

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH
C.P. NO.1201/ I&BP/NCLT/MB/MAH/2017

Under Section 7 of IBC, 2016

In the matter of

Innoventive Industries Ltd. Petitioner

vs.

Kumar Motors Pvt. Ltd Respondent.

Order delivered on 27.7.2017

Coram: Hon'ble B.S.V. Prakash Kumar, Member (J)
Hon'ble V. Nallasenapathy, Member (T)

For the Petitioner: Mr. Amit Tamhankar, Advocate assisted by Mr. Pankaj Dhame, Practising Company Secretary and Ms. Sadhana Tamhankar, Company Secretary.

For the Respondent: Mr. Kersi Dastoor, i/b Phoenix Legal

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

ORDER

It is a Company Petition filed u/s 7 of the Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor on the ground that this Corporate Debtor defaulted in making repayment of ₹24,06,52,849.50 along with interest, hence the Financial Creditor moved this application for initiation of Insolvency Resolution Process against the Corporate Debtor.

Brief facts of the case:

2. The Corporate Debtor borrowed ₹8,70,03,374 on various dates ₹3.00crores through RTGS on 8.9.2011, ₹5.00crores by way of cheque on 25.10.2011, ₹20.00 lakhs through RTGS on 7.4.2012, ₹50 lakhs through a cheque bearing no.558847 on 5.5.2012 and ₹3,374 through Bank transfer on 9.9.2012.

3. The Petitioner has claimed an amount of ₹24,06,52,849.50 as on 15.6.2017 for the Corporate Debtor having defaulted in making payment on 1.5.2013 with a further additional point saying that the Corporate Debtor defaulted on 4.8.2015 when the Company petition under Section 433-434 of the Companies Act, 1956 was filed before Hon'ble High Court of Bombay.

4. In pursuance of the application moved by the Financial Creditor, the Corporate Debtor raised various objections saying,

1. this Company Petition is liable to be dismissed for this Petitioner has already initiated winding-up proceedings on the self same claim on 28.6.2013 and the same is still pending before Hon'ble High Court of Bombay, therefore, this Petitioner shall be estopped from seeking Insolvency Resolution Process on the very same cause of action,
2. that since last date of acknowledgement admittedly being 1.5.2013, the present claim is barred by limitation,
3. that it is liable to dismissed because Insolvency Resolution Process has already been initiated against this applicant in another insolvency case filed before this Bench itself, therefore, u/s 11(a) of the Code 2016, this petitioner is barred from initiating Insolvency Resolution Process,
4. that since Arbitration proceeding is already pending, on this reason alone, this Company petition is liable to be dismissed.

5. The Corporate Debtor Counsel submits that jural relation between the Petitioner and the Debtor is not that of Creditor and Debtor relationship, but of investor and the Company as per shareholder agreement between them, whereby this Petitioner should not have invoked jurisdiction under the Insolvency and Bankruptcy Code, 2016 however, the debtor Counsel, without prejudice to rights and contentions of the debtor, submits that this claim of ₹8,70,03,374 along with interest has been exaggerated to ₹24,06,52,849.50, even if assuming it is calculated on compound interest basis, then also it will not come to ₹24,06,52,849.50.

5. If you see these objections of the debtor, as to first objection is concerned, the applicant counsel submits that since Section 238 of the Code has over riding effect upon other laws, the Petitioner is entitled to initiate Insolvency Resolution Process against the Corporate Debtor notwithstanding the fact of pendency of winding up proceedings before Hon'ble High Court of Bombay between the same parties on the same subject matter.

6. Before going into overriding effect of Section 238 of this Code, it is relevant to look into section 255 of this Code and schedule thereto, thereafter notifications dated 7.12.2016 and 29.6.2017 issued by the Ministry of Corporate Affairs, which are as follows:

"255. The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule."

"THE ELEVENTH SCHEDULE

(See section 255)

AMENDMENTS TO THE COMPANIES ACT, 2013

(18 OF 2013)

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

(a)

(b)

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

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

(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 courts, to the Tribunal under this section."

7. So, by reading section 255 of the Code and schedule thereto, it is evident that the source for amendment for section 434 of Companies Act 2013 is from section 255 of this Code, therefore when it is evident that Section 434 is amended in such a way that High Courts, as prescribed by Central Government, can proceed with pending winding-up matters other than the winding-up matters transferred to NCLT, it has to be construed that the source for saving winding up proceedings pending before High Courts has come from section 255 of this Code.

8. Now let us see what notifications have come from the Ministry of Corporate Affairs in pursuance of the power come from 11th Schedule to the Code. Two notifications have come – one on 29.12.2016 and another on 15.7.2017, the text to the extent relevant has been taken out, which is as follows:

“MINISTRY OF CORPORATE AFFAIRS NOTIFICATION

New Delhi, the 7th December, 2016

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

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

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

.....

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)

6.

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. —*

[F. No. 1/5/2016– CL-V]

AMARDEEP SINGH BHATIA, Jt. Secy.”

9. By these Rules, the winding up case where notice has not been served upon other side alone are transferred to NCLT, remaining matters have been left to the jurisdiction of High Courts.

10. Soon thereafter, central government has issued another notification on 29th June 2017 substituting Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, which is as follows:

“MINISTRY OF CORPORATE AFFAIRS NOTIFICATION

New Delhi, the 29th June, 2017

G.S.R. 732(E).— *In exercise of the powers conferred under sub-sections (1) and (2) of section 434 of the Companies Act, 2013 (18 of 2013) read with sub-section (1) of section 239 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the Code), the Central Government hereby makes the following rules further to amend the Companies (Transfer of Pending Proceedings) Rules, 2016, namely:—*

1. *Short title and Commencement*

2.

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

“5. **Transfer of Pending proceedings of Winding up on the ground of inability to pay debts.**-(1) *All petitions relating to winding up of a company under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of*

Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

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

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

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."

(F.No.1/5/2016-CL-V)

AMARDEEP S. BHATIA Jt. Secy.

11. The essentials of this notification are:

1. - that all winding up cases pending before High Courts, where notice has not been served upon the Respondent under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to NCLT, wherein information required for admission 7, 8 or 9 of the Code has to be supplied on or before 15th day of July, 2017, failing which petitions stand abated with liberty to proceed under I & B Code.

2. - that there is a third proviso in these substituted Rules stating that where a winding petition not transferred from High Court to the Tribunal under this Rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act 1956 for winding up against the same Company pending as on 15th December 2016, such other petition shall not be transferred to NCLT, even if the petition has not been served on the Respondent.

12. The bottom line of entire literature is Section 255 of the Code, 11th schedule thereto and consequent notifications dated 7.12.2016 and 29.6.2017 r/w section 434 of the Companies Act 2013 and subsection (1) of Section 239 of The Insolvency and Bankruptcy Code have come into existence for transfer of proceedings from other forums to NCLT, in respect to transfer of winding up cases, two points have been clarified – one, the jurisdiction u/s 433 (e) of the Act 1956 in respect to the matters pending before High Courts is still in force, two, the source for saving the winding proceedings u/s 433 (e) and 434 of the Act 1956 has come from section 255 of the Code through 11th Schedule to the Code.

13. Now, it is also contextual to mention section 238 of the Code, which is as follows:

“238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

14. On reading of Section 238 of the Insolvency and Bankruptcy Code, 2016, it appears that **this overriding effect** will have **upon other law only** but not in respect to the law envisaged under Insolvency and Bankruptcy Code, 2016 and that overriding effect will only trigger into action when the other law is inconsistent with the provisions of Insolvency and Bankruptcy Code, 2016, otherwise not.

15. Since Section 255 of the Code through 11th Schedule has amended Section 434 of the Companies Act 2013 for transfer of winding up proceedings as prescribed by Central Government, the Central Government having notified Rules for transfer of winding up proceedings that where notice is given under Rule 26 of the Companies (Court) Rules, 1959, those winding-up cases shall remain before High Courts, thus today, by virtue of these transfer Rules, winding-up matters, where notice is given, have remained before High Courts to be tried under Companies Act 1956. It can't be tried u/s 271 (1) (a) (inability to pay debts) of Companies Act 2013, which is analogous to section 433 (e) (inability to pay debts) of the Companies Act 1956, because section 271 (1) (a) of

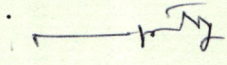
Companies Act 2013 has been deleted from section 271 of the Act 2013 in the same 11th Schedule to the Code. For High Courts have not been conferred with jurisdiction under I&B Code, those matters pending before High Courts will obviously be tried under the old Companies Act 1956 only. Since all these changes and transfers have taken place by virtue of amendment of Companies Act 2013 under section 255 of the Code, therefore it has to be construed that the amendments and consequences thereto the 11th Schedule are part of section 255 of The Insolvency and Bankruptcy Code. When a winding up proceedings before High Courts have remained alive because of section 255 of the Code and incidental provisions such as mentioned above, **it cannot be said now that the winding-up proceedings pending before High Courts under 433 (e) of the Act 1956 are proceedings under any other law.** Saving to the proceedings under 433 (e) of the Act 1956 pending before High Courts has come from Section 255 of the Code. When amendment to Companies Act 2013 under 11th Schedule of the Code is the scheme envisaged under this Code and "saving" as mentioned above is consequent to this amendment, then cause and effect in respect to these changes are automatically parts of this Code, not proceedings under any other law. That being so, the question of inconsistency, that triggers overriding effect, will not arise because this inconsistency is applicable to other laws, but not to itself. We have already given constructive interpretation saying winding proceedings still pending before High Courts have been saved by this Code. The reason, perhaps, for saving winding up proceedings before High Courts is giving notice under 434 of the Act 1956 to the respondents will arise only when Honourable High Court is of the view that the case is triable by it, if such conclusion is arrived at, the matter will be, nothing but para materia to second stage (liquidation) in I & B Code, and ultimate conclusion under both statutes is liquidation, if case under IB Code is not resolved at first stage, that is resolution stage. Therefore, we are of the view that Section 238 will not have any overriding effect over Section 433 (e) proceedings pending before the High Courts, where notice has already been served upon the Corporate Debtor.

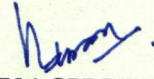
16. When it has been held that Section 238 will not have any overriding effect on the winding-up proceedings saved under the same Code, if any party comes before NCLT under Insolvency and Bankruptcy Code, 2016 on the very same

claim between the same parties already pending before the Hon'ble High Court, it will become nothing but forum shopping devised to frustrate the winding-up proceeding validly pending before other competent forum.

17. Since this petition has fallen on the first ground itself, we are of the view that this Bench is not warranted to deal with other points such as the point on limitation, the point on section 11 (a) of this Code, the point on arbitration proceeding pending, the point on jural relationship between the petitioner and the company. Therefore, we have not seen any merit in petitioner's endeavour to set this case against the winding up proceeding already pending between this petitioner and the corporate debtor before the Honourable High Court of Bombay.

18. Accordingly, this Company Petition is dismissed without costs.


V. NALLASENAPATHY
Member (Technical)


B.S.V. PRAKASH KUMAR
Member (Judicial)