

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1434 of 2019

[Arising out of Order dated 6th November, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP(IB)No.494/NCLT/MB/2019]

IN THE MATTER OF:

Action Barter Private Limited
2A, Chowringhee Square
Kolkata 700069
Through Sh. Shankar Sharma
Authorized Representative

.... Appellant

Vs

1. SREI Equipment Finance Limited
Vishwakarma, 86C Topsia Road,
Kolkata – 700046.
2. Shree Ram Urban Infrastructure Ltd.
(In Prov. Liqn.)
Ganpatrao Kadam Marg,
Lower Parel, Mumbai-400013.
Through Insolvency Resolution Professional
Sh. Srigopal Choudhary

.... Respondents

Present:

**For Appellant: Mr. Gurpreet Hora and Mr. Ankit Kohli,
Advocates.**

For Respondents:

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the '**I&B Code**') was filed by SREI Equipment Finance Limited ('Financial Creditor') against Shree Ram Urban Infrastructure Limited ('Corporate Debtor'). The Adjudicating Authority

(National Company Law Tribunal), Mumbai Bench admitted the Application. Action Barter Private Limited, Shareholder has challenged the same on the ground that Winding up Petition against Shree Ram Urban Infrastructure Ltd. has already been admitted by the Hon'ble High Court of Bombay on 5th October, 2016 and Official Liquidator has been appointed as the Provisional Liquidator on and from 15th November, 2017.

2. Learned Counsel for the Appellant submitted that the Provisional Liquidator on 16th April, 2018, upon notice to SREI Equipment Finance Limited, 'Financial Creditor' has taken over the assets and properties of Shree Ram Urban Infrastructure Ltd. on 17th April, 2018. Thereafter, the Provisional Liquidator has also carried out boundary determination on 1st May, 2018. It was further submitted that Application under Section 7 of the I&B Code filed by Indiabulls Housing Finance Limited was already rejected by the Adjudicating Authority on 18th May, 2018. The said order is under challenge before the Hon'ble Supreme Court in Civil Appeal No.6814/2018, which is still pending. Therefore, according to the Learned Counsel application under Section 7 or 9 of the I&B Code can be filed and entertained after admission of the winding up petition.

3. The similar issue fell for consideration before the Hon'ble Supreme Court in ***"Forech India Ltd. vs. Edelweiss Assets Reconstruction Co. Ltd. – 2019 SCC OnLine SC 87"***. In the said case, the Hon'ble Supreme Court noticed the pendency of the Application under Section 433 and 434 of the Companies Act, 1956 and winding up petition, being 42 of 2014 was filed by Forech India Ltd. before the Hon'ble High Court of Delhi. In the said case, the notice was issued. The Forech India Ltd. took plea that the Application

under Section 7 of the I&B Code was not maintainable, which was the reason that Section 7 Application was rejected by the NCLT. Against the said order, an Appeal was filed before this Appellate Tribunal, which was also disposed of, in which Section 11 of the I&B Code was referred to, and it was held by this Appellate Tribunal that since there was no winding up order by the Hon'ble High Court, the Financial Creditor's petition would be maintainable. As a result of this the Appellant's Appeal was dismissed.

4. When the matter was challenged before the Hon'ble Supreme Court by Forech India Ltd., the Hon'ble Supreme Court referring to different provisions observed and held:

"21. The resultant position, therefore, is that we agree with the learned counsel for the appellant that the Appellate Tribunal's reasoning is not correct. Section 11 of the Code specifies which persons are not eligible to initiate proceedings under it. In particular, Section 11(d) reads as follows:

"11. Persons not entitled to make applications- *The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:-*

xxx xxx xxx

(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."

22. *This Section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.*

23. *Though, we are not interfering with the Appellate Tribunal's order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code.*

24. *With these observations, we dispose of the aforesaid appeal."*

5. The case of the Appellant is covered by the decision of the Hon'ble Supreme Court in **Forech India Ltd** (supra), therefore, we hold that the Application under Section 7 of the I&B code filed by the Respondent – SERI Equipment Finance Limited is not maintainable. In so far as pending winding up petition before the Hon'ble Bombay High Court is concerned, the

Appellant in terms of the decision of the Hon'ble Supreme Court in ***Forech India Ltd*** (supra) may move before the Hon'ble High Court of Bombay.

The Appeal is dismissed with the aforesaid observations. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

[Justice Venugopal M.]
Member (Judicial)

NEW DELHI

7th February, 2020

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