

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

TCP/592/(IB)/KER/2018

*Application (Form-9 of NCLT Rules) under section 271 and 272 of the
Companies Act 2013 for winding up.*

In the matter of M/s. Hotel Xavier Avenue Private Limited

Shri. Gerald. K. John & another

---Petitioners

V/s

M/s. Hotel Xavier Avenue Private Limited & 3 Others

---Respondents

Order delivered on: 27.09.2018

Coram:

B. S.V. Prakash Kumar, Member (Judicial)

S. Vijayaraghavan, Member (Technical)

For the Petitioners/OC: *Shri. R. Divakaran, Advocate*

For the Respondent/CD: *Shri. Thomas Geeverghee, Advocate*

ORDER

Per: B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

1. It was a company petition initially filed before the Hon'ble High Court of Kerala u/s.433 (e) & (f) r/w Section 439 (1) (b) of the Companies Act 1956 against the Debtor Company (R1) and the Directors of the Company (R2 to R4) seeking winding up of R1 company on the ground that R1 failed to repay an amount of Rs3,16,93,526/- (Rupees Three Crores Sixteen Lakhs



Ninety Three Thousand Five Hundred and Twenty Six only) to the Petitioners.

2. The petitioners filed this case before the Hon'ble High Court on 09.09.2016, wherein when the Registry of the Hon'ble High Court noted defects stating that the petitioners did not append the Power of Attorney to the Petition, the Petitioners cured the defects on 15.10.2016. Thereafter, when notice was served upon the respondents to appear before the Court, the respondents filed their statement of opposition before the Hon'ble High Court on 03.02.2017, to which, the Petitioner's side on 11.04.2017 filed Reply-affidavit to the statement of opposition filed by the respondents. Soon after having the Hon'ble High Court examined as to whether this Petition should continue before the High Court or whether it could be transferred to the Company Law Tribunal, the Hon'ble High Court passed an order on 19.03.2018 giving directions to transfer this case to the NCLT, which is as follows:

“Heard both sides. The Petition is seen filed on the basis of a Power of Attorney. It appears that the said Power of Attorney was executed after formation of the Company Law Tribunal. This means that as on date of filing the petition, there was no such authorisation, and so the Petition as on date was incompetent. Both sides submitted that the Petition will have to go to the



Company Law Tribunal. Hence, the Petition is ordered to be transferred to the Company Law Tribunal”.

3. On looking at the order passed by the Hon'ble High Court, it is observed that this case was ordered to be transferred to NCLT on the ground that since there was no authorisation to the Power of Attorney holder at the time of filing and this authorisation having come only after formation of the NCLT, the Hon'ble High Court, basing on the request made by both the counsel to refer this matter to the NCLT, ordered transfer of this case to this Bench. This is how this case has come before this Bench on 16th April 2018.
4. Perhaps basing on that order, the petitioners filed an application (Form-9 of NCLT Rules) under section 271 and 272 of the Companies Act 2013 for winding up of this Company.
5. On perusal of the earlier Company Petition filed before the Honourable High Court as well as the Application filed before this Bench, we are given to understand that the sum and substance of both the applications are that these Petitioners lent some monies to R.2, who happens to be one of the Directors of R.1 Company and when this money was not returned to the Petitioners, it appears that R.2 executed an agreement on 02.11.2013 agreeing to repay the said money to the Petitioners, when that was also not complied with, these Petitioners filed various Suits before Sub-Court of Perumbavoor, Kerala.

These petitioners have annexed those complaints to the petition filed before this Bench, but whereas, they have not annexed the agreement dated 02.11.2013 to the petition. Moreover in the pleadings of the petitioners, it is evident that this agreement was executed by R2, not by R1 Company. Though these petitioners have not filed any document creating obligation upon R1 company to repay the said monies to the Petitioners, they submit that 1st Petitioner is entitled to get Rs.1,32,25,658/- (Rupees One Crore Thirty Two Lakhs Twenty Five Thousand Six Hundred and Fifty Eight only) with 12% interest and 2nd Petitioner is entitled to get Rs.33,00,000/- (Rupees Thirty Three Lakhs only) with 12% interest from the Respondents and their assets. It is further submitted in the Company Petition filed before this Bench as a sequel to the earlier Company Petition transferred to this Bench, the Petitioners stated that 2nd Respondent filed written statement with counter claim in O.S. 51/2015 before Sub-Court Perumbavoor, Kerala as an indigent person reflecting that R.1 Company functioning without any income and profit.

6. These Petitioners have further stated that R.2 to R.4 have not issued any Share Certificates to the Petitioners, but they have not mentioned as to whether any allotment of shares taken place, as to how many shares were issued to each of the petitioners. They simply submit that R.2 to R.4, in



violation of the objects of Memorandum of Association and Articles of Association of R.1 Company, mortgaged landed property of the Company with Kerala State Finance Corporation and availed loan of Rs.4 crores to defeat the interest of the Petitioners and other Creditors. The Respondent Company having not paid an amount of Rs.3,16,93,526/- (Rupees Three Crores Sixteen Lakhs Ninety Three Thousand Five Hundred and Twenty Six only) to the Petitioners, they say, R-1 has to be treated as Company unable to pay the debt and commercially insolvent rendering the Company to be wound up under the provisions of Companies Act 2013. With this reasoning, the Petitioners sought for the relief of winding up of the Company u/s.271, 272 of the Companies Act 2013 (Section 433 (e) and (f) of the Companies Act 1956) with a direction to liquidate the company and pay the Petitioners dues.

7. Against which, these Respondents filed statement in opposition to the winding up Petition before the Hon'ble High Court of Kerala questioning their Power of Attorney authority in filing this Company Petition before the Hon'ble High Court and also mentioning about various Suits pending before the Civil Courts. Likewise, they also mention that the pleas taken by the Petitioners are conflicting to each other, on one hand, they say that they are shareholders of the company because money has been given to R2 as



investment in R1 Company, on the other, they say that they are the Creditors of the company. Moreover, the Respondents have stated that no statutory notice u/s.434 (1) (a) of the Companies Act 1956 has ever been issued to R.1 company before filing of this Company Petition. They further submit that R1 Company is completely solvent and commercially viable and engaged in the business of hospitality and beverages having three star Beer and Wine licence. They further submit that this company had paid all its admitted dues to various Banks and other creditors, hence there is no valid reason to wind up R1 Company.

8. As an answer to Statement in Opposition filed by the Respondents, the petitioners filed reply before the Hon'ble High Court denying the averments made by the Respondents.
9. On looking at the pleadings of the Petitioners and the Respondents herein, the point for consideration before this Bench is whether this Company Petition transferred from Hon'ble High Court of Kerala to NCLT falling within the ambit of either section 7/9 of the Insolvency and Bankruptcy Code or section 271 (e) of the Companies Act 2013.
10. As per Notification dated 7th December 2016, the Petition falling under section 433 (e) & (f) of the Companies Act 1956 shall be transferred to the



Bench of the NCLT exercising territorial jurisdiction considering such Petitions falling under IBC or u/s 271 of the Companies Act 2013, as the case may be.

11. For the sake of clarity, Rule No.5 and 6 of Notification dated 7th December 2016 is mentioned below:

“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) ”.

12. In the case of inability to make payment, as soon as the application u/s.433 (e) of the Companies Act, 1956 has been transferred to NCLT, the respective Petitioner shall file Form-1 under Section 7 of IBC 2016 and the same is to be dealt with in accordance with the Part-II of the Code.
13. Having regard to the petitions falling under 433 (f) of the Companies Act, 1956, as per the notification, those Petitions shall be treated as Petitions falling under section 271(e) of the Companies Act, 2013.
14. But, on the contrary, these petitioners filed Company Petition (Form-9 under NCLT Rules) under section 271 and 272 of the Companies Act, 2013, but not filed any Form before this Bench either u/s 7 or 9 of IBC 2016.




15. In case, the petitioners take a stand that they are Creditors of the company, then they have to invariably file Form - 1 under section 7 of IBC 2016 before this Bench, but that has not been done. On the contrary, they filed Form-9 under NCLT Rules as if this Company Petition is falling under 271 and 272 of the Companies Act, 2013, but they have not mentioned as to whether it is falling under section 271 (e) of the Companies Act, 2013 or under some other provision of section 271 of the Companies Act, 2013. If this petition is to be considered as a Petition falling within Rule 6 of Notification dated 7th December 2016, the Petitioners have to prove that they are shareholders of the company and that their cause of action is just and equitable for winding up of the Company. But whereas no pleading is made in the company petition stating that shares have been allotted to them and they are holding these many shares in the company.

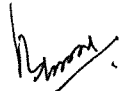
16. As to the maintainability under IBC is concerned, the petitioners have not proved that any agreement has been entered between the petitioners and R.1 company to prove that R1 company is liable to repay the debt to the petitioners, when existence of debt itself is not shown, no occasion will arise to this Bench to say it falls under IBC provisions. However, since no Form has been filed under IBC claiming that it is a liability attracting the



provisions of the Section 7 of IBC, no occasion will arise for us to consider this Petition as has been filed under section 7 of the Code.

17. As to Winding up on just and equitable ground, it is incumbent on the part of the Petitioners to be the shareholders of the company, since no categorical plea has been taken stating that they are shareholders of R.1 company holding particular shares, this Company Petition cannot be considered as a Petition maintainable under section 271(e) of the Companies Act 2013.
18. Though this Company Petition is numbered as IBC Company Petition, by seeing the pleadings of this Company Petition, we hereby hold that the Company Petition does not lie either under section 7, 9 of IBC or under section 271 (e) of the Companies Act, 2013, henceforth, the Company Petition is dismissed without going into the merits of the case.


(S. Vijayaraghavan)
Member (Technical)


(K. B. S.V. Prakash Kumar)
Member (Judicial)