

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 202 of 2017

IN THE MATTER OF:

Forech India Pvt. Ltd.

...Appellant

Versus

**Edelweiss Assets Reconstruction
Company Ltd. & anr.**

...Respondents

Present:

For Appellant :

**Ms. Purti Marwaha and Ms. Henna George,
Advocates**

For Respondent No. 1:

**Ms. Misha and Shri Shantanu Chaturvedi,
Advocates**

ORDER

23.11.2017 An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I & B Code') was filed by the Edelweiss Assets Reconstruction Company Ltd. (Financial Creditor) against one 'Tecpro Systems Ltd.' (Corporate Debtor). After notice to the Corporate Debtor, the case was taken up by the Adjudicating Authority, Principal Bench, New Delhi. The appellant, who is not a 'Corporate Debtor', but a third party and claimed to be an 'Operational Creditor', appeared and opposed the application under Section 7 preferred by the 'Edelweiss Assets Reconstruction Company Ltd.' (Financial Creditor) on the ground of pendency of winding up cases. The Adjudicating Authority on hearing the parties and taking into consideration the facts that the record was complete, filed in Form 1 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules,

2016 (hereinafter referred to as the 'Adjudicating Authority Rules') by impugned order dated 7th August, 2017 admitted the application, passed order of moratorium and appointed Interim Resolution Professional with certain directions. Thereby objection raised by the appellant stands rejected.

2. Learned counsel appearing on behalf of the appellant submits that a number of winding up applications have been filed and pending against the 'Tecpro Systems Ltd.' (Corporate Debtor) and, therefore, the petition under Section 7 is not maintainable. However, such objection cannot be accepted in absence of any ineligibility, as imposed under Section 11 of the I & B Code and reads as follows:

"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.”

3. From the aforesaid provision, we find that the ‘Corporate Debtor’ or ‘Financial Creditor’ is ineligible to make application under Section 7 or 10 where (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.

4. Thus, the ‘Financial Creditor’ is ineligible to file an application under Section 7 only if the ‘Financial Creditor’ has violated any of the terms of resolution plan which was approved twelve months from the date of making an application.

5. Chapter III of Part II deals with liquidation process. In the said Chapter the word ‘winding up’ has not been mentioned. However, if Section 255 is read with Schedule 11 of the I & B Code, we find that in Section 2 of the Companies Act, 2013 after clause (94), the following clause shall be inserted namely :

“2. In this Act, unless the context otherwise requires –

xxx

xxx

xxx

(94A) “winding up” means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.”

6. Therefore, it is clear that the “winding up” under the Companies Act, 2013 has been treated to be “liquidation” under the I & B Code.

7. There is no provision under the I & B Code which stipulate that if a ‘winding up’ or ‘liquidation’ proceeding has been initiated against the Corporate Debtor, the petition under Section 7 or Section 9 against the said Corporate Debtor is not maintainable.

8. However, if a ‘Corporate Insolvency Resolution’ has started or on failure, if liquidation proceeding has been initiated against the Corporate Debtor, the question of entertaining another application under Section 7 or Section 9 against the same very ‘Corporate Debtor’ does not arise, as it is open to the ‘Financial Creditor’ and the ‘Operational Creditor’ to make claim before the Insolvency Resolution Professional/Official Liquidator.

9. Similarly, one may argue that in case where ‘winding up’ proceeding has been ordered by the Hon’ble High Court and thus stands initiated, where is the question of filing an application under section 7 or 9 or initiation of Corporate Insolvency Resolution Process, which, on failure ultimately culminates into liquidation proceedings (winding up proceedings) ? The argument can be that once second stage i.e. liquidation (winding up) proceedings has already initiated, the question of reverting back to the first stage of ‘Corporate Insolvency Resolution Process’ or preparation of Resolution plan does not arise. One can appreciate such stand which can be decided in an appropriate case, but such issue being not involve in the present

case, we are not deciding the issue aforesaid. It is left open to be decided in other appropriate case.

10. In the present case, admittedly no order for winding up has been passed against the 'Corporate Debtor' by Hon'ble High Court. No liquidation proceeding has been initiated. It appears that some of the applications for 'winding up' under the Companies Act, 1956 are pending, but no order for 'winding up' has been passed. In the circumstances, in the absence of actual initiation of 'winding up' proceedings against the Corporate Debtor, it is always open to the Financial Creditor/Operational Creditor to file an application for Corporate Insolvency Resolution Process against the Corporate Debtor.

11. For the reasons aforesaid, the objection raised by the appellant that petition under Section 7 is not maintainable against the Corporate Debtor because of pendency of some applications for winding up cannot be accepted.

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

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member(Judicial)

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