulfils any one of the conditions mentioned in the provision. The second process mentioned under Section 248(2) of the Act involves the dissolution of a company on its own accord. Once an application for dissolution is filed, the company is struck off from the register of the ROC.

As one of the pre-emptive measures for removal of the name of a company, the company may only be struck off of the ROC if all the liabilities of the company are satisfied. Hence, as a liability extinguishment method, the company is under obligation to make the payment of the amount which is due to its creditors. Furthermore, it can be verified from Section 248(6) of the Act, that the ROC shall remove the name of the company only if it is satisfied that the company has arranged for sufficient provisions for discharging its liabilities.

However, even after removal of the name from the register of ROC, a corporate debtor is still under the liability to pay its dues. The liabilities of directors, officers and managers of the corporate debtor can be enforced, if required for enforcement of the liability whenever required as per Section 248(7) of the Act. It may further be noticed from the wordings of Section 248(8) that, National Company Law Tribunal (“NCLT”) still has the power to wind up a company even if the company is removed from the register of ROC. Hence, from a bare perusal of the abovementioned provision of the Act, it can be ascertained that the liability to pay the dues is not extinguished by simply removing the name from the register of ROC.

Section 250 of the Act has also re-confirmed the discharge of liability even after striking off of the name of the corporate debtor. Furthermore, removal of the names of the corporate debtor under Section 248(5) of the Act can be restored under Section 252(3) of the Act, if any application of revival of the name of the company is filed by the creditor.

Furthermore, as per Section 60(1) of Insolvency and Bankruptcy Code, 2016 (“IBC”), NCLT acts as an adjudication authority. It can be derived that on one side, it plays the role of an adjudication authority and on the other as a tribunal under the Act. Hence, even if an application is filed under section 252(3) of the Act, it is open to

the tribunal to provide directions as per the provisions. It can be observed that under Section 2(94A), winding up of the company also includes liquidation under the provisions of the IBC.

Background-

Elektrans Shipping Pte Ltd. v. Pierre D'silva & Anr.

The

Hon'ble National Company Law Appellate Tribunal ("NCLAT") has dealt with the issue of whether insolvency proceedings

can be filed against a company whose name has been struck off from ROC, in Elektrans Shipping Pte Ltd. ("Appellants")

v. Pierre D'silva ("Respondent")

& Anr. passed in Company Appeal (AT) (Insolvency) No. 754 of 2019 ("Appeal") on 06.09.2019, wherein it was

held that even after the name of Elektrans Shipping Pte Ltd. ("Corporate Debtor"), is struck off

from the register of ROC, IBC proceedings can still be initiated against it.

The

Respondent filed an application under Section 9 of the IBC, numbered as

C.P.(IB) -599/MB/2018 ("Insolvency

Proceedings") before Hon'ble NCLT, Mumbai against the Appellant/Corporate

Debtor. The said Insolvency Proceedings was admitted by Hon'ble NCLT, Mumbai Bench, by order dated 10th April, 2019. Hence, aggrieved by the order of NCLT

Mumbai Bench, the appellants challenged through its shareholders challenged the

same before NCLAT.

Issue raised- Striking off of a company

Whether Insolvency proceedings can be filed against a company whose name has been struck off from the register of Registrar of Companies?

Judgment

The

Hon'ble NCLAT stated that it is evident from sub-section (3) of Section 252, that Hon'ble NCLT can restore the name of the company, by order, before the expiry of twenty years from the publication in the Official Gazette. Further, under Section 248(5), on an application made by a creditor or any aggrieved stakeholder, NCLT has powers to enforce the liability of every Director, Manager or Other Officer, who were exercising any power of management in the company already dissolved under Section 248(5) of the Act, as if the name of the company had never been struck off from the ROC.

It was further observed under Section 248(6) of the Act, that before removing the name from the registrar of companies, the ROC should be satisfied that sufficient provisions are made for realisation of all amounts due, payments or any liability and obligation of the company.

Moreover,

Section 248(7) of the Act specifies the liability of all the members of company

in case of any pendency of amounts or payments or obligations and the same may

be enforced as if the company had never been dissolved. It was further

contended that under Section 60 of IBC read with Section 252(3) of the Act, the

NCLT is positioned as an Adjudicating Authority.

Further,

the Hon'ble NCLT has observed that as the application under Section 7 has been

admitted, it is deemed under Section 252(3) of the Act that the company is restored along with its directors, officers and managers.

The

said judgement is a sequel to the judgement in *Mr. Hemang Phophalia vs. The Greater Bombay Co-operative Bank Ltd. and Anr.* in Company Appeal (AT)

(Insolvency) No. 765 of 2019 which was decided on 05th September, 2019 and has been pronounced in similar lines.

However, the Hon'ble NCLAT has clarified that the above-mentioned provisions regarding restoration of the removed name from the register of companies of ROC would not be applicable in case, of voluntarily liquidation of

corporate person as per provisions of Section 59 of IBC.

The

Hon'ble NCLAT lastly held that *"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."

Conclusion

From a collective reading of both the judgements passed by the Hon'ble NCLAT, it can be derived that striking off of a company does not extinguish the rights of creditor to initiate IBC. The Act has provided ample provisions to ensure that liability of the creditors and stakeholders is not hampered.

However, the Hon'ble NCLAT in the earlier judgement has observed non-applicability of the Corporate Insolvency Resolution Process in case of voluntary liquidation of the company. So, it is very clear that insolvency proceedings can be initiated even against a struck-off company.

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