

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

I.A. No. 1135 of 2020

IN

Company Appeal (AT) (Ins.) No. 746 of 2019

In the matter of:

Spicejet Ltd.

....Appellant

Vs.

**Affordable Infrastructure and Housing
Project Pvt. Ltd.**

...Respondent

Present

For Appellant: Mr. Vrun K Chopra & Mr. Gurtej Pal Singh, Advocates.

**For Respondent: Mr. Sameer Jain, Mr. Angad Sandhu, Mr. Karan
Valecha & Mr. Himesh Thakur, Advocates.**

ORDER
(Virtual Mode)

03.11.2020: Heard Learned Counsel for the Applicant/ Appellant as well as the Learned Counsel for the Respondent.

The Applicant / Appellant has preferred the instant Interlocutory Application (under Rule 11 of the National Company Law Tribunal Rules, 2016) praying inter-alia that liberty be granted to it, to approach the Hon'ble Adjudicating Authority in terms of the ingredients of Section 7 of the 'Insolvency & Bankruptcy Code, 2016' or to allow it to contest the instant 'Appeal' on merits.

It is represented on behalf of the Applicant/ Appellant that on 04.02.2020, this Appellate Tribunal had heard the Applicants/ Appellants arguments and during the course of arguments, this Tribunal was pleased to

state that if the present Appeal was withdrawn liberty shall be granted to the applicant/appellant for filing of Application under Section 7 of the I&B Code before the Adjudication Authority and accordingly the Applicant/ Appellant sought time to move a 'Memo' 'For Withdrawal' after securing necessary instructions.

Further, on 18.02.2020 the Applicant/ Appellant moved a 'Withdrawal of Memo' seeking liberty from this Tribunal to approach the Adjudicating Authority under Section 7 of the I & B Code.

The Learned Counsel for the Applicant/ Appellant adverts to the contents of the said Memo which run as under:

"That the Appellant, in light of Orders dated 24.07.2019 & 04.02.2020 seeks permission to withdraw the present Company Appeal (AT) (Insolvency) No. 746 of 2019, with liberty to move Application u/s Section of the IBC as 'Financial Creditor' against the Respondent before the Hon'ble NCLT, New Delhi, qua commercial borrowing of Rs. 1,20,00,000/- (Rupees One Crore Twenty Lakhs), advanced through RTGS on 08.09.2015 to the Respondent namely M/s Affordable Infrastructure and Housing Projects Pvt. Ltd.

That the Appellant herein also humbly submits that the aforesaid liberty sought before this Hon'ble Appellate Tribunal

is without prejudice to the averments, contentions and submissions qua Appellant being an 'Operational creditor'."

The real grievance of the Applicant/ Appellant is that the Applicant/ Appellant had approached the Adjudicating Authority in a bona-fide manner as an 'Operational Creditor' and in the absence of liberty, by Tribunal, the Applicant/ Appellant will be barred by limitation to approach the Hon'ble Adjudication Authority under Section 7 of the I&B Code, which in turn will cause grave prejudice to it. Therefore, the Applicant/ Appellant is perforced to file the present Application seeking the clarification in the matter pertaining to the Order dated 18.02.2020 passed by this Tribunal, which is to the following effect:

"...It is represented by the Learned Counsel for the Appellant and that the Appellant seeks permission to withdraw the Company Appeal (AT) (Ins.) No. 746 of 2019 and filed a Memo dated 18.02.2020 in this regard. Resting on the said memo, this Tribunal accords permission to the Learned Counsel for the Appellant to withdraw the instant Company Appeal (AT) (Ins.) No. 746 of 2019 and accordingly the said Appeal is dismissed as withdrawn but without costs..."

Contending contra, the Learned Counsel for the Respondent submits that the Applicant/ Appellant is endeavouring to redefine the nature of the alleged 'Debt' and before the Adjudicating Authority the 'IFSD' was presented

as an 'Operational Debt' and before this Tribunal, the 'IFSD' was presented and argued as an advance payment in Appeal. Further, the 'IFSD' was presented before this Tribunal and it was argued as 'Commercial Borrowing' under the 'Memo of Withdrawal' before this Hon'ble Tribunal in utter disregard to established precedents. In effect, the Respondent prays for dismissal of the Interlocutory Application filed by the Applicant/ Appellant.

At this juncture, this Tribunal, after going through the withdrawal order dated 18.02.2020 passed in the instant Appeal is of the considered view that Applicant/ Appellant was permitted to withdraw the present Company Appeal (AT) (Insolvency) No. 746 of 2019 and the same was dismissed as 'withdrawn' but without costs. However, the liberty prayed for by the Applicant/ Appellant to approach the Hon'ble Adjudicating Authority under Section 7 of IBC was not granted by this Tribunal vide its order dated 18.02.2020 passed in the main Company Appeal. To clear the mist in the subject matter in issue, this Tribunal, on the basis of Equity, Fair play, Good Conscience and in the interest of justice passes an order by pointing out that the dismissal order of main Company Appeal (AT) (Ins.) No. 746 of 2019 dated 18.02.2020 'as withdrawn' will not in any way preclude the Applicant/ Appellant to approach Competent Authority/ Adjudicating Authority in seeking redressal of its grievances, by filing necessary application, of course, in accordance with Law and in manner known to Law if it so desires/ advised.

Before parting with the case, this Tribunal makes it abundantly clear that it is open to the respective parties to raise all factual and legal pleas before the 'Competent Authority'/ 'Adjudicating Authority' when the necessary 'Application seeking appropriate relief is filed by the concerned party and further that said 'Authority' shall determine the said 'Application' on merits, of course, after providing due opportunities to the contesting parties to air their the views, by adhering to the 'Principles of Natural Justice'

With the aforesaid observations/ the Interlocutory Application stands disposed off. No costs.

[Justice Venugopal M.]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Dr. Alok Srivastava]
Member (Technical)

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