

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

C.P. No. 1305/I&BP/2017

Under section 7 of the IBC, 2016

In the matter of
Superways Enterprises Pvt. Ltd.
.... Petitioner

v/s.

Topworth Steel & Power Pvt. Ltd.
....Corporate Debtor

Order delivered on 03.01.2018

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Ms. Shruti Sardesai a/w Mr. Neerav B.
Merchant i/b Thakordas & Madgavkar

For the Respondent: Mr. Mayur Khandeparkar a/w
Mr. Devesh Juvekar
Mr. Rishabh Jaisani

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

ORDER

Oral Order dictated in the open court on 04.12.2017

It is a Company Petition filed u/s 7 of the Insolvency and Bankruptcy Code by the Financial Creditor namely Superways Enterprises Pvt. Ltd. against the Corporate Debtor namely Topworth Steel & Power Pvt. Ltd. on the ground that the Corporate Debtor after availing an Inter-Corporate Deposit (ICD) facility for an amount of ₹10 crores, defaulted in making repayment, on the demand made by the Petitioner herein, hence this petition for initiation of Corporate Insolvency Resolution Process (CIRP) against this Corporate Debtor.

2. The case of the Petitioner is that the Petitioner disbursed ₹10 crores as Inter Corporate Deposit (ICD) to the Corporate Debtor on 25.01.2016 and when this creditor made a demand for repayment of those ICDs on 31.03.2017, it was mutually agreed by an oral agreement between the parties that the ICD amount of ₹10 crores was repayable by the Corporate Debtor to this creditor along with

interest @17% p.a. payable on monthly basis after deduction of TDS. As security against this aforesaid amount granted by the creditor, the Corporate Debtor had issued an undated cheque bearing No. 694455 dated 31.03.2017 for an amount of ₹10 crores drawn on Oriental Bank of Commerce, Mumbai, in favour of the Petitioner evidencing that the debt granted was repayable on demand. As this ICD was payable on demand, the Petitioner issued a letter dated 21.03.2017 to the Corporate Debtor informing that the undated cheque No. 694455 for an amount of ₹10 crores dated 31.03.2017 deposited for clearance and the same was returned on 03.04.2017 with remarks '*drawer's signature differs*', on which when the Petitioner issued a demand notice dated 28.04.2017 to the Corporate Debtor for repayment of ICD amount along with interest, the Corporate Debtor, without making any denial, replied that the amount has not become due as per the terms & conditions between them.

3. On the Letter sent by the Petitioner saying that their account shows debit balance of ₹11,72,78,518 as on 28.02.2017, the Corporate Debtor confirmed that the balance as per their books of accounts as on 28.02.2017 is only ₹10,28,08,492.

4. On the facts stated above, for there being argument on maintainability of the Company Petition, since duty is cast upon this Bench to look into as to whether or not this Company Petition filed u/s 7 of the Code deserves admission, when provisional Liquidator has already been appointed in the Company Petition 174/2015 pending before the Hon'ble High Court of Bombay against the same Corporate Debtor. The case of the Petitioner is, since it is an independent proceeding initiated against the Corporate Debtor notwithstanding the fact of Winding Up case filed by somebody else against the Corporate Debtor pending before Honourable High Court, the proceeding pending before High Court will not have any bearing upon this proceeding, whereby owing to the non-obstante clause u/s 238 of IBC, this Petition will lie before this Bench and this Bench is competent to adjudicate for passing admission order.

5. As against this argument, the Counsel appearing on behalf of the Corporate Debtor has cited a case decided by this Bench on **27.07.2017 in Innoventive Industries Ltd. v. Kumar Motor Pvt. Ltd.** and also Judgment of Hon'ble Justice Dhanuka in **Ashok Commercial Enterprises v. Parekh Aluminex Ltd. dated 11.04.2017 in CP 136/2014** to say that non-obstante clause provision u/s 238 will not have any overriding effect on the proceedings filed under some other law which is not inconsistent with the provision of this Court.

For the sake of reference, we quote para 63 from the Judgment of Hon'ble Justice Dhanuka of Bombay High Court in Ashok Commercial Enterprises v. Parekh Aluminex Ltd. dated 11.04.2017 in CP 136/2014, which is as follows:

"63. In my view, since there is no inconsistency in the provisions of the Insolvency and Bankruptcy Code, 2016 and the Companies Act, 2013 or Companies Act, 1956 in respect of the jurisdiction of the Company Court or of the NCLT in so far as winding up proceedings are concerned, reliance placed by Mr. Andhyarujina, the learned Counsel appearing for the Respondent on Section 238 of the Insolvency and Bankruptcy Code, 2016 is totally misplaced. The effect of non-obstante provision if any in Section 238 of the Insolvency and Bankruptcy Code, 2016 would have been significant only if there would have been conflict in aforesaid provisions and not otherwise. In my view, Mr. Sen, the learned Counsel appearing for the Petitioner is right in his submissions that Section 238 of the Code has no application in this situation on the ground that there is no conflict between the provisions of the Code and the provisions of the Companies Act, 1956 or the Companies Act, 2013."

The same point is decided by this Bench in Order dated 27.07.2017 in CP 1201/2017 in Innoventive Industries Ltd. v. Kumar Motors Pvt. Ltd. (para 7, 14, 15 & 16) which is as follows:

"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.

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 cannot 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 material 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."

6. By looking at the proposition laid by the Corporate Debtor counsel herein, it is evident that the winding up proceedings pending before High Court against the same Corporate Debtor will not be hit by non-obstante clause envisaged u/s 238 of the IB Code because

winding up proceeding pending before High Courts are being saved u/s 255 of this Code r/w 11 schedule of this Code, henceforth without making any further discussion, this Bench holds that this Company Petition is not maintainable because in the winding up proceeding pending before the Hon'ble High Court, provisional Liquidator has already been appointed, therefore, this Company Petition is liable to be **dismissed as not maintainable** without dealing with the merit of the case.

7. Therefore, for the reasons stated above, the Petition is **dismissed** with liberty to proceed in accordance with law.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

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