

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) (INSOLVENCY) NO.709 OF 2018

(ARISING OUT OF JUDGEMENT AND ORDER DATED 04.10.2018 PASSED BY THE LEARNED ADJUDICATING AUTHORITY (NATIONAL COMPANY LAW TRIBUNAL), HYDERABAD BENCH, HYDERABAD IN COMPANY PETITION (IB) NO.462/7/HDB/2018)

IN THE MATTER OF:

PTC India Financial Services Ltd, `
 7th Floor, Telephone Exchange Building,
 8 Bikaji Cama Place,
 New Delhi-11006.

Appellant

Versus

1. ICOMM Tele Ltd,
 Plot No.40-46,
 Phase I, IDA
 Cherlapally, HCL Post,
 Hyderabad 500051, Telangana.
2. L&T Infrastructure Finance Company Ltd,
 Brindavan, Plot No.177,
 C.S.T. Road, Kalina,
 Santacruz (East),
 Mumbai, Mumbai City
 Maharashtra 400098

Respondents

Present: Mr. Alok dhir, Ms Varsha Banerjee, Mr. Milan Singh Negi and Mr. Kunal Godhwani, Advocates for Appellant.
 Mr. Shashank Agarwal, Advocate for R1 company.
 Mr. Dinkar Singh, Advocate for R2.

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J

M/s L&T Infrastructure Finance Company Ltd (financial creditor) filed an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 (I&B Code) against M/s ICOMM Tele Ltd (Corporate Debtor) which having

been admitted by impugned order dated 4th October, 2018, the appellant has challenged the said order.

2.L Learned counsel for appellant submitted that two winding up proceedings have already been filed before the Hon'ble High Court of Hyderabad in CP No.182 of 2011 and CP No.244 of 2016 and order has been passed on 2nd January, 2017 and, therefore, application under Section 7 is not maintainable. Reliance has been placed on the decision of this Appellate Tribunal in "*Unigreen Global Private Limited Vs Punjab National Bank & Ors*"- Company Appeal (AT) No.81 of 2017.

3. Learned counsel appearing on behalf of Respondent, L&T Infrastructure Finance Company Ltd referring to Section 11 of I&B Code submitted that the said provision donot bar filing of an application under Section 7 of I&B Code.

4. We have heard learned counsel for the parties and perused the record.

5. Section 11 of I&B Code prescribes ineligibility of persons to move application for corporate insolvency, which 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 his 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.

The aforesaid issue came up for consideration before the Hon'ble Supreme Court of India in '*Forech India Ltd Vs Edelweiss Assets Reconstruction Company Ltd 2019 SCC Online SC 87*. In the said case the Hon'ble Supreme Court observed and held as under:-

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

xxxx

(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."

6. In *Jaipur Metals & Electricals Employees Organisation through General Secretary Mr. Tej Ram Meena Vs Jaipur Metals & Electricals Ltd 2018 SCC Online SC 2803*, the Hon'ble Supreme Court vide its Judgement dated 12th December, 2018 held as under:

"17. However, this does not end the matter. It is clear that Respondent No.3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No.3 at any time before a winding up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows:

"238. Provision of this Code to override other laws-The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

18. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section

434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgement has to be set aside. The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgement."

7. Apart from the law as explained by Hon'ble Supreme Court, in the present case we also find that the Hon'ble High Court of Andhra Pradesh has not passed any order of liquidation nor appointed any Liquidator in the pending winding up proceedings.

8. For the reasons aforesaid we hold that the application under Section 7 of I&B code filed by the Respondent is maintainable.

9. In absence of any merit appeal is dismissed. No cost.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice A.I.S. Cheema)
Member (Judicial)

New Delhi
Dated: 17th May, 2019.