

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

**I.A. Nos. 811/2020, 917/2020, 962/2020 & 1587/2020 in
Company Appeal (AT) (Insolvency) No. 1434 of 2019**

IN THE MATTER OF:

Action Barter Private Limited,
2A, Chowringhee Square,
Kolkata – 700 069,
Through Sh. Shankar Sharma,
Authorized Representative.

...Appellant

Vs

1. SREI Equipment Finance Limited,
Vishwakarma, 86C Topsia Road,
Kolkata - 700046.

**2. Shree Ram Urban Infrastructure Ltd.
(in Prov. Liqn.),**
Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400013.
Through Insolvency Resolution Professional
Sh. Srigopal Choudhary.

....Respondents

Present:

For Appellant: Mr. Ankit Kohli and Mr. Gaurav Kejriwal,
Advocates.(Applicant in I.A. No. 917 of 2020)

For Respondents: Mr. Abhijit Sinha, Mr. Arijit Mazumdar and
Mr. Shambo Nandy, Advocates for R-1. (Applicant in
I.A. No. 811 of 2020)

Mr. Neeraj Kr. Gupta, Advocate for R-2.

Mr. Srigopal Choudhary, IRP.

Mr. Varun Singh and Mr. Gaurav Nair, Advocates for
(Applicant in I.A. No. 1587 of 2020).

Mr. Patita Paban Bishwal, Advocate

Mr. Abhishek Puri, Advocate.

ORDER

Company Appeal (AT) (Insolvency) No. 1434 of 2019 titled '*Action Barter Pvt. Ltd. Vs. SREI Equipment Finance Ltd. & Anr.*' preferred against order of the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai admitting application of '*SREI Equipment Finance Ltd.*' (Financial Creditor) against '*Shree Ram Urban Infrastructure Ltd.*' (Corporate Debtor) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') came to be dismissed in terms of judgment rendered on 7th February, 2020 with observations that the case of Appellant '*Action Barter Pvt. Ltd.*' was covered by the decision of Hon'ble Supreme Court in '*Forech India Ltd. vs. Edelweiss Assets Reconstruction Co. Ltd.*' and application under Section 7 of the I&B Code filed by the Financial Creditor was not maintainable. With regard to pending winding up petition before Hon'ble Bombay High Court it was observed that the Appellant may move before the Hon'ble High Court in terms of decision of Hon'ble Apex Court in '*Forech India Ltd.*'. The aforesaid judgment rendered by this Appellate Tribunal has invited as many as four IAs seeking rectification/clarification/modification. Grounds for invoking inherent powers vested in this Appellate Tribunal under Rule 11 of National Company Law Appellate Tribunal Rules, 2016 may hereunder be briefly adverted to and noticed separately to understand how each of the Applicants in such applications have construed the judgment in question and what type of rectification/clarification/modification is sought by each of the Applicants

on account of the mistake, error or ambiguity in the judgment as perceived by them.

2. I.A. No. 811 of 2020 has been filed by the Financial Creditor – ‘SREI Equipment Finance Ltd.’ seeking modification/rectification/clarification in para 5 of the aforesaid judgment by rectifying the inadvertent error as regards maintainability of the petition and substituting the error in regard to Company Petition as being ‘not-maintainable’ by reflecting the correct position that the same was ‘maintainable’. It is submitted by learned counsel for Applicant that while dismissing the appeal it was erroneously recorded that the Company Petition of Respondent No. 1 was not maintainable whilst it ought to have been recorded as maintainable.

3. In I.A. No. 917 of 2020 the Appellant in the aforesaid disposed of appeal is the Applicant. He seeks clarification/ modification of the aforesaid judgment at page 5 para 5 to the extent of dismissal of appeal. It is submitted by learned counsel for the Applicant that after rightly holding the petition filed under Section 7 of the I&B Code by the Respondent as being not-maintainable, this Appellate Tribunal has inadvertently, while granting liberty to the Respondent to approach the Hon’ble High Court of Bombay, dismissed the appeal. According to the Applicant/Appellant, Appellate Tribunal ought to have disposed of the appeal with aforesaid observations i.e. holding that “the Petition under Section 7 of the I&B Code was not maintainable and the appeal is disposed of with the aforesaid observations”.

4. I.A. No. 962 of 2020 has been filed by Mr. Srigopal Choudhary, Interim Resolution Professional (IRP) seeking rectification/clarification to omit the conclusions in para 5 regarding maintainability of Section 7 application filed by Respondent No. 1 and continuation of Corporate Insolvency Resolution Process in respect of 'Shree Ram Infrastructure Urban Ltd.'. It is submitted on behalf of applicant that while dismissing the appeal and directing Appellant to approach the Hon'ble Bombay High Court this Appellate Tribunal, being unaware of the fact that the Respondent No. 2 Company was undergoing CIRP observed that the application filed by Respondent No. 1 Company is not maintainable. It is further submitted that if the conclusion regarding maintainability of Section 7 application is not rectified and the Appellant shareholder approaches Bombay High Court for transfer of proceedings to NCLT Mumbai, the effect would be the same as ordered by NCLT Mumbai vide order dated 06.11.2019.

5. In I.A. No. 1587 of 2020, the Applicant - the Official Liquidator of Bombay High Court seeks clarification whether the appeal has been allowed or dismissed, whether the IRP has been discharged or it is the Applicant as Provisional Liquidator in-charge of the affairs of the Corporate Debtor. It is submitted by learned counsel for the applicant that once this Appellate Tribunal held that Section 7 application filed by the Financial Creditor was not maintainable, it had to allow the appeal and proceedings before the Adjudicating Authority were to be set aside and IRP discharged. Confusion is said to have arisen as regards continuation of Applicant as the Provisional Liquidator of the Corporate Debtor.

6. For better understanding of the controversy raised as regards some errors/mistakes having crept in the aforesaid judgment, it would be appropriate to refer to the factual matrix as emerging from record. 'SREI Finance Equipment Ltd.' filed application under Section 7 of the I&B Code seeking initiation of Corporate Insolvency Resolution Process against Corporate Debtor – 'Shree Ram Urban Infrastructure Ltd.'. The application was admitted by the Adjudicating Authority. Appellant – 'Action Barter Pvt. Ltd.', happens to be shareholder of the Corporate Debtor, assailed the order of admission primarily on the ground the winding up petition against the Corporate Debtor had already been admitted by Bombay High Court on 5th October, 2016 and the Official Liquidator has been appointed as Provisional Liquidator w.e.f. 15th November, 2017. According to Appellant, the Provisional Liquidator had taken over the assets and properties of the Corporate Debtor on 17th April, 2018 and also carried out boundary determination on 1st May, 2018. The Appellant further submitted that application under Section 7 filed by 'India Bulls Housing Finance Ltd.' against the Corporate Debtor had already been rejected by the Adjudicating Authority on 18th May, 2018 and the order of rejection had been challenged in appeal before Hon'ble Apex Court. It was submitted before this Appellate Tribunal that applications under Section 7 & 9 could not be filed and entertained after admission of the winding up petition. This Appellate Tribunal while noticing that similar issue had fallen for consideration before Hon'ble Apex Court in '**Forech India Ltd. Vs. Edelweiss Asset Reconstruction Company Ltd.**' reported in 2019 SCC Online SC 87 found that the case of Appellant was covered by the decision of Hon'ble Apex

Court in '*Forech India Ltd.*'. After referring to paras 21 to 24 of the judgment in '*Forech India Ltd.*', this Appellate Tribunal held that the application under Section 7 of the I&B Code filed by the Respondent - 'SREI Equipment Finance Ltd.' was not maintainable. This observation regarding the application of 'SREI Equipment Finance Ltd.' being not-maintainable has raised a storm as the same is interpreted as being an observation having direct nexus with the observations of Hon'ble Apex Court in '*Forech India Ltd.*' judgment. Though, efforts were made on the part of one of the applicants to expand the scope of application under Rule 11 of the NCLAT Rules, we have no doubt in mind that the Rule 11 is of a limited scope and does not admit of reviewing the findings on merit or revising the judgment. Rule 11 of the NCLAT Rules is reproduced hereunder:-

“11. Inherent powers.-Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal”

Rule 11 is merely declaratory in the sense that this Tribunal is armed with inherent powers to pass orders or give directions necessary for advancing the cause of justice or prevent abuse of the Appellate Tribunal's process. Even in absence of Rule 11 this Appellate Tribunal, being essentially a judicial forum determining and deciding rights of parties

concerned and granting appropriate relief, has no limitations in exercise of its powers to meet ends of justice or prevent abuse of its process. Such Powers being inherent in the constitution of the Appellate Tribunal, Rule 11 can merely be said to be declaring the same to avoid ambiguity and confusion. Having said that, we are of the firm view that the Rule cannot be invoked to revisit the findings returned as regards the assertion of facts and pleas raised in the appeal and it is not open to reexamine the findings on questions of fact, how-so-ever erroneous they may be. The mistake/error must be apparent on the face of the record and must have occurred due to oversight, inadvertence or human error. Of course it would be open to correct the conclusion if the same is not compatible with the finding recorded on the issues raised. We accordingly decline to entertain any plea in regard to the merits of the matter involved at the bottom of the appeal and confine ourselves to the interpretation of the findings recorded and the conclusions derived therefrom as regards fate of the application under Section 7 of I&B Code filed by the Financial Creditor and the disposal of appeal.

7. A glance at the Judgment dated 7th February, 2020 passed in appeal by this Appellate Tribunal, in respect whereof rectification/ clarification/ modification is sought, would reveal that the disposal of the appeal rests upon the ratio of judgment rendered by the Hon'ble Apex Court in '*Forech India Ltd.*' (*Supra*). Since the relevant paras being 21 to 23 of the *Forech* Judgment have been cited and relied upon by this Appellate Tribunal in the judgment under discussion, we do not propose to reproduce the same again

only to increase the volume of this order. Suffice it to say that in *Forech* Judgment the Hon'ble Apex Court, while interpreting the ambit and scope of Section 11 of I&B Code dealing with persons not entitled to make applications for initiation of Corporate Insolvency Resolution Process observed that Section 11 having limited application only bars a Corporate Debtor from filing a petition under Section 10 of the I&B Code in respect of whom a liquidation order has been made. But it does not follow that until a liquidation order has been made, insolvency petition may be filed. The Hon'ble Apex Court further observed that the Financial Creditor's application admitted by the Tribunal was an independent proceeding which had to be decided in accordance with the provisions of I&B Code. The Hon'ble Apex Court granted liberty to the Appellant before it to apply under the Proviso to Section 434 of Companies Act, 2013 to transfer the winding up proceeding pending before the Hon'ble High Court to the NCLT which can then be treated as a proceeding under Section 9 of the I&B Code. **The dictum of law laid down by the Hon'ble Apex Court is loud and clear. An application under Section 7 of the I&B Code admitted by the Adjudicating Authority being an independent proceeding has to be decided in terms of the provisions of I&B Code and the insolvency resolution process has to proceed unhindered and notwithstanding pendency of any other proceedings. The bar only operates against the Corporate Debtor against whom a liquidation order has been made and not to a Financial Creditor or an Operational Creditor.** The effect of this would clearly be that in terms of law laid down in '*Forech India Ltd.*' application filed by 'SREI Equipment Finance Ltd. (Financial Creditor) under Section 7 of I&B Code would be maintainable.

Therefore, there should be no difficulty in arriving at the conclusion that in para 5 of the judgment of this Appellate Tribunal an error has crept in as regards maintainability of application under Section 7 of the I&B Code filed by 'SREI Equipment Finance Ltd.' (Financial Creditor). The error has to be rectified. As regards pendency of winding up petition pending before Hon'ble Bombay High Court, the Appellant would be required to approach the Hon'ble High Court for transfer of the pending proceedings to the Adjudicating Authority which is already ceased of the matter as application of Financial Creditor under Section 7 of I&B Code has been admitted and CIRP is underway. However, the view taken by us would not warrant any change as regards the fate of appeal preferred by Appellant 'Action Barter Pvt. Ltd.' which correctly stands dismissed.

8. The I.As are accordingly disposed of by recasting para 5 of the judgment of this Appellate Tribunal, which, after rectification, would read as under:-

“5. The case of the Appellant is covered by the decision of the Hon'ble Supreme Court in **Forech India Ltd.** (supra), therefore, we hold that the Application under Section 7 of the I&B code filed by the Respondent – SREI Equipment Finance Limited is maintainable. In so far as pending winding up petition before the Hon'ble Bombay High Court is concerned, the Appellant in terms of the decision of the Hon'ble Supreme Court in **Forech**

India Ltd (supra) may move before the Hon'ble High Court of Bombay.

The appeal is dismissed with the aforesaid observations. No costs.”

Rectified version of the Judgment in terms of this order be issued and placed on the file of Company Appeal (AT) (Insolvency) No. 1434 of 2019.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Justice Venugopal M.]
Member (Judicial)**

NEW DELHI

21st September, 2020

AM