

**In the National Company Law Tribunal
Kolkata Bench
Kolkata**

Before Shri Jinan K.R., Hon'ble Member (J)

Common Order

C.A. (IB) Nos. 510, 669, 688 & 819/KB/2018

In C.P. (IB) No. 767/KB of 2017

In the matter of:

An application u/s. 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016;

-And-

In the matter of:

An application u/s. 60 of the Insolvency and Bankruptcy Code, 2016;

In the matter of:

Jai Balaji Industries Ltd. Contractor's & Worker's Union;

...

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Applicant

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-And-

In the matter of:

Lakhotia Transport Company Pvt. Ltd.;

...

...

Applicant

-And-

In the matter of:

Dynamic Hard Coke Manufacturing Company.

...

...

Applicant

-And-

In the matter of:

State Bank of India;

...

...

Applicant/Financial Creditor

-Versus-

Jai Balaji Industries Limited

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Respondent/Corporate Debtor

Counsel appeared:

- | | |
|-------------------------------------|-------------|
| 1. Mr. Jishnu Chaudhury, Advocate |] For the |
| 2. Mr. Ajay Gaggar, Advocate |] Financial |
| 3. Ms. Rakhi Purnima Paul, Advocate |] Creditor |
| 1. Mr. Abhrajit Mitra, Sr. Advocate |] |
| 2. Mr. D.N.Sharma, Advocate |] For the |
| 3. Ms. Manju Bhuteria, Advocate |] Corporate |
| 4. Mr. Anuj Singh, Advocate |] Debtor |
| 5. Ms. Iram Hassan, Advocate |] |

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1. Mr. Ratnanko Banerji, Sr. Advocate] For Lakhotia
2. Mr. C.K.Saha, Advocate] Transport
3. Mr. Reetobrato Mitra, Advocate] Company
4. Mr. Rudrajit Sarkar, Advocate] Pvt. Ltd.

1. Mr. Aniruddha Roy, Advocate] For the Worker's
2. Mr. Niladri Khanra, Advocate] Union

1. Mr. Kuldip Mallik, Advocate] Dynamic Hard Coke
2. Mr. A. Bagaria, Advocate] Mfg. Co. Ltd.

Order pronounced on 10/10/2018

O R D E R

All the four (4) applications are taken together since common question arises for determination, for convenience and for avoiding repetition of facts.

1. CP(IB) No. 767/KB/2017 was filed on 22/12/2017 by the State Bank of India (In short, **SBI**) u/s. 7 of the Insolvency and Bankruptcy Code, 2016 (In short, **I & B Code, 2016**) for initiating Corporate Insolvency Resolution Process (In short, **CIRP**) as against the

Sd

corporate debtor/Jai Balaji Industries Ltd. alleging existence of default in repayment of loan advanced to the corporate debtor.

2. Pending consideration of the C.P., the four interim applications above referred were pressed for hearing on the side of the applicants in the CAs.

3. CA(IB) No. 510/KB/2018 is filed by the workers of the Corporate Debtor Jai Balaji Industries Ltd. The applicants submit that due to winding up proceeding pending before the Hon'ble High Court, Calcutta against the Corporate Debtor, the present petition being CP (IB) No. 767/KB/2017 is not maintainable. They further submit that livelihood of 1000 of workers are at stake as steps to revive and rehabilitate the Corporate Debtor cannot be taken due to the stringent opposition of SBI, being the financial creditor in CP (IB) No. 767 of 2017. The

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applicants, therefore, seek relief in the form of the said Insolvency petition be permanently stayed and/or dismissed.

4. CA(IB) No. 688/KB/2018 is filed by Lakhotia Transport Company Pvt. Ltd. for seeking stay of the present IBC petition being CP (IB) No. 767 of 2017 filed by SBI. This application was filed after an appeal filed by the applicant being A.P.O. No. 186 of 2018 was disposed of by the Hon'ble Division Bench at Calcutta High Court vide order dated July 19, 2018, wherein the Hon'ble Court upheld its recalling order and gave direction for fresh advertisement for winding up of the company namely Jai Balaji Industries Ltd., a copy of which is produced and marked as Annexure P-6. Thereafter, notice was duly published in two newspapers as per the said order, so that the creditors of the company can have

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their say in the post-advertisement stage. The applicant further submits that if this Tribunal proceeds to hear the insolvency petition filed on December 20, 2017, the same will be rendered *infructuous* as the winding up petition has already been admitted long back on August 17, 2015.

5. The applicant further states that jurisdiction is with the Hon'ble High Court at Calcutta in the pending winding up proceeding to deal with the affairs of the Corporate Debtor and unless the petition pending before the High Court is finally decided, there cannot be a parallel proceeding continuing before this Hon'ble Tribunal. Therefore, the applicant insists that the financial creditor (SBI) is not entitled to and should not be permitted to proceed with the present IBC application, and prays that the instant insolvency

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petition be dismissed, or in the alternative, be stayed/adjourned.

6. CA(IB) No. 669/KB/2018 has been filed by the very same applicant in CA (IB) No. 688/KB/2018 (Lakhotia Transport Company Pvt. Ltd.) for seeking an adjournment/stay of the hearing of CP (IB) No. 767/KB of 2017, to ensure that there is no conflict between the orders passed by the Hon'ble High Court and this Hon'ble Tribunal. Since the pleadings in the applications are similar to the pleadings in the CA (IB) No. 688 of 2018, the same is not repeated for avoiding repetition of facts.

7. CA(IB) No. 819/KB/2018 filed by one Dynamic Hard Coke Manufacturing Company praying similar prayer for permanent stay of the proceeding in the CP(IB) No. 767/KB/2017 till the disposal of the winding up

Sd

proceeding initiated before the Hon'ble High Court at Calcutta. The applicant submits that since a sum of Rs. 3,36,56,664/- is due and payable by Jai Balaji Industries Ltd., the corporate debtor in the matter, it filed an affidavit in the winding up petition being C.P. No. 822 of 2014 before the High Court at Calcutta, stating the same, pursuant to the notice caused to be published in the newspaper dated July 24, 2018. The applicant is opposing CP (IB) No. 767/KB of 2017 and any insolvency resolution process to be initiated before this learned Tribunal, as winding up proceeding has already been admitted and is already in progress before the Hon'ble High Court at Calcutta, and unless the company petition pending before the Hon'ble High Court is finally decided, there cannot be a parallel proceeding continuing before this Hon'ble Tribunal. The

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applicant states that the Financial Creditor, SBI, has already appeared in the winding up petition and at the instance of the SBI, the final order of winding up dated June 7, 2018 was recalled. It has been the submission of the financial creditor that some form of notice/advertisement ought to have been issued so that creditors are heard before finally hearing the matter and passing the order, and accordingly the Hon'ble High Court directed fresh advertisement to be published. The applicant further states that various creditors of the corporate debtor have already appeared before the High Court after the advertisement and direction have been given for filing affidavit to the winding petition by both secured and unsecured creditors, and hence the jurisdiction is with the Hon'ble High Court in the pending winding up proceeding to deal with the affairs

Sd

of the Corporate Debtor. The applicant therefore, prays that the present insolvency petition be dismissed or in the alternative, the hearing of the same, along with all the applications be adjourned till the disposal of the final order of the winding up petition before the Hon'ble High Court.

8. The Financial Creditor filed reply affidavits in all CAs except in CA 819 of 2018. The contentions are similar in nature and hence not dealt with separately. It is in brief as the following:-

9. The Financial Creditor submits that it has filed an application under Section 7 of the I & B Code, 2016 against the Corporate Debtor for default caused by the Corporate Debtor in making payment of the financial dues of the Financial Creditor amounting to Rs. 1082 crores. The financial creditor denies and disputes the allegations contained in the application and submits

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that since Section 7 of the I & B Code is clear that no person other than the financial creditor and the corporate debtor has a right to be heard at the stage of admission of the Section 7 application, the applicant has no right of intervention in the present insolvency petition.

10. The financial creditor further submits that winding up proceedings filed before the Hon'ble High Court has two stages namely: First stage, wherein application for winding up is filed and the Hon'ble High Court may admit such application on reasonable grounds, directing issue of advertisement inviting all creditors to participate in the winding up process. And the Second stage, wherein the Hon'ble High Court, after hearing all creditors who participated in the winding up process, on being reasonably satisfied, pass final orders of winding up/liquidation. According to the financial creditor, the winding up proceeding in the present case is in the first stage whereby the creditors are invited to participate in the said proceeding post advertisement. And so, the Hon'ble Tribunal is not barred in any manner

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from hearing the application filed under Section 7 of the I & B Code, 2016.

11. Heard the Ld. Counsel Mr. Jishnu Chawdhury for the financial creditor, Ld. Sr. Counsel Mr. Abhrajit Mitra for the Corporate Debtor, Ld. Counsel for the workmen Mr. Aniruddha Roy and Ld. Counsel for the Dynamic Hard Coke Manufacturing Company. Perused the records and citations referred to on both sides.

12. The Ld. Counsel for the financial creditor/SBI who has filed the C.P. seriously objected all these applications and insisted for considering the CP(IB) No. 767/KB/2017 without taking into consideration of all the interim applications referred to above. Interim applications, on the other hand were filed challenging the maintainability of the proceeding to be initiated by the financial creditor/SBI, in view of the pending

Sd

winding up proceeding as against the very same corporate debtor before the Hon'ble High Court at Calcutta.

13. Ld. Counsel Mr. Jishnu Chawdhury for the financial creditor cited *M/s. Unigreen Global Private Limited Vs. Punjab National Bank & Ors. - Company Appeal (AT)(Insolvency) No. 81 of 2017* and argued that what is to be considered by the Adjudicating Authority is the applicants' eligibility u/s. 11 of the I & B Code, 2016. According to him, since the Hon'ble High Court did not pass an order of liquidation of Corporate Debtor as per S.11(d) of the Code, the applicant is eligible to initiate CIRP as against the Corporate Debtor. He attempted to assert that the application filed by the financial creditor is perfectly maintainable and therefore, liable to be considered ignoring the

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applications filed by the corporate debtor and other operational creditors challenging the maintainability.

14. Shall I hear the interim applications before hearing the CP is also a question pressed before me when the above referred CAs firstly came up for consideration. To resolve the controversy, the above said question was heard at length and an order in detail was passed by me on 06/08/2018 upholding the objections raised by the applicants, that their interim applications are to be heard before hearing the CP on its merit. It is good to read the operative portion of the order of this Bench dated 06/08/2018. It reads as follows:-

“Since question of maintainability of the application is under challenge it appears to me that before CP(IB) No. 767/KB/2017 is heard on merit the CA(IB) No. 510/KB/2018, CA(IB) No. 669/KB/2018 and CA (IB) No. 688/KB/2018 filed challenging the

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maintainability of the application is to be heard. Accordingly, the above CAs are to be listed for hearing by directing the respondents to file reply affidavit within 7 days by serving copy of the reply affidavit to the applicants in CP(IB) No. 767/KB/2017 and the applicants are directed to file rejoinder if any."

15. The above order of this Bench was not at all under challenge from the side of the financial creditor, who repeatedly pressed for hearing the CP(IB) No. 767/KB/2017 when this Interim Applications were came up for final hearing on 04/10/2018. The Ld. Counsel appearing for the financial creditor again insisted for hearing the CP(IB) No. 767/KB/2017, despite the order of this Bench that the above referred interim applications are to be heard first.

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16. At this juncture, Ld. Sr. Counsel, Mr. Abhrajit Mitra, appearing on the side of the corporate debtor, on the strength of an order of the Hon'ble NCLAT in ***Company Appeal (AT) (Insolvency) No. 295 of 2017 (Amod Amladi Vs. Sayli Rane & Ors.)*** submits that the above order of this Bench directing to hear the interim applications cannot be recalled or reviewed by the Bench since this Bench has no power to recall or review the order already passed. I do find some force in the arguments on the side of the Ld. Sr. Counsel appearing for the corporate debtor and thereby I decided to hear the interim applications so as to see whether pendency of winding up proceeding already initiated at the instance of an operational creditor against the corporate debtor before the Hon'ble High Court at Calcutta in C.P. No.

Sd

822 of 2014 is a bar to initiate CIRP as against the very same Corporate Debtor.

17. The proposition laid down in the citation referred to on the side of the Financial Creditor, i.e., **M/s. Unigreen Global Private Limited** of the Hon'ble NCLAT does not at all restrict the Adjudicating Authority from hearing the interim applications challenging the maintainability of the C.P. No. 767/KB/2017 filed by the financial creditor. The main question to be answered in the applications in hand is, *whether CP(IB) No. 767/KB/2017 for triggering CIRP as against the corporate debtor/Jai Balaji Industries Ltd. U/s. 7 of the I & B Code is maintainable where winding up petition have already been initiated and pending before the Hon'ble High Court at Calcutta in C.P. No. 822 of 2014?*

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18. Before answering the point it is good to state brief facts behind the filing of interim applications above referred.

19. C.P. No. 822 of 2014 was filed by Lakhotia Transport Company Pvt. Ltd./operational creditor (applicant in CA(IB) Nos. 688 & 669/KB/2018) for initiating winding up proceeding as against the corporate debtor for the reason of inability to pay the debt due to the operational creditor. By an order dated 17/08/2015 the Hon'ble High Court at Calcutta admitted the said winding up application by directing the company (the corporate debtor) to pay the entire amount inclusive of interest and costs within a fortnight from the date of the said order with further directions that in default of such payment, the petition would be advertised in the newspapers.

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20. Aggrieved by the said order, the corporate debtor had preferred an appeal before the Hon'ble Division Bench of the Hon'ble High Court at Calcutta as A.C.O. No. 146 of 2015. The Hon'ble Division Bench stayed the operation of the order subject to a deposit of Rs. 50 Lakhs on 04/09/2015. The corporate debtor had failed to pay the above said amount as directed, and thereby the operational creditor issued advertisement of the winding up application.

21. In the meanwhile, the proceeding of the said winding up application (C.P. No. 822 of 2014) was stayed on the ground that the corporate debtor was referred to the Board of Industrial and Financial and Reconstruction (In short, BIFR) under the provisions of the Sick Industrial Companies (Special Provision) Act, 1985 (In short, SICA). By an order of the Hon'ble High Court at

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Calcutta, the hearing of the winding up application was adjourned *sine die* with liberty to the parties to mention upon notice. It is at this juncture, Insolvency and Bankruptcy Code, 2016 came into force on 28th May, 2016. The SICA has been repealed and references pending before BIFR stood abated thereby 180 days from December 1, 2016 was given to approach the Tribunal. Thus repealing of SICA came into force w.e.f. December 1, 2016 and the reference to BIFR stood abated and parties did not opt to make a reference to the Tribunal as per section 434 (d) of the Companies Act, 2013. The Hon'ble High Court at Calcutta also did not transfer the pending winding up Petition before the Tribunal.

22. In the meanwhile, the Corporate Debtor has moved C.A. No. 133 of 2017 praying for stay of all further proceedings in the winding up application before the

58

Hon'ble High Court at Calcutta in C.P. No. 822 of 2014 proposing settlement of the claim of the Applicant Creditor and the Hon'ble High Court at Calcutta passed a consent Order on 17-04-2017 stipulating certain terms. The Corporate Debtor failed in complying with the terms of settlement, thereby the Applicant Creditor has filed the C.A. No. 51 of 2018. The Hon'ble High Court at Calcutta passed an Order allowing C.A. No. 51 of 2018 on 07-06-2018 directing publication of fresh advertisement of the winding up Application in the newspapers for enabling the Secured Creditors and other Creditors of the Company (Corporate Debtor) to participate in the winding up Application.

23. Pending the above said winding up application before the Hon'ble High Court at Calcutta, the Financial Creditor/State Bank of India has filed the CP(IB)

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767/KB/2017 on 22-12-2017. When this Application came up for consideration before this Bench, the Applicant who initiated the winding up proceedings, rushed to this Tribunal and filed the C.A.(IB) No. 669/KB of 2018 and No. 688/KB of 2018 praying for stay of the proceedings in the CP.

24. Since the Applicants in the interim applications above referred, challenged the maintainability of this Application, the Operational Creditor, Lakhotia Transport Company Pvt. Ltd., has moved an Appeal A.P.O. 186 of 2018 in C.P. No. 822 of 2014 before the Division bench of Hon'ble High Court at Calcutta challenging the order of issuance of advertisement in the winding up proceedings initiated by the Financial Creditor against the Corporate Debtor. It is good to read the operative portion of the Order. It reads as follows:

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"The order impugned does not call for any interference. However, since the date for directing fresh advertisements to be published has passed, such directions are issued hereby. The petitioning creditor will cause advertisements to be published in the same newspapers in which the original advertisements had been published, indicating that the company petition will appear before the Company Court on the first available working day two weeks after the date of the publication. The publication of the advertisements has to be simultaneous in the newspapers on a date within two weeks from today."

25. A reading of the above said Order, what I understood is that the Order of admission of winding up Petition filed by the Lakhotia Transport Company Pvt. Ltd./Operational Creditor, was not at all recalled as submitted on the side of the Financial Creditor. On the other hand, the Hon'ble Division Bench of the High court at Calcutta has held that the order of admission of

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winding up application does not call for any interference but issued direction to issue fresh advertisement. So, the winding up proceeding as against the Corporate Debtor has been initiated long before the date of filing of the Application by the financial Creditor in this case in hand. It is significant note here that in pursuance of the advertisement, the Financial Creditor did not join in the winding up proceedings and approached this Tribunal for invoking Section 7 of the I & B code as against the Corporate Debtor pending winding up proceedings initiated by the Hon'ble High Court at Calcutta.

26. The above noted factual background proves that one among the Creditors of the Corporate Debtor has moved the winding up application C.P. No. 822 of 2014 on 16-09-2014 before the Hon'ble High Court at Calcutta

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which has been admitted by the Hon'ble High Court at Calcutta vide Order dated 17-08-2015. That winding up order is in force. Upon ordering the winding up, what the Hon'ble High Court has directed is to pay the principal sum of the amounts with interest due from the Corporate Debtor but the Corporate Debtor did not pay and even preferred an Appeal against the Order and a consent order has been passed as referred to above. Despite opportunity given to the corporate Debtor, it did not comply with the directions and thereby, in continuation of the order of admission of the winding up procedure, a fresh advertisement has been ordered.

27. Therefore, the question herein is as to whether after admission of a winding up application as against the Corporate Debtor and after issuing publication, can a Financial Creditor maintain an application under

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Section 7 of the Insolvency and Bankruptcy code, 2016
before this Tribunal?

28. At the outset, I would say that it is not maintainable at all. Various judgements of the Hon'ble High court, NCLT as well as NCLAT were brought to my notice on the side of the Corporate Debtor as well as on the side of the applicant/Operational Creditor, namely, the Lakhotia Transport Company Pvt. Ltd.

29. The Ld. Counsel for the Financial Creditor, on the other hand, tried to stress his argument on the strength of the Order in Unigreen Global Pvt. Ltd of the Hon'ble Appellate Tribunal dated 01-12-2017 that since an order of liquidation is not passed and since no Official Liquidator was appointed in the case in hand, there is no bar under Section 11 of the Insolvency & Bankruptcy Code, 2016 and therefore, this Tribunal shall

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proceed with hearing of the C.P. and not hear the CAs. According to him, the Financial Creditor is eligible under Section 7 of the Insolvency and Bankruptcy Code, 2016 to move an application of this nature and it is perfectly maintainable.

30. The Hon'ble Appellate Tribunal in the Unigreen Global Pvt. Ltd. has discussed in detail the question of entitlement of an Applicant coming under the purview of Section 11 of the Insolvency and Bankruptcy Code, 2016. The Hon'ble Appellate Tribunal discussing in detail the definition clause referring to "liquidation order" and "winding up" has held that (para 31) "By aforesaid amendment, the legislators have made it clear that the word "winding up" mentioned in the Companies Act, 2013 is synonymous to the word "liquidation" as

mentioned in the Insolvency and Bankruptcy Code.” At this juncture it is also good to read Para 32. It reads as:

“In view of the provisions aforesaid, we hold that if any winding up proceeding has been initiated against the Corporate Debtor by the Hon’ble High Court or Tribunal or liquidation order has been passed, in such case, the application under Section 10 is not maintainable. However, mere pendency of a petition for winding up where no order of winding up or order of liquidation has been passed, cannot be ground to reject the application under Section 10.”

31. Truly, this is not an application filed by the Corporate Debtor but filed by the Financial Creditor under Section 7 of the Insolvency and Bankruptcy code, 2016. In respect of an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 whether pendency of winding up proceedings before the Hon’ble

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High Court is a bar is also considered by the Hon'ble Appellate Tribunal in *Birender Kumar Vs. M/s Adel Landmarks Ltd (Company Appeal(AT) (Insolvency) 39 of 2018.*

32. In the above cited order, the Appellant has preferred an appeal as against the order of dismissal of the application by the Hon'ble NCLT, New Delhi Bench, for the reason of the pendency of the winding up proceedings before the Hon'ble High court, New Delhi.

33. The Hon'ble Appellate Tribunal confirmed the order of dismissal. However, it set aside the order of direction to pay cost. The Hon'ble Appellate Tribunal dismissed the appeal by applying the ratio laid down in M/s Unigreen Global Pvt. Ltd. upon the reasons recorded as given below:-

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"4. The question as raised in this appeal fell for consideration before 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 by judgement dated 23rd November, 2017 observed as follows :

"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

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open to the 'Financial Creditor' and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator.

9. Similarly, one may argue that in case where 'winding up' proceeding has been ordered by the Hon'ble High Court and thus stands initiated, where is the question of filing an application under section 7 or 9 or initiation of Corporate Insolvency Resolution Process, which, on failure ultimately culminates into liquidation proceedings (winding up proceedings)? The argument can be that once second stage i.e. Liquidation (winding up) proceedings has already initiated, the question of reverting back to the first stage of 'Corporate Insolvency Resolution Process' or preparation of Resolution plan does not arise. One can appreciate such stand which can be decided in an appropriate case, but such issue being not involve in the present case, we

Sd

are not deciding the issue aforesaid. It is left open to be decided in other appropriate case."

34. A reading of the above cited order of the Hon'ble Appellate Tribunal, it appears to me that the Corporate Debtor here in the case undergoing winding up proceedings and winding up petitions being already admitted and the Hon'ble High Court has not transferred the winding up proceeding before the NCLT, all the Creditors are bound to join in the winding up proceedings so as to make their claims in the said proceedings. It was submitted on the side of the applicants in CAs that secured and unsecured creditors have already joined in the said proceedings. Where a winding up proceedings is initiated in an application under section 433(e) of the Companies Act, 1956 by the Hon'ble High Court, an application filed under section 9 of the I&B Code was

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held not maintainable in the above cited order. The proposition as held in the said order is squarely applicable in the case in hand.

35. At this juncture, the Ld. Senior Counsel appearing for the Corporate Debtor cited ***2018 SCC online Rajasthan 1472 (M/s. Jaipur Metals Electricals Ltd. & Ors.)***, a judgement of the Hon'ble High Court of Judicature For Rajasthan Bench At Jaipur for reasserting the view taken by the Hon'ble NCLAT that after initiating winding up proceedings by the Hon'ble High Court, a proceeding under section 7, 9 and under section 10 of the Code is not maintainable.

36. It has been held in the above cited judgement that "since winding up petition is pending before this High Court, no fresh application could have been filed

Sd

under the Insolvency and Bankruptcy code, 2016 and application moved under Section 7 by the Respondent is held to be an abuse of the process of the Court and contrary to law. If any other interpretation is taken, it would result into multiplicity of the proceedings and would defeat the very purpose of framing of rules of 2016".

37. A reading of Para 36 in the above said judgement is good to understand the ratio laid down in the judgement. It reads as follows:-

"36. As notices have already been served under Rule 26 of the Companies (Court) Rules, 1959 and all the parties are present before the Court and even a Provisional Liquidator was appointed, the present proceedings before this court would not be transferable under Rule 6 of the Rules of 2016. In terms of Rule 5 proviso 3, since the winding

Sd

up petition is pending before this High court, no fresh application could have been filed under the IBC, 2016 and the application moved under Section 7 by the respondent is held to be an abuse of the process of the Court and contrary to law. If any other interpretation is taken, it would result into multiplicity of the proceedings and would defeat the very purpose of framing of Rules of 2016. Even at the stage when the Companies Act of 2013 came into force, the pending case before the High Court relating to winding up were not transferred to the NCLT and after coming into force of the IBC, 2016, the basic rule of not having multiplicity of the proceedings shall continue to be the guiding principle. It would be a dangerous situation if the applicant ALCHEMIST is allowed to proceed before IBC while the other creditors are before this Court and say after six months that is the maximum period during which the proceedings can continue under the IBC, this

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Court also appoints an OL to examine the claims of other parties. However, as the present petition is not a petition by creditors alone and is a case referred to this Court under Section 20(1) of the erstwhile SICA Act, the order passed by the NCLT relating to only one creditor treating the present petition as the petition under Section 433(e) is wholly misconceived. A look at third proviso to Rule 5 also clarifies the picture further as it specifically provides that if there another petition required to be filed under section 433 (e), the same would continue with the High Court and would not be transferred. Thus, the basis as noted above, continues that there ought not be multiplicity of the proceedings."

38. Expressing the above said view the Hon'ble High Court has also relied upon judgements of various other Hon'ble High Courts. The Hon'ble High Court of Bombay

in the case of West Hills Reality Pvt. Ltd. Vs. Neelkamal Realtors Tower Pvt. Ltd (CP No.331 of 2016) also has considered the same question and observed that a winding up petition pending before the High Court which is not transferred to the NCLT, shall continue to be dealt with by High Court itself in accordance with the provisions of 1956 Act and a pending proceedings in which notice, as required under Rule 26 of the Companies (Court) Rules, 1959 has been issued, shall not be transferred to NCLT. The Hon'ble court has held that:-

"12. In fact, if anything, the argument that Rule 26 contemplates a post-admission notice and only in the event such notice is actually served on the respondent that the petition shall stand transferred to NCLT, will lead to a peculiar situation. It will mean that those petitions, which are admitted and where notice of the petition is not

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served on the respondent pursuant to the order of admission, will stand transferred to NCLT and will be taken up Sat 15/15 CP 331-2016, 332-2016.doc for admission once again by requiring the petitioners in those petitions to furnish information for admission of the petitions under Section 7, 8 or 9 of the Code, as the case may be. That would be clearly anomalous."

39. The very same view is taken by the Hon'ble High Court of Judicature at Hyderabad in the case of Paharpur Colling towers Ltd.Vs Basal Steels and Power Pvt. Ltd. 2017 (5) ALD 695) wherein it has been held as under:-

"39. In the case of West Hills Realty Private Ltd. Vs. Neelkamal Realtors Tower Pvt. Ltd. (Company Petition No. 331 of 2016), decided on 23/12/2016, report in (2017) 3 ComplJ 225 (Bom) by the High Court of Bombay, a similar controversy had arisen and after appreciating the various provisions and Rule

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26 of the Companies (Court) Rules, 1956 as well as the provisions of the Rules of 2016, it was held as under :-

18. Question is whether the Constitution of present proceedings before this Court in the winding up petition filed by the petitioner herein can be so enjoined by the NCLT, which is a tribunal not superior to this Court?

19. Since NCLT is not forum superior to the High Court, it's orders cannot be construed as enjoining this Court from proceeding with a winding up proceeding in which it has clear jurisdiction to hear and decide. That is the effect of Section 41(b) of the Specific Relief Act, 1963, particularly when the IBC itself permits such continuation under the notifications issued under Sections 239 and 255 of the IBC.

24. The principle of Comity of Courts cannot be invoked to restrain the High Court from proceeding with a winding up petition which Parliament intended

the High Court alone to decide as per the notifications issued under Sections 239 and 255 of the IBC. Since this winding up petition did not get transferred to the NCLT by virtue of the notifications dated 7.12.2016 and 29.6.2017 issued under the very IBC, the NCLT cannot have any jurisdiction in regard to the petitioner or to the winding up petition and it's order cannot be interpreted to restrain this Court."

40. The Hon'ble Principal Bench, NCLT, New Delhi , in **M/s. Nauvata Engineering Pvt. Ltd. Vs. Punj Llyods Ltd.** also has taken the very same view that "where winding up proceedings are pending against the Company, then it would not be conducive for the Tribunal to trigger Insolvency process against that very Company as there is likelihood of conflicts between the two statutory entities, namely, Official Liquidator and the IRP. Therefore, the proceedings which are continuing in

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the Hon'ble Delhi High Court may constitute a better basis for adjudication being earlier in point of time and a claim having been made by other Creditors in the proceedings in 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 the Hon'ble High Court. The registry is directed to send all the papers at the earliest".

41. By going through the citations above referred, I am of the considered view that if a winding up petition filed against the Corporate Debtor has been admitted by Hon'ble High Court and notice under rule 26 of the Companies (Court) Rules, 1959 was issued and such Company petition has not been transferred after the commencement of Insolvency and Bankruptcy Code, 2016 and winding up proceedings has been initiated and pending before the

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Hon'ble High court the remedy if any available to the creditors who has not joined in the said winding up proceedings is not to approach to the Tribunal under the provisions of the Code but to submit its claim before the Hon'ble high Court.

42. Here in the case in hand, the Applicant in CA(IB)No. 688/KB/2018, Lakhotia transport Co. Pvt. Ltd has moved the winding up petition long before the filing of this application by the Financial Creditor before this Tribunal. The winding up petition was filed before the Hon'ble High Court at Calcutta on 16-09-2014 and it was admitted on 17-08-2015 and notice was issued and advertisement of winding up petition was caused in the newspaper in terms of the winding up order on 14-09-2015. That order of admission of winding up proceedings is still in force. Truly the Financial Creditor has got an

order referred to earlier from the Hon'ble High Court for reissuing publication of advertisement relating to winding up in the newspaper. It is incorrect to say that the order of admission was recalled as submitted by the Ld. Counsel for the Financial Creditor.

43. In view of the above said discussion, I am of the considered view that the CP(IB) No. 767/KB/2017 filed by the Financial Creditor under section 7 of the I&B Code is not maintainable. Accordingly, the CA(IB) No. 688/KB/2018, CA(IB) No. 669/KB/2018, CA(IB) No. 510/KB/2018 and CA(IB) 819/KB/2018 are liable to be allowed upon the following orders:-

- i) CA(IB) No. 688/KB/2018 CA (IB) No. 669/KB/2018, CA(IB) No. 510/KB/2018 and CA (IB) 819/KB/2018 are allowed holding that CP(IB) No.767/KB/2018 is not maintainable.

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ii) In view of the findings that CP(IB) No. 767/KB/2017 is not maintainable, it is dismissed.

iii) In view of dismissal of the CP(IB) No. 767/KB/2018, CA(IB)No. 161/KB/2018 and CA(IB) No.162/KB/2018 are dismissed.

Parties are directed to bear their respective cost.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all the requisite formalities.



(Jinan K.R.)
Member (J)

Signed on this, the 10th day of October, 2018.

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