

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****COMPANY APPEAL (AT)(INSOLVENCY) NO.435 OF 2019****IN THE MATTER OF:**

Rahul Tantia,
S/o Shri Govardhan Prasad Tantiia,
DD 30, 7th Floor,
Sector-I,
Salt Lake City,
Kolkata-700064

Appellant

Vs

1. State Bank of India,
State Bank Bhawan,
14th Floor,
Corporate Centre,
Madam Cama Road,
Nariman Point
Mumbai-400021.

2. Mr Kshitiz Chhawchharia,
Interim Resolution Professional,
C/o B. Chhawchharia & Co.,
8A & B Satyam Tower,
3, Alipore Road,
Kolkata-700 027.

Respondents.

Present:

For Appellant: Mr. Debol Bannerjee, Senior Advocate with Mr. Abhijeet Sinha, Mr. Swatrup Bannerjee, Ms Arveena Sharma and Mr. Abhishek Guha, Advocates.

Mr. Ajay Edgear, Advocate for SBI.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

The State Bank of India, Financial Creditor, filed an application under Section 7 of the Insolvency & Bankruptcy Code, 2016 ("I&B Code" for short)

for triggering 'Corporate Insolvency Resolution Process' against M/s Tantia Construction Limited ('Corporate Debtor'). The Adjudicating Authority, (National Company Law Tribunal), Kolkata Bench, Kolkata by impugned order dated 13th March, 2019 admitted the application against which the present appeal has been preferred by the Shareholder of the 'Corporate Debtor'.

2. The 'Corporate Debtor' took plea before the Adjudicating Authority that a winding up proceeding has already been initiated against the 'Corporate Debtor' and is pending before the Hon'ble Calcutta High Court, therefore, the application under Section 7 of I&B Code is not maintainable. The Adjudicating Authority referring to the decision of the Hon'ble Supreme Court in '**Forech India Ltd Vs Edelweiss Assets Reconstruction Co Ltd**' *Civil Appeal No.818 of 2018* decided on 22.01.2019 held that the application under Section 7 of I&B Code was maintainable.

3. Similar plea has been taken by the appellant shareholder before this Appellate Tribunal. It is stated that a petition for winding up was filed against 'Corporate Debtor' by one 'Kamlesh Mercantile Credit Pvt Ltd' in CP No. 763 of 2015 before the Hon'ble High Court of Calcutta pursuant to which CDR Scheme was notified in March, 2015. The Hon'ble High Court of Calcutta admitted the case on 4.2.2016 pursuant to which advertisement was also published in the newspaper of 6th April, 2016. Several other winding up applications were also filed and taken up for consideration by the Hon'ble High Court of Calcutta wherein the State Bank of India has also entered appearance.

4. It was informed that an application being CA No.443 of 2016 was preferred before the Hon'ble High Court of Calcutta for direction to State Bank

of India to reconsider the CDR Scheme of March, 2015 wherein the Hon'ble High Court of Calcutta vide order dated 19th August, 2016 directed the 'Corporate Debtor' to file affidavit. The matter was taken up for consideration by the Hon'ble High Court of Calcutta on different dates.

5. In the meantime an application under Section 7 of I&B Code was filed by one 'Atzon Infracon Prviate Ltd' against the 'Corporate Debtor' wherein an Intervener application was filed by the State Bank of India. The Adjudicating Authority (National Company Law Tribunal), Kolkata Bench in CP No.95/KB/2017 held that if the petition is admitted under the I&B Code and any order is passed which will amount to interference with the jurisdiction of the Hon'ble High Court of Calcutta and, therefore, adjourned the proceedings. The matter was subsequently considered by the Hon'ble High Court of Calcutta, and the Court noticed that three winding up petitions have been filed against the 'Corporate Debtor', on 8th September, 2017 observed that as the matter is of representative character, no further payment or settlement with an individual creditor is possible without reference to all creditors who came before the Court to press their claims. The matter is still pending.

6. In the meantime the State Bank of India filed an application under Section 7 of I&B Code in 2018 against 'Corporate Debtor' wherein the 'Corporate Debtor' appeared and after hearing the parties, the Adjudicating Authority passed the impugned order of admission on 13.03.2019.

7. The question arises for consideration in this appeal is as to whether in the facts and circumstances of the case the application under Section 7 of the I&B Code filed by State Bank of India for initiating 'Corporate Insolvency

Resolution Process' against the 'Corporate Debtor' was maintainable against which a winding up petition is already pending before the Hon'ble High Court.

8. In '**State Bank of India Vs Shakti Bhog Foods Limited**' Company Appeal (AT) (Insolvency) No.83 of 2018, this Appellate Tribunal by judgement dated 12th March, 2018 observed and held that there is no provision under the I&B Code which stipulates that if a 'winding up' or 'liquidation' proceedings has been initiated against the 'Corporate Debtor', the petition under Section 7 or Section 9 against the said 'Corporate Debtor' is not maintainable.

9. This issue fell up for consideration before the Hon'ble Supreme Court of India in '**Forech India Ltd Vs Edelweiss Assets Reconstruction Co. Ltd**' **Manu/SC/0080/2019** wherein by Judgement dated 22nd January, 2019 the Hon'ble Supreme Court observed and held as under:-

"17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgement which is contained in Jaipur Metals & Electricals Employees Organization Through General Secretary Mr. Tej Ram Meena Vs Jaipur Metals &

Electricals Ltd Through its Managing Director being a judgement by a Division Bench of this Court dated 12.12.2018.

18. After referring to the statutory scheme, as aforesaid, this Court held:

“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.Provisions 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.

Referring to Section 11 of I&B Code the Hon'ble Supreme Court further observed:

"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."

10. In the present case the application under Section 7 of I&B Code being an independent proceeding which relates to 'Corporate Insolvency Resolution Process', and in view of the decision of the Hon'ble Supreme Court in **'Forech India Ltd Vs Edelweiss Assets Reconstruction Co Ltd (Supra)** we hold that the application under Section 7 of I&B Code filed by State Bank of India was maintainable.

11. As no case is made out to interfere in the impugned order, the appeal is dismissed. However, there shall be no order as to costs.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member (Technical)

New Delhi
Dated: 19th August, 2019

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