

ATTENDANCE-CUM-ORDER SHEET OF HEARING

NATIONAL COMPANY LAW TRIBUNAL GUWAHATI BENCH

TP No. 01/433/GB/2017
(CP No. 8 of 2015)

Madhusudan Mandal - Petitioner

-Versus-

Apposite Benefit Society Ltd. - Respondent

PRESENT

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

Date of Order 09.05.2017

Name of the Company	
Under Section	433/434 and 439 of the Companies Act, 1956

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

ORDER

This application has a hackneyed past. It may be stated here that the petitioner herein had filed an application under Sections 433/434 and 439 of the Companies Act, 1956 against the Apposite Benefit Society Ltd. (in short , the company) before Hon'ble Gauhati High Court seeking certain reliefs, so mentioned in the petition. The Company Petition No. 08 of 2015 was registered on the basis of such petition. In the aforesaid proceeding certain reliefs were sought for. They are as follows: -

"Your petitioner, therefore, humbly prays your Lordships for an order that-

(a) The above named company, namely, Apposite Benefit Society Limited, having its Registered Office at Azara, Borali Park, P.O. Azara, Pin 781017, District Kamrup

(Rural) Assam, be wound up by this Hon'ble Court under the provisions of the Companies Act, 1956; and

(b) The Official Liquidator attached to this Hon'ble Court be appointed and be directed to take possession of the assets properties, books, records, papers etc of the said Apposite Beneit Society Limited and liquidate the dues of the petitioner immediately; and

(c) Costs and/or incidental to this application be paid by the Official Liquidator from the assets of the said company; and

(d) Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Court may seem fit and proper".

2. On receipt of the proceeding, notice was ordered to be sent to the aforesaid company. However, during the pendency of said proceeding, to be precise, on 7th December, 2016, the Companies (Transfer of Pending Proceedings) Rules, 2016 (in short, the Rules of 2016) came to be notified. As required under Rule 5 of Rules, 2016, said proceeding was transferred to this Tribunal.

3. Since the present proceeding has a chequered history, I find it necessary to reproduce some of the orders, passed in this proceeding to acquaint oneself with the back ground of the present proceeding. In that connection, I find it necessary to reproduce the order dated 15th March, 2017 passed by this Tribunal. For ready reference, same is reproduced below:

"Vide Registrar's note dated 10.03.2017, record is put up before me today. The Registrar's note dated 10.03.2017 is reproduced below:

"Through Letter No.HC.XIV/141/R.O.S. dated 8/3/2017, the Registry of Hon'ble Guwahati High Court has transferred the records pertaining to CP No.08/2015, to this Bench as per Hon'ble Gauhati High Court order dated 22/02/2017.

The case records pertain to the case of Madhusudan Mandal versus Apposite Benefit Society and is a petition under section 433 of the Companies Act, 1956 on the grounds of inability to pay debts.

As per clause 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, such petitions shall be treated as applications under section 7, 8 or 9 of the Insolvency and Bankruptcy Code, as the case may be and dealt with in accordance with Part II of the Code.

But the proviso to the section also provides as follow:

*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 section 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the **Tribunal within a period of sixty days** from the date of this notification, failing which the petition shall abate.*

Hon'ble Gauhati High Court while ordering the transfer of records vide order dated 22/02/2017 has not given any instruction on the admission of the petition in light of provisions contained in the proviso above. The period of sixty days from the date of notification was 5th February 2017.

In view of the above, the case records are put up for perusal of Hon'ble Member (Judicial), along with request for necessary instructions for admitting the petition."

2. Facts leading to this order, in short, are as follows:

One, Madhusudan Mandal, as petitioner has filed C.P.No.08/2015 under Sections 433, 434 & 439 of the Companies Act, 1956 against respondent company namely Apposite Benefit Society Ltd. having its registered office at Azara, Borali Park, P.O. Azara, District Kamrup, Assam, Pin-781017, alleging that the petitioner has deposited in the respondent Bank an amount to the tune of Rs.5,00,000/- as a term loan for 400 days and in that connection, a certificate vide Certificate No.01150505002 dated 13.02.2014 has been issued. It has been stated that the maturity value of such fixed deposit would be Rs.5,75,000/- The amount aforesaid got matured on 30.03.2015. However, the company did not pay the maturity amount as agreed upon earlier for which the petitioner has approached the respondent company on several occasion, but without any success.

3. Having found no other way out, the petitioner filed C.P.No.08/2015 seeking following reliefs:

- "a) The above named Company, namely, Apposite Benefit Society Limited, having its Registered Office at Azara, Borali Park, P.O. Azara, PIN-781017, District- Kamrup (Rural), Assam, be wound up by this Hon'ble Court under the provisions of the Companies Act, 1956; and
- b) The Official Liquidator attached to this Hon'ble Court be appointed and be directed to take possession of the assets properties, books, records, papers etc. of the said Apposite Benefit Society Limited and liquidate the dues of the Petitioner immediately; and
- c) Costs and/or incidental to his application be paid by the Official Liquidator from the assets of the said Company; and
- d) Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Court may deem fit and proper."

4. The Hon'ble High Court, on receipt of the application, ordered issuance of notice upon the respondent Company to show cause as to why the application for winding up should not be allowed. The notice was ordered to be sent by registered post vide order dated 14.08.2015 in C.P.No.08/2015. However, notice could not be served in the normal way upon the respondents for which Hon'ble High Court ordered publication of notice upon the respondents through two newspapers, one in English and one in Bengali vide order dated 23.05.2016.

5. The direction rendered vide order dated 23.05.2016 was complied with for which Hon'ble High Court, by its order dated

31.08.2016 held that respondents were served with notice. For ready reference, the order dated 31.08.2016 is reproduced below:

"Heard Mr SS Roy, learned counsel for the petitioner.

Perused the affidavit dated 1.8.2016. By that affidavit, the petitioner has submitted two newspapers, namely, the 'Telegraph' dated 15.7.2016 and 'Dainik Jugasanka' dated 28.7.2016.

In both these newspapers, notice has been published against the Apposite Benefit Society Ltd. In the present company petition, service of notice on the sole respondent is accordingly accepted.

Let the matter be listed for further orders after 4 (four) weeks."

6. While the matter was pending before the Hon'ble High Court, the Notification dated 07.12.2016 viz. Companies (Transfer of Pending Proceedings) Rules, 2016 (for short, 'Rules of 2016') was notified and in view of Rule 5 thereof, which requires that all petitions relating to winding up under clause (e) of section 433 of the Act of 1956 (for short, '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 for doing further needful in accordance with the requirements of Insolvency & Bankruptcy Code, 2016. For ready reference, the provisions of Rule 5 are reproduced 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."

7. The Hon'ble High Court, in view of provisions of Rule 5 of the Rules of 2016, had opined that service of notice on the respondents by way of paper publication is not service as contemplated in Rule 5 of the Rules of 2016 and, therefore, Hon'ble High Court, vide order dated 22.02.2017, directed said proceedings to be transferred to this Bench of National Company Law Tribunal for doing the needful in accordance with law. For ready reference, the relevant part of the order of the Hon'ble High Court is reproduced below:

"The only issue arising in this proceeding at this stage is whether service of notice without being accompanied by a copy of the petition would amount to compliance of Rule 26, so as to prevent Rule 5 of the Rules of 2016 to come into operation. The recent decision of the Bombay High Court in the case of West Hills Realty Private Ltd. Vs. Neelkamal Tower Pvt. Ltd. [Company petition No.331/2016] is precisely on this point. In the said decision, it has been categorically held that service of a copy of the petition upon the named respondent would be necessary for completing the process indicated in Rule 26 of the Company (Court) Rules, 1959 and, therefore, mere service of notice without the accompanying petition would not amount to compliance of Rules 26. I am in respectful agreement with the aforesaid view expressed by the learned Single Judge of the Bombay High Court.

The decisions of the Supreme Court relied upon by Mr Dasgupta are all on the point of proof of service of notice but in the present case we are concerned with proof of "service of petition" upon the respondent in compliance with Rule 26 of the Company (Court) Rules, 1959. As such, the decisions relied upon by Mr Dasgupta would be of no assistance to him.

For the reasons stated hereinabove, this court is left with no option but to direct that this winding up petition be transferred to the Guwahati Bench of the Company Law Tribunal NCLT) in accordance with Rule 5 of the Rules of 2016.

Registry to take steps in the matter accordingly.

Upon such transfer, the learned Company Law Tribunal may cause fresh notice of the proceeding be issued to both parties after renumbering the petition."

8. In view of the above, as required under the order aforesaid, Registry is directed to take steps in the matter of service of notice to both the parties after renumbering the petition in this Bench."

4. In view of the order dated 15.03.2017, notice was ordered to be served on both the parties. In response to the notice, issued from this Tribunal, the petitioner appeared before the Tribunal through his counsel, Mr. N.Dasgupta and Mr. S.S.Roy. The learned counsel appearing for the petitioner submits that this proceeding was originally filed U/s 433/434 and 439 of the Companies Act, 1956 (in short, the Act of 1956) before the Hon'ble High Court and therefore, in view of the law laid down in Section 434(c) of the Companies Act, 2013, this Tribunal needs to deal with the present proceeding from the stage before the transfer of the proceeding to this Tribunal.

5. In doing so, as required U/s Section 434(c) of the Companies Act, 2013, it needs to follow the prescription of law, so given in chapter II of part VII of Companies Act, 1956, dealing with the matters pertaining to winding up the companies--- and certainly ----not in accordance with the prescription of Rule 5 of the notification dated 7th December, 2016 which, however, amongst other things, says that the present petition needs to be treated as petition U/s 7 of the Code of 2016 and therefore, it needs to be dealt with in accordance with

prescription of such a Rule. That being so, Rule 5 of the said notification is retrospective in operation in so far matters covered by such Rule is concerned.

6. According to Mr. Dasgupta, the Notification dated 7th December, under which the present proceeding along with many other proceedings were transferred to this Tribunal, is an executive order/fiat. It is a settled law that executive order or notification cannot override the provisions of law or the Rules framed thereunder. That being so, notification dated 7.12.2016 cannot replace the relevant provisions in the Act of 1956 dealing with winding up the company or for that matter, corresponding provisions in the Act of 2013 or the National Company Law Tribunal Rules, 2016 (in short, NCLT Rules of 2016). In that connection, reliance has been placed on the following decisions: -

- 1 *AIR 2001 SC 1769 in the case of Dr. Rajinder Singh Vs The State of Punjab and Ors.*
- 2 *(2000) 4 GLR 326 in the case of Kshetrimayum Jitendra Singh Vs State of Manipur and others.*

7. It has further been submitted that neither the Companies Act, 2013 nor the NCLT Rules of 2016 speaks anything about the retrospective operation of aforesaid Act and Rules. In that connection, it has been stated that when an Act or Rules, framed thereunder, do not speak anything about their retrospective operation, it needs to be concluded that such Act/Rules are prospective in operation.

8. In support of such contention, my attention has been drawn to the decision of Hon'ble Apex Court in the case of *Monnet Ispat and Energy Ltd Vs Union of India (UOI) and ors., reported in 2012 (6) Scale 650* wherein it was held that when an Act or the Rules, framed there under, are silent vis-à-vis its operation, it needs to be concluded that such Act or Rules are prospective in operation. In view of above, there cannot be any escape from the conclusion that the Companies Act, 2013 or for that matter NCLT Rules, 2016 are prospective in operation and therefore, proceeding in hand is required to be dealt with in accordance with the prescription rendered in chapter II of part VII of Companies Act, 1956.

9. Now, let me see, how far such arguments are found tenable in law. Before addressing the contentions, raised by Mr. Dasgupta, learned counsel for the petitioner, one may look into the notification dated 7th December, 2016 issued by Ministry of Corporate Affairs. For ready reference, the notification is reproduced below:

“MINISTRY OF CORPORATE AFFAIRS
Notification
New Delhi, the 7th December, 2016
Companies (Transfer of Pending Proceedings) Rules, 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.

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.

[F. No. 1/5/2016- CL-V]
AMARDEEP SINGH BHATIA, Jt. Secy

10. In order to appreciate the present problem, I also find it necessary to have a look at the Section 434(2) and 469 (1) of the Companies Act, 2013. For ready reference, the aforesaid provisions of law are also reproduced below:

"Section 434(2) – The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the court, to the Tribunal under this section".

"Section 469(1) - The Central Government may, by notification, make rules for carrying out the provisions of this Act.

11. Thus, while Section 434(2) of the Companies Act, 2013 has empowered the Central Government to make Rules consistent with the provisions of the Act to ensure timely transfer of all matters/ proceedings or cases which are referred to in Section 434(1) and which are pending before the CLB or the Court to the Tribunal, Section 469(1) requires the Central Government to make Rules for carrying out the provisions of the Act by way of notification. Similar power was granted on the Central Govt. U/s. 239 of the Insolvency & Bankruptcy Code, 2016 (in short, Code of 2016).


12. On a perusal of notification dated 7th December, 2016, it is found well apparent that said notification has been issued by the Central Govt. in exercise of the powers, conferred on it U/s 434 (1) and (2) of the Act of 2013 read with sub-section (1) of Section 239(1) of the Code of 2016. More importantly, under such notification, a body of Rules under caption "Companies (Transfer of Pending Proceedings) Rules, 2016" was notified and same was done for carrying out the aforesaid provisions of laws. That being the position, there cannot be any doubt that notification dated 07.12.2017 is not an executive order/fiat. Rather, it is a sub-ordinate legislation, framed by Central Govt. in exercise of Rule making power conferred on it by the Act/Code aforesaid.

13. It may be stated here that the Act of 2013 and the NCLT Rules, 2016 do not say anything as to whether they are prospective or retrospective in operation. Therefore, they are definitely prospective in operation. But then, the petition under consideration is governed---not by NCLT Rules, 2016---but--- by Companies (*Transfer of Pending Proceedings*) Rules, 2016. Rule 5 of said Rules, in so far matters, covered by such Rule are concerned, is retrospective in operation.

14. It is because of the fact that Rule 5 of the above Rules unambiguously says that all petitions relating to winding up under Clause (e) of Section 433 of the Act of 1956 which are pending before the High Court on the date of notification and where petition has not been served on the respondent as required under the Rule of 26 of the Companies (Code) 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:

15. Being so, I have no hesitation in holding that Rule 5 of the Rules of 2016 is retrospective in operation and therefore, such a Rule shall apply to all the petitions covered by it which include the present petition as well. In the face of such revelation, there cannot be any escape from the conclusion that this proceeding will be governed by Rule 5 of the Rules of 2016 ---and ---not by chapter II of part VII of Companies Act, 1956.

16. In view of above, it is directed that the petitioner shall submit all information other than information forming part of the records, transferred, in accordance with the Rule 7 of the Code of 2016 including details of proposed insolvency professional to this Tribunal within 6(six) months from the date of receipt of the above petition from the High Court, failing which, this proceeding shall abate.


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

samir