

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT)(Insolvency) No. 790 of 2018

IN THE MATTER OF:

State Bank of India

...Appellant

Vs

Topworth Steels and Power Pvt. Ltd.

....Respondent

Present:

**For Appellant: Mr. P.V. Dinesh and Mr. Ashwini Kumar Singh,
Advocates**

For Respondent: Present but did not mark appearance

ORDER

19.08.2019 A petition for winding up under Section 433(e) and 434 of the Companies Act, 1956 was filed against Topworth Steels and Power Pvt. Ltd. ('Corporate Debtor') in which the Hon'ble Bombay High Court appointed Provisional Liquidator for liquidation of the Company. While the matter was pending before the Hon'ble Bombay High Court, the Appellant –State Bank of India ('Financial Creditor') filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **IBC**) against Topworth Steels and Power Pvt. Ltd. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Mumbai by impugned order dated 16.11.2018 dismissed the application as not maintainable in view of pendency of winding up petition before the Hon'ble Bombay High Court against the 'Corporate Debtor'. He referred to the decision of this Appellate Tribunal in "*Arise India Limited Vs. TCI Freight*" [Company Appeal(AT)(Insolvency) No. 153 of 2018] without giving any reason, the Division Bench of this Appellate Tribunal dismissed similar appeal on 03.05.2018 with the following observation:

“Where the ‘Provisional Liquidator’ has been appointed, the question of initiation of ‘Corporate Insolvency Resolution Process’ under Section 9 of the Insolvency and Bankruptcy Code, 2016, against the same ‘Corporate Debtor’ does not arise. For the said reason, we are not inclined to interfere with the impugned order and dismiss the appeal. No cost.”

2. It appears that aforesaid decision was given by the Division Bench of this Appellate Tribunal based on a decision of this Appellate Tribunal in *“Forech India Pvt. Ltd. Vs. Edelweiss Assets Reconstruction Company Ltd. & Anr.”* [Company Appeal(AT)(Insolvency) No. 202 of 2017] wherein this Appellate Tribunal held that the Application under Section 7 was not maintainable in view of initiation of winding up proceeding by the Hon’ble High Court of Delhi. Against the decision of this Appellate Tribunal, Forech India Pvt. Ltd. moved before the Hon’ble Supreme Court in Civil Appeal No. 818 of 2018 (2019 SCC online SC 87) (*Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.*) whereby the Hon’ble Supreme Court by a judgment dated 22.01.2019 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.”*

....

3. Learned Counsel appearing on behalf of Respondent-‘Corporate Debtor’ accepts applicability of the decision of Hon’ble Supreme Court in ‘Forech India

Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.' (supra) and therefore we hold that the application under Section 7 was maintainable irrespective of pendency of the petition before the Hon'ble Bombay High Court (now pending in NCLT, Mumbai).

4. For the reasons aforesaid, we set aside the impugned order dated 16.11.2018 and remit the case to the Adjudicating Authority (National Company Law Tribunal), Mumbai to admit the application under Section 7 after notice to the Respondent and pass appropriate order including the order of 'Moratorium' under Section 14 of IBC. If such order of 'Moratorium' is passed, the proceeding Transferred under Section 434 of Companies Act, 2013 pending before NCLT Mumbai shall remain stayed till 'Resolution Process' is complete.

5. It will be also open to the 'Creditors' including the Applicant of the Company Petition 114 of 2016 to file claim before the Resolution Professional on admission of the Application under Section 7 of IBC which may be decided in accordance with law irrespective of pendency of transferred petition before the NCLT, Mumbai.

[Justice S.J. Mukhopadhaya]
Chairperson

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

(Kanthi Narahari)
Member(Technical)

Akc/Sk