

ATTENDANCE-CUM-ORDER SHEET OF HEARING

NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH

TP No.02/446/GB/2017

M/s. National Building Construction

Corporation (India) Ltd.

- Petitioner

-Versus-

The Official Liquidator

- Respondent

PRESENT

Hon'ble Mr. Justice P K Saikia, Member (J)

Date of Order: 24. 05.2017

Name of the Company	
Under Section	446

Sl. No.	Name & Designation of Authorized Representative.(in Capital Letters).	Appearing on behalf of	Signature with date

ORDER

1. Reappraised the submissions, Mr. Chandan Kumar, Official Liquidator attached to Hon'ble Gauhati High Court as well as submission made by Mr. Aswini Thakur and Ms. J.R.Thakur, learned counsel appearing for the petitioner
2. In terms of the order dated 04.04.2017 rendered by this Tribunal, Official Liquidator attached to Hon'ble Gauhati High Court has already submitted his report.

3. In order to appreciate the present proceeding, I find it necessary to have a look at the order dated 04.04.2017, rendered in this proceeding giving the back ground of the present proceeding in detail.

For ready reference, same is reproduced below: -

"Heard Mr. Aswini Thakur, learned Senior Counsel, assisted by Ms. J.R.Thakur, learned counsel appearing on behalf of the applicant/ petitioner.

The facts necessary for disposal of present proceeding, in short, are that one M/s. National Building Construction Corporation (India)Ltd, hereinafter referred to as petitioner, had supplied Ready Mix Concrete to M/s. Double Dee Constructions (P) Ltd (hereinafter referred to as winding up company) at an agreed rate and consideration thereof was to be paid in accordance with arrangement made between the parties. It has been stated that the company was to pay an amount of Rs. 71, 63,850/- to the petitioner which was to be paid within 30 days from receipt of the RMC.

The company received the entire RMC without any objection and also accepted the bill of the petitioner-creditor. The petitioner had received 2(two) cheques both dated 12.12.2009 for an amount of Rs. 20(twenty) lakhs each drawn on the Punjab National Bank, but upon presentation, the cheques were dishonoured by the Bank due to insufficient fund in the account of the company. Since, the winding up company did not repay the debt to the petitioner company, the petitioner company had initiated a winding up proceeding against the respondent company under the Companies Act of 1956 which was registered as C.P.No.8 of 2010.

On hearing the learned counsel for the parties, Hon'ble Gauhati High Court was pleased to pass an order dated 06.06.2012 in C.P.No.8 of 2010, directing the Official Liquidator, amongst other things, to take immediate possession of the assets and the properties of the winding up company. The relevant paragraphs of the order of the Hon'ble Gauhati High Court are reproduced below: -

"para 14. In the result, the winding up petition is allowed. The respondent company accordingly be wound up and the Official Liquidator is accordingly directed to take immediate possession of the assets and properties of the respondent company".

"Para 15. Let the Registrar General inform the Official Liquidator under Rule 109 of Company (Court), Rules 1959 in form 50 and draw up necessary orders under Rule 111 in form 52 under the Companies (Court) Rules 1959".

"Para 16 The petitioner company is directed to take steps to advertise the order for winding up of the respondent company by the Company Court in Form 53 under Rule 113 of the Companies (Court) Rules 1959. The advertisement be published in "The Assam Tribune" and the "Dainik Janambhumi".

While the Liquidation process was going on, the petitioner herein has filed a suit before the Delhi High Court in 2013 seeking realization of money from the winding up company. However, in due course, Hon'ble Delhi High Court came to know that the company aforesaid has already been wound up under the order of the Hon'ble Gauhati High Court.

Since a company undergoing liquidation process cannot be permitted to be sued, without obtaining leave from the concerned High Court which ordered the winding up of the company, Hon'ble Delhi High Court had directed the petitioner to approach Hon'ble Gauhati High court seeking leave for continuation of the suit already instituted against the aforesaid company.

In view of above, the petitioner has approached Hon'ble Gauhati High Court and filed a petition seeking leave for continuation of the suit against the aforesaid company vide Co. Appl. No. 1/2017. However, Hon'ble High Court has transferred said proceeding to this court in view of notification dated 07.12.2016 vide order dated 18.01.2017 in Co. Appl. No. 1/2017.

For ready reference, said order is also reproduced below: -

Heard Mr. A. Thakur, learned counsel for the petitioner. He submits that this application is filed under the provision of Section 446 (1) of the Companies Act, 1956 praying for leave to proceed with the pending suit before the Delhi High Court. This Court finds that by virtue of the notification dated 7.12.16, the National Company Tribunal, Guwahati Bench have the jurisdiction to entertain such application under the Companies Act, 2013.

In view of above, Mr. Thakur prays for withdrawal of this petition with liberty to approach the jurisdictional Court/Tribunal

The petition is closed on withdrawal with the liberty as prayed for.

In view of the above, the petitioner has filed the instant petition before this Bench of NCLT.

List this proceeding on 11.04.2017 for further orders.

Petitioner is directed to take steps in the matter of service of notice on the respondent (the Official Liquidator). Needless to say that notice must accompany a copy of the petition along with all other connected documents.

Registry is also directed to send notice of this proceeding to the Official Liquidator for information and necessary action."

4. Since the report of official liquidator has some bearings on the present proceeding, I also find it necessary to reproduce the relevant part of the report herein below:

"Without prejudice to the order passed by the Hon'ble High Court Gauhati in CA No. 1 of 2017, it is respectfully submitted that Ministry of Corporate Affairs vide notification 07.12.2016 made the rules called 'The Companies (Transfer of pending proceedings) Rules 2016' which came into effect on 15.12.2016. The rule 5 provides that 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 the bench of the Tribunal established under sub-section 4(4) of section 419 of the Act, exercising territorial jurisdiction and such petition shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance of Part II of the Code.

2. That the company namely Double Dee Constructions Pvt. Ltd. (in liquidation) has been wound up by the Hon'ble Gauhati High Court as per the order dated 06.06.2012 in C. P. No. 8/2010 and it is relevant to note that said petition is still pending before the Hon'ble High Court Gauhati and the same has not been transferred to NCLT, Guwahati, in pursuance of the above said rules. So, any matter connected therewith may be dealt/heard by the Hon'ble High Court Gauhati only.

3. That in IA.6991/2016 (u/s 446(1) of the Companies Act, 1956, Hon'ble High Court Delhi was pleased to direct the defendant i.e. your present petitioner to seek express leave u/s 446(1) of Companies Act, 1956 and approach the Hon'ble Gauhati High Court.

4. That applicant has prayed for grant of leave u/s 446(1) of Companies Act, 1956. Section 446(1) provides that when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose. It is further submitted that Section 446 of Companies Act, 1956 does not confer any jurisdiction on NCLT and it is pertinent to mention that the said section empowers "Courts to grant leave". Sub-section 29 of section 2 of Companies Act, 2013 defines Court as-

"the Court" means,

- (i) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any district court or district courts subordinate to that High Court under sub-clause (ii);
- (ii) the district court, in cases where the Central Government has, by notification, empowered any district court to exercise all or any of the jurisdictions conferred upon the High Court, within the scope

- of its jurisdiction in respect of a company whose registered office is situate in the district;
- (iii) the Court of Session having jurisdiction to try any offence under this Act or under any previous company law;
 - (iv) the Special Court established under section 435;
 - (v) any Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law;

In the definition of Court Tribunal is not included.

5. *That in absence of jurisdiction it is prayed that Hon'ble Tribunal may refrain from exercising its jurisdiction and dismiss the instant application at the threshold as non-maintainable.*

5. Before appreciating the report of Official Liquidator, I also find it necessary to have a look at the Companies (Transfer of pending proceedings) Rules 2016 (in short, Rules of 2016) under which the proceeding in hand was transferred to this Tribunal.

For ready reference, the Rule is reproduced below:

"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.

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.

6. Rules, 2016 thus states that only three categories of the petitions (pertaining to winding up) which are pending before the High Court on the date of publication of aforesaid Rules shall be transferred to the Bench of NCLT having jurisdiction over the matter. The petitions, referred to in the Rules, 2016, are the petitions, filed under Section (i) 433 (a), (ii) 433 (e) and (iii) 433 (f) of the Companies Act, 1956.

7. It may further be stated here that the Rules 5 and 6 also state that only those petitions which were filed before the High Court under Section i) 433 (a), ii) 433 (e) and iii) 433 (f) and where petition has not been served on the respondent in accordance with Rule 26 of the Companies (Court) Rules, 1959, in short Rules, 1959 shall be transferred to the Bench of NCLT.

8. Rule 5 further says that the petition, so sent to the Tribunal, shall be treated as application under Section 7, 8 or 9 of the Code, as the case may be, and same shall be dealt with in accordance with prescriptions, rendered in Chapter II and Chapter III of Part-II of the Code, 2016. It may be stated that the Chapter II and Chapter III of Part-II of the Code, 2016 put in place a detailed procedure qua corporate insolvency resolution process which may even be resulted in liquidation of the corporate debtors in appropriate cases.

9. It may be stated here that Hon'ble Gauhati High Court ordered the winding up of M/s. Double Dee Constructions (P) Ltd on the ground of its inability to pay its debts (Section 433(e) of the Act of 1956, vide order dated 06.06.2012 in C.P.No 08/2010. Thereafter, the company was put in liquidation process and such liquidation process has still been going on. In the meantime, M/s National Building Construction Corporation Ltd., hereinafter referred to as applicant, instituted a suit against M/s. Double Dee Constructions (P) Ltd before the Hon'ble Delhi High Court.

10. Having found that the company in question is in liquidation, Delhi High Court asked the applicant to obtain leave from the concerned court to institute suit against the company in liquidation as required under section 446 of the Companies Act, 1956. Being so required, the applicant approached Hon'ble Gauhati High Court with an application Under section 446 of the Act of 1956 seeking leave to institute /continue with the suit, instituted against the company in liquidation.

11. Hon'ble High Court, however, opined that in view of publication of Rules of 2016, it has no jurisdiction to entertain such an application further holding that such jurisdiction has now been vested in the NCLT by the Rules of 2016 read with relevant provisions of the Companies Act, 2013 and allowed the applicant to withdraw the application before the High Court with liberty to file it before the appropriate authority. This is how, the present application has been before this Bench of NCLT for taking further necessary action on it in accordance with law.

12. The narration, stated above, requires me to conclude that Hon'ble High Court has allowed the withdrawal of the aforesaid application with liberty to file it before the appropriate authority on invoking the provisions in Rule 5 of the Rules of 2016 for disposal of the same in accordance with the prescriptions rendered in the Code of 2016. But then, Rule 5 deals with fresh petitions filed under section 433 (e) of the Act of 1956 which are pending before the High Court without copy thereof being served on the respondents therein.

13. It may be stated here that by the operation of law, the petitions so transferred to the Bench of NCLT by the High Court on invoking the provisions in Rule 5 of the Rules of 2016 shall be deemed to be the applications under sections 7, 8 or 9 of the Code, as the case may be, and thereafter, such applications are required to be dealt with in accordance with the prescription in Chapter II and Chapter III of the Part-II of the Code of 2016.

14. It deserves a mention here that the corporate debtors involved in such proceedings may be put in liquidation in appropriate cases as well. However, such prescriptions in Chapter II and Chapter III of Part II of the Code of 2016 cannot be made applicable to the application under consideration inasmuch as the company aforesaid has already been in liquidation following the winding up order rendered on it by the Hon'ble High Court vide order dated 06.06.2012 in CP No 08/2010.

15. One may notice here that Section 279 of the Act of 2013 which corresponds to Section 446 of the Act of 1956 has conferred on the Tribunal, constituted under Section 408 thereof, to grant leave to institute suit or other legal proceedings against the company in liquidation. For ready reference, section 279 of the Act of 2013 is also reproduced below: -

"Sec. 279. Stay of suit, etc, on winding up order. ---- (1) When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose.

Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

(2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court".

16. But then, in view of Rule 6 of Rules, 2016, provisions in Section 279 can be invoked only when a company is wound up on the ground specified in clause (a) *{(if the company has, by special resolution, resolved that company be wound up by the Tribunal)}* and clause (f) *{(if the Tribunal is of the opinion that it is just and equitable that the company should be wound up)}* of Section 433 of the Companies Act of 1956 which corresponds to **clause (b)** and **clause (g)** of section 271 of the Act of 2013.

17. However, the application in hand, not being an application either under **clause (b)** or under **clause (g)** of Section 271, perhaps cannot be dealt with in accordance with aforesaid provisions of law. Perhaps, the application in hand, may be dealt with in accordance with the prescription of section 446 of the Act of 1956.

18. In view of the foregoing reasons, I seek indulgence of Hon'ble High Court to lay the matter before the Hon'ble Gauhati High Court seeking further guidance over it.

19. Registry of this bench shall send a copy of this order along with the records forthwith to the Registry of the Hon'ble Gauhati High Court for placing the same before the Hon'ble High Court for doing further needful.



Member (Judicial)
National Company Law Tribunal
Guwahati Bench: Guwahati.

Samir/