

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

(IB)-190(PB)/2017

IN THE MATTER OF:

Union Bank of India

.... Applicant/petitioner

Vs.

Era Infra Engineering Ltd.

.... Respondent

For the Financial Creditor

:

Mr. Ramji Srinivasan, Sr. Advocate

Mr. Nesar Ahmad, PCS

Mr. Hitesh Joshi, PCS

Mr. Ahsan Ahmad, Mr. Tushar Bhardwaj,

Mr. Sohil Yadav, Advocates

Ms. Shikha Singh, CA

For the Respondent

:

Mr. Prag Tripathi Sr. Advocate

Mr. Manoj K. Singh, Mr. Vijay K. Singh,

Mr. Vineet Arora, Advocates

(IB)-109 (PB)/2017

IN THE MATTER OF:

Tata Capital Financial Ltd.

.... Applicant/petitioner

Vs.

Svogi Oil Gas and Energy Ltd.

.... Respondent

For the Applicant/
Financial Creditor

:

Mr. Raktim Gogoi, Mr. Parinay T.

Vasandani, Ms. Medhavi Singh,

Mr. Kartikeya Singh,

Ms. Simran Brar, Advocates

For the Respondent

:

(IB)-110 (PB)/2017

IN THE MATTER OF:

Alchemist Asset Reconstruction Co. Ltd.

.... Applicant/petitioner

And

Triupati Buildings & Offices Pvt. Ltd.

.... Respondent





For the Petitioner : Ms. Varsha Banerjee, Mr. Kunal Godhwani, Advocates

For the Respondent : Mr. Parag Tripathi, Mr. Pulkit Deora, Ms. Mishika Bajpai, Advs.

(IB)-191(PB)/2017

IN THE MATTER OF:

Reliance Commercial Limited Applicant/petitioner
Vs
Varaha Infra Ltd. Respondent

For the Petitioner(s) : Shri Soumyajit Nath, Adv.
Shri Shreyansh Rastogi, Auth. Rep.

For the Respondent : Mr. Abhishek Birthray, Mr. Abhishek Verma, Mr. Rakesh Khanna, Mr. Sumit R. Sharma & Mr. Prateek Seth, Advocates

CP-1050/2016

IN THE MATTER OF:

Xionn Applicant/petitioner
Vs.
Aman Hospitality Pvt. Ltd. Respondent

For the Applicant/petitioner : Ms. Suman Doval, Mr. Ramesh Wangnool, Advocates

For the Respondent : Ms. Tannya Sharma, Advocate

Order under Section 7 of Insolvency & Bankruptcy Code, 2016

Judgment delivered on 16.02.2018

Coram:

CHIEF JUSTICE (Retd.) M.M.KUMAR
Hon'ble President

Shri R. Varadharajan,
Hon'ble Member(Judicial)

Ms. Deepa Krishan
Hon'ble Member (Technical)




ORDER**M.M. KUMAR, PRESIDENT**

Whenever any new dispensation comes into force it brings along a large number of challenges. The parties to litigation make effort to project a view point suitable to each one of them confronting the Courts with the gigantic task of implementing the provisions of a new statute rolling out the new regime in a manner as to achieve its primary object. The Insolvency & Bankruptcy Code has been in force w.e.f. 1.12.2016 and it has its share of challenges which are reflected in the reference order made by the Bench comprising of Hon'ble Mr. R. Varadharajan, Member (Judicial) and Hon'ble Ms. Deepa Krishan, Member (Technical). To understand the challenges it would therefore, be necessary to set out the reference order dated 21.08.2017 *in extenso* which reads thus:

"No.IB-190(PB)/2017

UNDER SECTION 7 Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:
UNION BANK OF INDIA
BRANCH OFFICE AT M-11,
FIRST FLOOR,
CONNAUGHT CIRCUS,



NEW DELHI-110001.

..... Petitioner

V/s

ERA INFRA ENGINEERING Limited
1107, INDRAPRAKASH BUILDING,
21, BARAKHAMBHA ROAD,
NEW DELHI -110001

..... Respondent

No.IB-110(PB)/2017

UNDER SECTION 7 Insolvency and Bankruptcy Code, 2016

IN THE MATTER OF:

ALCHEMIST ASSET RECONSTRUCTION COMPANY LTD.
D-54, First Floor,
Defence Colony,
New Delhi – 110024.

.... Financial Creditor/Petitioners

Versus

TIRUPATI BUILDINGS & OFFICES PVT. LTD.
Plot No.3,
District Centre Sector-10,
Dwarka, New -110075

.... Corporate Debtor /Respondent

ORDER

PRONOUNCED ON: 21.08.2017

“Union Bank of India has categorized itself as a Financial Creditor under the provisions of Insolvency & Bankruptcy Code, 2016 (hereinafter for sake brevity called as ‘Code’) for the purpose of initiating the Corporate Insolvency Resolution Process (CIRP) as contemplated under the Code against Era Engineering Infra Limited, being the Corporate Debtor. The circumstances leading to the filing of the present petition as per the averments of the Financial Creditor is detailed as follows: -

- a) The Corporate Debtor being an EPC contractor is engaged in execution of large construction projects like construction of highways, airports and industrial projects and since 1990 has





been availing credit from the Financial Creditor and the latest being in the year 2012 wherein a Working Capital Term Loan of Rs.100 crores on standalone basis was sanctioned vide sanction letter bearing No.IFB:CR:602.12. Pursuant to the sanction the loan was also disbursed to the Corporate Debtor on 31.12.2012. The amount of term loan along with interest was repayable in 14 instalments as agreed to between the parties. Perusal of the form as prescribed under Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form I as filed by the Financial Creditor discloses in Part IV of the said form that the total amount sanctioned to the Corporate Debtor on several dates is to the extent of Rs.1506.33 crores and the amount claimed to be in default is to the extent of Rs.681.04 crores and in addition External Commercial Borrowing of USD 11,971,939.12 as on 31.05.2017 is also in default, all it is averred substantiated by Statement of Accounts filed along with the Petition. In relation to the facilities granted, the Financial Creditor has given in Part V of Form I as referred to above, securities created by the Corporate Debtor and held by the Financial Creditor under pari-passu charge as well as in relation to certain securities which it is having a first charge with the consortium of lenders as well as the personal guarantees given by the promoters of the Corporate Debtor as well as Corporate Guarantees given.

- b) After due notice of the petition by the Financial Creditor on the Corporate Debtor, appearance on behalf of the Corporate Debtor/Respondent was put in and as per the representation made by the Counsel for the respondent before the Hon'ble Principal Bench, NCLT which is evident vide order dated 11.07.2017 that several company petitions seeking for winding up of the Corporate Debtor is pending before the Hon'ble High Court of Delhi and in the circumstances vide the said order of the Hon'ble Principal Bench the following question has been framed, namely:

“Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions or it is to be considered as an independent process?”

- c) For arguments of the aforesaid issue the Company Petition was listed on 25.07.2017.

Since the Hon'ble Principal Bench did not sit on the said date and as a Special Bench was constituted to hear the matters listed before the Hon'ble Principal Bench in lieu of it, this Special Bench taking into consideration the exigencies of the

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situation chose to hear the submissions of the respective parties in this as well as in **C.P.No.110 (PB) of 2017 in the matter of Alchemist Asset Reconstruction Company Limited – Vs- Tirupati Buildings & Offices Private Limited** in which petition also a similar issue has arisen due to the pendency of winding up petitions against the Corporate Debtor therein.

- d) At the time of submissions by the counsels appearing for the parties it was able to be discerned that coordinate benches of the NCLT have taken different viewpoints on the above question framed by the Hon'ble Principal Bench.
- e) Thus in the matter of **M/s. Alcon Laboratories (India) Private Limited -Vs- M/s. Vasan Health Care Private Limited** the Hon'ble Division Bench of NCLT, Chennai, wherein one of the issues raised by the Corporate Debtor was to effect that since a winding up petition is sub-judice before the Hon'ble High Court of Madras the maintainability was sought to be questioned of the CIRP process under the Code before it and in relation to the same it has been held as follows at Paragraph 5 of the said decision rendered on 21st April 2017, namely:-

The last objection that has been raised by the counsel for corporate debtor is that winding up petition is sub judice before the Hon'ble High Court of Madras, where the Court permitted Andhra Bank to appoint suitable person to conduct forensic audit of the corporate debtor. The pendency of the winding up petition cannot be a bar under the Code for initiating the corporate insolvency resolution process, because the Hon'ble High Court has not passed any order for winding up of the corporate debtor and no Official Liquidator has been appointed. Therefore, this objection is also rejected.

- f) Even though the above decision had been taken in Appeal before the Hon'ble NCLAT in **Company Appeal (AT) (Insol.)No.41 of 2017** by the Corporate Debtor, the Hon'ble Appellate Tribunal did not have the occasion to consider the above question in view of the Corporate Debtor having obtained a stay of the proceedings before the Hon'ble High Court of Madras in relation to the Insolvency Resolution Process pending before the Hon'ble NCLT, Chennai.
- g) The view of the Hon'ble NCLT, Ahmedabad it is seen from the decision rendered in **Industrial and Commerce Bank of China -vs- Alok Industries Ltd in IA No.188 of 2017 in C.P. (I.B) No.48/7/NCLT/AHM/2017** rendered as recently as

18.07.2017 is similar to the view expressed as above by the Hon'ble NCLT Bench, Chennai.

- h) On the other hand the Hon'ble Principal Bench, NCLT, New Delhi in several of its orders including the one passed in ***M/s. Nauvata Engineering Pvt. Ltd -Vs- Punj Llyods Ltd in C.P. No. (IB)-217(PB)/2017 on 19.07.2017*** has held as follows:-

Learned Counsel for the respondent has brought to the notice of the Bench that winding up petition against the respondent company namely Punj Lloyds Ltd. is already pending before the Hon'ble Delhi High Court and taking notice of the aforesaid fact C.P. No.1156 of 2016 was transferred back to the Hon'ble Delhi High Court.

In various orders passed by this Tribunal, we have expressed the opinion that in cases where winding up proceedings are pending against a Company, then it would not be conducive for the Tribunal to trigger insolvency process against that very company as there is likelihood of conflict between the two statutory entities, namely Official Liquidator and the Insolvency Resolution Professional. Therefore, the proceedings which are continuing in the Hon'ble Delhi High Court may constitute a better basis for adjudication being earlier in point of time and the claim having been made by other Operational Creditors in the proceedings for winding up. The Ministry of Corporate Affairs has also issued notification on 29.06.2017 to that effect. Accordingly, we refer this matter for consideration of Hon'ble High Court. The Registry is directed to send all the papers at the earliest.

Parties through their Counsel are directed to appear before the Hon'ble Delhi High Court on 18th September, 2017.

This order may first be placed before Hon'ble the Chief justice for appropriate orders.

- i) In the case of Nikhil Mehta and Sons (HUF) -Vs- AMR Infrastructure Ltd in C.P. No. (ISB) -03(PB)/2017, a decision rendered by the Hon'ble Principal Bench, NCLT, New Delhi one of issues considered by it, amongst others, was in relation to the similar question on hand and at paragraph 14 of the said decision it has been held as follows:-



Even otherwise the present petition would not be maintainable as many winding up petitions have been filed before Hon'ble Delhi High Court being Company Petition No.477 of 2014, Company Petition Nos. 689,691,692,693,694,695,700 and 722 of 2015 alongwith CP No.238 and 244 of 2016. Even the Official Liquidator has been appointed as a provisional liquidator although the matter is presently before the Appellate Bench with interim directions.

- j) The above decision rendered in Nikhil Mehta's case had been taken in appeal before the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.07 of 2017 and it is pertinent to note that the Hon'ble NCLAT had framed the following two issues at paragraph 14 while rendering its judgement in appeal in Nikhil Mehta's case, namely:

Whether the appellants who reached with agreements/Memorandum of Understanding with respondent for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the respondent come within the meaning of 'Financial Creditor' as defined under the provisions of sub-section (5) of Section 7 of the 'I & B code'; and

Whether an application for triggering insolvency process under Section 7 of 'I & B code' is maintainable where winding up petitions have been initiated and pending before Hon'ble High Court against the 'Corporate Debtor'.

- k) However question no.(ii) as framed above by the Hon'ble NCLAT has not been answered as probably it did not consider the same in view of holding that the petitioner will fall under the category of 'Financial Creditor' as compared what was otherwise held by Hon'ble NCLT and had thus remitted back the matter to NCLT, New Delhi for admission, if the papers are otherwise in order.
- l) In addition, this Special Bench of NCLT in the case of *M/s. Nowfloats Technologies Pvt. Ltd -Vs- M/s. Getit Infoservices Pvt. Ltd in C.A. No. (IB) 45(PB)/2017 vide order dated 11.04.2017* had specifically held, where the Official Liquidator has been appointed as the Provisional Liquidator, then the recourse of the parties is to approach the Court which has thought it fit to appoint the Liquidator and not this Tribunal



and that the proceedings cannot be sustained before this Tribunal without obtaining the leave of the Hon'ble High Court under Section 450 of the Companies Act, 1956 for continuation of the proceedings under the Code.

- m) Strictly speaking the above cases referred to are not transferred cases as contemplated under Section 434 of the Companies Act, 2013 and the notifications issued thereunder from time to time to facilitate and to remove difficulties in relation to matters which are required to be transferred and for bringing in clarity as to jurisdiction of the respective judicial forums. A combined reading of Section 434 of the Companies Act, 2013 and the notifications issued thereunder from time to time, in relation to winding up, particularly under Section 433(e) of the Companies Act of 1956 discloses the following categorization and the judicial forum which is to have jurisdiction, namely: -

Category of Cases in relation to Winding up	Relevant Notification	Forum to have jurisdiction
i) In which notice not served in relation to respondent company	07.12.2016 GSR 1119 (E)	NCLT
ii) In the case of more than against the same respondent company notice served in one and notice not served in the other	29.06.2017 S.O.2042 (E)	High Court
iii) Winding up petition admitted Pending service	-	High Court*
iv) Winding up petitions in which orders have been reserved prior to 15.12.2016	07.12.2016	High Court

***As interpreted by the Hon'ble High Court of Bombay in an order passed in C.P.No.331 of 2016 in the matter of M/s. West Hills Realty Pvt. Ltd. vs. Neelkamal Realtors Pvt. Ltd dated 23.12.2016.**

- n) The Hon'ble High Court of Bombay has also expressed its view in relation to the conflict of jurisdiction between High Courts on the one hand and NCLT on the other in relation to proceedings which were pending before it on 15.12.2016 and the notifications issued in relation to transfer of proceedings as well



in relation to the non-obstante clause as provided under Section 238 of IBC of 2016 in following terms: -

In my view, it is clear that all winding up proceedings shall not stand transferred to the NCLT. It is clear that if the service of the notice of the Company Petition under Rule 26 of the Companies (Court) Rules, 1959 is not complied before the 15th December 2016 such petitions shall stand transferred to NCLT whereas all other Company Petitions would continue to be heard and adjudicated upon only by the High Court. The Legislative intent is thus clear that two sets of winding up proceedings would be heard by two different forum i.e. one by NCLT and another by the High Court depending upon the date of service of Petition before or after 15th December 2016. In my view, there is thus, no embargo on this Court to hear this Petition along with other companion Petitions, in view of the admitted position that the notice under Rule 26 of the Companies (Court) Rules, 1959 has been served on the respondent prior t 15th Decem̄ber 2016.

In my view, since there is no inconsistency in the provisions of the Insolvency and Bankruptcy Code, 2016 and the Companies Act, 2013 or Companies Act, 1956 in respect of the jurisdiction of the Company Court or of the NCLT in so far as winding up proceedings are concerned, reliance placed by Mr. Andhyarujina, the learned Counsel appearing for the respondent on Section 238 of the Insolvency and Bankruptcy Code, 2016 is totally misplaced. The effect of non obstante provisions if any in Section 238 of the Insolvency and Bankruptcy Code, 2016 would have been significant only if there would have been conflict in aforesaid provisions and not otherwise. In my view, Mr. Sen, the learned Counsel appearing for the petitioner is right in his submission that Section 238 of the Code has no application in this situation on the ground that there is no conflict between the provisions of the Code and the provisions of the Companies Act, 1956 or the Companies Act, 2013.

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o) The above extracts is from the decision rendered on 11.04.2017 by the **Hon'ble High Court of Bombay in C.P.No.136 of 2014 along with C.A.No.932 of 2015 and C.A.No.887 of 2015 in the matter of Ashok Commercial Enterprises vs Parekh Aluminex Limited.**

p) Thus taking into consideration all the above and more particularly the differing views taken by coordinate benches of this Tribunal, this Special Bench is of the considered view that the matter should be placed before the Hon'ble President of NCLT for the purpose of being transferred to a Larger Bench or as the Hon'ble President may deem fit in accordance with the second proviso to sub section (2) of Section 419 of the Companies Act, 2013 and the question to be referred to such Bench as the Hon'ble President, NCLT may deem fit and proper is as follows:-

"1. Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions before the respective High Courts or it is to be considered as an independent process?"

2. In case the process is considered to be not independent, whether the petition filed under the Code is required to be transferred to the concerned High Court which is having seisin over the winding up proceedings or await the outcome of the winding up proceedings by adjourning it sine die?

3. Whether the Code gives any room for discretion to be exercised for adjourning it sine die in view of the statutory mandate given under Section 7, 9 and 10 of the Code for expeditious disposal of cases by either admitting or rejecting it within the fixed time frame?

4. In case if the petition is adjourned sine die and if the winding up petition is dismissed or set aside in appeal subsequently, whether there is scope in such an eventuality for power of revival within the frame work of the Code conferred on this Tribunal?

2. The Registrar, NCLT, New Delhi is directed to place the above reference made by this Special Bench, NCLT, New Delhi by virtue of second proviso to sub section (2) of Section 419 of the Companies Act, 2013 as expeditiously as possible before the Hon'ble President.

**Sd/-
(DEEPA KRISHAN)
MEMBER (TECHNICAL)**

**Sd/-
(R.VARADHARAJAN)
MEMBER (JUDICIAL)"**



2. Reference has thus been made to the three-Member Bench in the cases of Alchemist Asset Reconstruction Company Limited v. Tirupati Buildings & Offices Pvt. Ltd. and Union Bank of India, Branch Office v. Era Infra Engineering Limited. The other petitions have also been tagged with the aforesaid two petitions.

3. In order to put the issues in their proper perspective and before embarking upon to consider those issues, it is imperative to notice the seminal facts which generally confront the NCLT resulting in the emergence of these legal issues. In umpteen cases proceedings for winding up on account of 'inability to pay debt' under Section 439 read with Section 433 (e) and Section 434 of the erstwhile Companies Act, 1956 have been initiated and have been in progress in various High Courts when the IBC was enforced w.e.f. 1.12.2016. Section 434 of the Companies Act 2013 provides for transfer of proceedings to NCLT *inter alia*, pending immediately before such date before the High Courts or District Court under Companies Act, 1956. Sub-section (c) of Section 434 of the 2013 Act reads as under:

 "434. **Transfer of Certain Pending Proceedings**sp.

(1) On such date as may be notified by the Central Government in this behalf,—

(a).....

(b)

(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer”.

4. It is evident from the opening words of Section 434(1), that the date of transfer was to be notified by the Central Government and the NCLT was to proceed to deal with such proceedings from the stage immediately before the transfer.

5. The Government of India, Ministry of Corporate Affairs on 7.12.2016 (for brevity the ‘MCA’) issued first a set of rules (vide gazette of India Notification) framed under Section 434(1)&(2) of the Companies Act, 2013 read with Section 239 of the IBC. These rules are known as the Companies (Transfer of Pending Proceedings) Rules 2016 (for brevity “Transfer Rules”). As some controversy surrounding these rules has been raised the Transfer Rules are set out below in extenso:

“MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION
New Delhi, the 7th December, 2016



G.S.R. 1119(E).- In exercise of the powers conferred under sub-sections (1) and (2) of section 434 of the Companies Act, 2013 (18 of 2013) read with sub-section (1) of section 239 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the Code), the Central Government hereby makes the following rules, namely:-

1. Short title and Commencement. - (1) These rules may be called the Companies (Transfer of Pending Proceedings) Rules, 2016.

(2) They shall come into force with effect from the 15th December, 2016, except rule 4, which shall come into force from 1st April, 2017.

2. Definitions.- (1) In these rules, unless the context otherwise requires-

(a) "Code" means the Insolvency and Bankruptcy Code, 2016 (31 of 2016);

(b) "Tribunal" means the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013.

(2) Words and expressions used in these rules and not defined, but defined in the Companies Act, 1956 (1 of 1956)(herein referred to as the Act), the Companies Act, 2013 (18 of 2013) or the Companies (Court) Rules, 1959 or the Code shall have the meanings respectively assigned to them in the respective Act or rules or the Code, as the case may be.

3. Transfer of pending proceedings relating to cases other than Winding up.-All proceedings under the Act, including proceedings relating to arbitration, compromise, arrangements and reconstruction, other than proceedings relating to winding up on the date of coming into force of these rules shall stand transferred to the Benches of the Tribunal exercising respective territorial jurisdiction:

Provided that all those proceedings which are reserved for orders for allowing or otherwise of such proceedings shall not be transferred.

4. Pending proceeding relating to Voluntary Winding up: All applications and petitions relating to voluntary winding up of companies pending before a High Court on the date of commencement of this rule, shall continue with and dealt with by the High Court in accordance with provisions of the Act.

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5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.(1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal *within sixty days* from date of this notification, failing which the petition shall abate.

(2) All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.

6. Transfer of pending proceedings of Winding up matters on the grounds other than inability to pay debts.-All petitions filed under clauses (a) and (f) of section 433 of the Companies Act, 1956 pending before a High Court and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal exercising territorial jurisdiction and such petitions shall be treated as petitions under the provisions of the Companies Act, 2013 (18 of 2013).

7. Transfer of Records.-Pursuant to the transfer of cases as per these rules the relevant records shall also be transferred by the respective High Courts to the National Company Law Tribunal Benches having jurisdiction forthwith over the cases so transferred.

8. Fees not to be paid.-Notwithstanding anything contained in the National Company Law Tribunal Rules, 2016, no fee shall be payable in respect of any proceedings transferred to the Tribunal in accordance with these rules".



A perusal of the Rule 5 of the Transfer Rules would show that all petitions relating to winding up under Section 433(e) of the Companies Act, 1956 pending before the High Court were to be transferred to respective benches of NCLT as per territorial jurisdiction if the petition has not been served on the respondent as per requirement of Rule 26 of the Companies Court Rules 1959. On transfer such petitions were to be treated as applications under Section 7, 8 or 9 of the IBC and the petitioners were to furnish all information including the details of the proposed insolvency professional. All such petitioners were granted sixty days time from the date of notification failing which their petitions were to abate.

Amendment extending the period

6. The Central Government through MCA issued another notification dated February 28, 2017 extending the period of sixty days to six months. That notification is also extracted in-extenso which reads as under:

MINISTRY OF CORPORATE AFFAIRS
NOTIFICATION

New Delhi, the 28th February, 2017



G.S.R. 175(E).— In exercise of the powers conferred under sub-sections (1) and (2) of section 434 of the Companies Act, 2013 (18 of 2013) read with sub-section (1) of section 239 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the Code), the Central Government hereby makes the following rules further to amend the Companies (Transfer of Pending Proceedings) Rules, 2016, namely:—

1. Short title and Commencement— (1) These rules may be called the Companies (Transfer of Pending Proceedings) Amendment Rules, 2017.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Companies (Transfer of Pending Proceedings) Rules, 2016, in rule 5, in sub-rule (1) in the proviso for the words “sixty days” the words “six months” shall be substituted.

7. The Ministry of Corporate Affairs issued yet another notification on June 29, 2017 extending the time upto July 15, 2017 which is set out below *in extenso*.

“Ministry of Corporate Affairs
Notification

New Delhi, the 29th June, 2017

GSR (E).- In exercise of the powers conferred under sub-sections (1) and (2) of section 434 of the Companies Act, 2013 (18 of 2013) read with sub-section (1) of section 239 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the Code), the Central Government hereby makes the following rules further to amend the Companies (Transfer of Pending Proceedings) Rules, 2016, namely:-

1. Short title and Commencement.-

(1) These rules may be called the Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017.

(2) Save as otherwise provided they shall come into force on the date of their publication in the Official Gazette.



2. In the Companies (Transfer of Pending Proceedings) Rules, 2016 (hereafter referred to as principal rules), for rule 4, the following rule shall be substituted, namely:-

"4. Pending proceeding relating to voluntary winding up.- All proceedings relating to voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Act but the company has not been dissolved before the 1st day of April, 2017 shall continue to be dealt with in accordance with provisions of the Act."

3. In the principal rules, for rule 5, the following rule shall be substituted and shall be deemed to have been substituted with effect from the 16th day of June, 2017, namely:-

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.- (1) All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act

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for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."

8. The 'Transfer Rules' and its subsequent amendments gave birth to numerous debates. There were arguments concerning interpretation of Rule 26 of the Companies Court Rules relating to service of petition. More significantly the controversy arose concerning cases where against the same company (a) notice of petition was served in one petition and in another petition the company has remained unserved for various reasons namely (i) petition was not listed or (ii) it was listed for hearing yet no notice could be issued or (iii) notice was issued and on the notified date December 7, 2016 service in accordance with Rule 26 of the Companies Rule was not effected. Another category of cases carved out by IIIrd un-numbered proviso of notification dated June 29, 2017 was where a petition has not been transferred to the Tribunal under Transfer Rules and it has remained pending before the High Court then it was not to be transferred where there is another petition under Section 433(e) of 2013 Act for winding up against the same company which had remained pending as on December 15, 2016. Another argument also came to be advanced that in cases where provisional or official



liquidator is appointed whether petition under Insolvency & Bankruptcy Code was maintainable or not.

9. At this stage we may also notice Section 238 of the Code that incorporates a most widely worded non-obstante clause providing that provisions of IBC were to over-ride other laws. The provisions need to be read in extensor and the same is as under:

“Provisions of this Code to override other laws.

238. 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”.

Brief Facts:

10 A brief reference to few material facts may now be made which have been taken from Union Bank of India v. Era Infra Engineering Limited (supra). The Union Bank of India claiming itself as Financial Creditor made a prayer for triggering the corporate insolvency resolution process in the matter of Era Infra Engineering Limited being the Corporate Debtor. The Corporate Debtor is an EPC contractor and is engaged in execution of a large construction projects like construction of highways, airports and industrial projects. It has been availing credit facility since 1990 from the Financial Creditor. The latest credit which is the bone of contention was taken in the year 2012 wherein a Working

Capital Term Loan of Rs. 100 crores on standalone basis was sanctioned vide sanction letter No. IFB:CR:602.12. The loan was disbursed to the Corporate Debtor on 31.12.2012 and it was repayable with interest in 14 instalments as was agreed between the parties. A perusal of the application filed by the Financial Creditor on the prescribed proforma i.e. Form-I, disclosed in part IV of the application that the total loan amount sanctioned to the Corporate Debtor on different dates was to the extent of Rs.1506.33 crores. The default amount stated by the Financial Creditor is Rs. 681.04 crores and in addition External Commercial Borrowing of USD 11,971,939.12 as on 31.05.2017 was also stated to be in default. It is also substantiated by Statement of Accounts filed along with the petition. In relation to the facilities granted, the Financial Creditor has highlighted in Part V of Form-1 the details of securities created by the Corporate Debtor and held by the Financial Creditor under *pari-passu* charge as well as in relation to certain securities on which it has first charge with the consortium of lenders as well as the personal and corporate guarantees given by the promoters of the Corporate Debtor.



11. In response to notice of the petition the Corporate Debtor put in appearance. Learned Counsel for the Corporate Debtor raised an objection that several company petitions have been filed before the Hon'ble Delhi High Court with a prayer for winding up of the Corporate Debtor which were pending there and the Principal Bench comprising of two of us [(Justice M.M. Kumar, President and Hon'ble Ms. Deepa Krishan, Member (Technical)] has framed the following question:

“Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions or it is to be considered as an independent process?”

12. However, by taking into consideration various factors, a Bench comprised of two of us, namely Hon'ble Mr. R. Varadharajan, Member (Judicial) and Hon'ble Ms. Deepa Krishan, Member (Technical) have framed four questions which have been captured in the reference order already quoted above.

13. The aforesaid reference raises vital issues which are likely to arise every day and there has been a conflict of opinion between the Benches of the Tribunal as is evident from reference order, therefore, it was considered necessary to make a reference to the three Member Bench for an authoritative pronouncement on the issues framed as is discernible from the preceding paragraphs.



That is how we are seized of the matter before this three Member Bench.

14. It appears to us that the necessity of going into detail arguments advanced by learned counsel for the parties is obviated because binding judgments delivered by NCLAT. Therefore we proceed to answer the questions framed accordingly.

Re question No.1

15. The core question framed by the Principal Bench and by a Division Bench that has been referred to three Members' Bench is the same. When we commenced search for the answer to the core question we came across two detailed judgments rendered by learned National Company Law Appellate Tribunal (for brevity 'NCLAT').

16. The first judgment has been rendered by 'NCLAT' in the case of Forech India Pvt. Ltd. v. Edelweiss Assets Reconstruction Company Ltd., (Company Appeal (AT)(Insolvency) No. 202 of 2017 decided on 23.11.2017). Upholding the view of the Principal Bench admitting the petition of the 'Financial Creditor' filed under section 7 of the Code the Appellate Tribunal has rejected the argument that since a company petition for winding up was

pending in the matter of 'Corporate Debtor' no petition under section 7 of the Code would be maintainable before the Adjudicating Authority –NCLT. The reasoning adopted by the Appellate Tribunal has its genesis in section 11 of the Code. It would be thus pertinent to read first section 11 which is set out below in *ex tenso*:

"11. 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 this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made. Initiation of corporate insolvency resolution process by corporate applicant.

Explanation.—For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor."

In paras 3 & 4 of its order the Hon'ble Appellate Tribunal proceeded to observe as follows :-

"3. From the aforesaid provision, we find that the 'Corporate Debtor' or 'Financial Creditor' is ineligible to make application under Section 7 or 10 where (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 this Chapter; or (d) a corporate debtor in respect of whom a liquidation order has been made.

4. Thus, the 'Financial Creditor' is ineligible to file an application under Section 7 only if the 'Financial Creditor' has violated any of the terms of resolution plan which was approved twelve months from the date of making an application"

17. The Appellate Tribunal then embarked upon to decide how the expression 'winding up' would be synonym with the expression 'liquidation'. It proceeded to state that the expression 'winding up' has not been used in Chapter III but in section 94 A added in the Companies Act, 2013 both the expressions have been used inter changeably. It would thus be profitable to read section 94A which is as under:

(94A) "Winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable"

18. It is on that basis that the NCLAT concluded as under:-

"6. Therefore, it is clear that the "winding up" under the Companies Act, 2013 has been treated to be "liquidation" under the I & B Code.

7. There is no provision under the I & B Code which stipulate that if a 'winding up' or 'liquidation' proceeding has been initiated against the Corporate Debtor, the petition under Section 7 or Section 9 against the said Corporate Debtor is not maintainable.

8. However, if a 'Corporate Insolvency Resolution' has started or on failure, if liquidation proceeding has been initiated against the Corporate Debtor, the question of entertaining another application under Section 7 or Section 9 against the same very 'Corporate Debtor' does not arise, as it is open to the 'Financial Creditor' and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator."



19. However the NCLAT left the question open to be decided in an appropriate case as to whether Corporate Insolvency Resolution Process under sections 7, 9 & 10 of the Code could be triggered after the winding proceedings have been initiated by appointing a liquidator. The reason is that no question of such a nature was involved in the appeal which came up before the NCLAT.

20. The other judgement rendered by NCLAT is in the case of Unigreen Global Private Limited v. P.N.B. & Others (Company Appeal (AT)(Insolvency) No.81 of 2017 decided on 1.12.2017). The NCLAT has adopted the same reasoning to reach the conclusion that in a case where winding up proceedings have been initiated against a 'Corporate Debtor' by Hon'ble High Court or NCLT or liquidation order has been passed in respect of the 'Corporate Debtor' then no fresh application under section 10 would be competent. Thus the principles governing the initiation of proceedings under sections 7, 9 & 10 are governed by same principles which are found on the same rationale.

21. An interesting situation arose before Hon'ble Bombay High Court in the cases of Jotun India Private Ltd. v. PSL [CA (L)



No.572 and 333 & 417 of 2017 in C.P. No.434 of 2015] and other applications decided on 5.1.2018.

22. In that case company petition for winding up was admitted by the High Court in March 2017 and no provisional liquidator was appointed since all assets were secured. The 'Corporate Debtor' filed an application under section 10 of the Code and order by the NCLT was reserved on 18.7.2017 and the matter was listed before it on 20.7.2017. On 18.7.2017 itself the Corporate Debtor filed an application before the High Court with a prayer for appointment of a provisional liquidator. The High Court dismissed the application for the following reasons:

(a) There is paradigm shift in the proceedings for winding up and the IBC. Under the Companies Act, it is for the court alone to decide the issues concerning winding up etc. whereas under the IBC the matter is left to the decision of Committee of Creditors.

(b) The Provisions of section 22 of SICA are in terms parallel to section 14 of IBC in so far as imposition of moratorium is concerned. Therefore once moratorium is in operation no court or authority can proceed by disregarding the mandates of the provisions. For that proposition reliance



has been placed on the Supreme Court judgements rendered on the interpretation of section 22 of SICA in the cases of *Madura Coats Ltd. v. Modi Rubber Ltd.* (2016) 197 Comp Cas 216 (SC) and *M/s Rishabh Agro Industries Ltd. v. P.N.B. Capital services Ltd.* (2000) 5 SCC 515. Referring to the view of Hon'ble the Supreme Court the Bombay High Court held that even after winding up order is passed, the provisions of section 22 of SICA continues to apply and the court under the Companies Act, 1956 would have no power to injunct proceedings before BIFR in view of section 22 of SICA. The High Court further held that since SICA is repealed and has been replaced by IBC (section 252 read with schedule viii of IBC) the provision of IBC would prevail over the provisions of Companies Act, 2013. It was further held that reading any power with the Company Court to injunct proceedings before NCLT in cases of pending winding up would be contrary to legislative intent as section 64(2) of IBC is *pari materia* to section 22 of SICA

- (c) NCLT is not a court subordinate to the High Court and in accordance with the provisions of section 41(b) of the Specific Relief Act 1963 no injunction can be granted by the



High Court against the 'Corporate Debtor' from institution of proceedings in NCLT. In that regard reliance has been placed on the observations made by Hon'ble the Supreme Court in the case of Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation (2009) 8 SCC 646 and Cotton Corporation of India Limited v. United Industrial Bank Limited (1983) 4 SCC 625.

(d) The 'Transfer Rule' which provide for transfer of winding up petition in case of non- service according to the provisions of Rule 26 of the Company Court Rules would give way to the Principles laid down by the Hon'ble Bombay High Court and in the order passed by the NCLAT.

23. It is in view of the aforesaid binding precedents and the principles of *stare decisis* that we answer the first question in affirmative. Thus there is no bar on NCLT to trigger an Insolvency Resolution Process on an application filed under sections 7, 9 & 10 if a winding up petition is pending unless an official liquidator has been appointed and a winding up order is passed. The cognate question as to whether Insolvency Resolution Process could be triggered where official /provisional



liquidator has been appointed is left open as in none of the cases before us such a question would arise.

Re: questions No.2, 3 & 4


24. These questions were framed contemplating an answer to the first question in the negative. As the question No.1 has been answered in affirmative the necessity of dilating upon questions No.2, 3 & 4 is obviated. Let all the petitions be now listed for hearing on merit before the Principal Bench on 28th March 2018.

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(M.M. KUMAR)
PRESIDENT

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(R.VARADHARAJAN)
MEMBER (J)

A yellow rectangular box containing a handwritten signature in black ink.

(DEEPA KRISHAN)
MEMBER (T)

(Veena Sethi)