

HIGH COURT OF BOMBAY**Bench: Justice Abhay Ahuja****Date of Decision: 3rd May 2024**

ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION (L) NO. 25210 OF 2022
COMPANY PETITION NO. 317 OF 2012

OMKARA ASSETS RECONSTRUCTION**ICICI BANK LIMITED ...PETITIONER****VERSUS****CLASSIC DIAMONDS (INDIA) LIMITED ...RESPONDENT****Legislation:**

Section 434(1)© of the Companies Act, 2013

Sections 454, 468 of the Companies Act, 1956

Rule 130 of the Companies (Court) Rules, 1959

Rule 148 of the Companies (Court) Rules, 1959

Sections 53(1)(b) and 15(1)(c) read with Regulations 6(2)(c) and 12(1) of the Insolvency and Bankruptcy Code, 2016

Subject: Interim application seeking transfer of Company Petition No. 317 of 2012 to the National Company Law Tribunal (NCLT), Mumbai, pursuant to the fifth proviso to Section 434(1)© of the Companies Act, 2013.

Headnotes:

Corporate Law – Transfer of Winding-Up Proceedings – Application for transfer of winding-up petition to NCLT under Section 434(1)© of the Companies Act, 2013 – Official Liquidator had taken possession of the company’s registered office but had not invited any claims from creditors or workers – Supreme Court precedents (A. Navinchandra Steels, Kaledonia Jute & Fibres, and Action Ispat) emphasize discretion of Company Court to transfer proceedings to NCLT as long as no irreversible actions have been taken in the winding-up process – Bombay High Court exercises discretion to transfer petition to NCLT for efficient resolution under Insolvency and Bankruptcy Code, 2016. [Paras 1-14]

Transfer of Proceedings – Discretionary Power of Court - Held – Court may transfer winding-up proceedings to NCLT unless irreversible steps have been taken – Irreversibility determined by whether assets have been sold or significant actions preclude setting the process back – Present case does not reach such stage – Transfer ordered subject to deposit of Rs. 3 lakhs towards liquidation costs. [Para 8-11]

Decision: Company Petition No. 317 of 2012 transferred to NCLT, Mumbai, subject to Applicant depositing Rs. 3 lakhs with Official Liquidator for liquidation costs – Admission order dated 28th September 2017 recalled/revoked – NCLT to treat the petition as an application for Corporate Insolvency Resolution Process under IBC, 2016. [Para 10-13]

Referred Cases:

- Navinchandra Steels Private Limited v. SREI Equipment Finance Ltd. & Others, (2021) 2 SCC 1
- Kaledonia Jute & Fibres (P) Ltd. V. Axis Nirman & Industries Ltd., 2020 SCC OnLine SC 943
- Action Ispat and Power Private Limited v. Shyam Metalics and Energy Limited, (2021) 2 SCC 641

Representing Advocates:

Ms. Aneesa Cheema a/w Mr. Harsh Kesharia for Applicant

Mr. Arun Siwach (via Video Conferencing) a/w Ms. Priyanka Mitra and Mr. Karan Gandhi i/by Cyril Amarchand Mangaldas for Petitioner

Mr. Mutahhar Khan for Official Liquidator

Ms. Nikita Yadav, Assistant Official Liquidator, present in Court

ORAL JUDGMNT :

1. This Interim Application seeks an order of this Court to transfer the Company Petition No.317 of 2012 to the National Company Law Tribunal (the “NCLT”), Mumbai, pursuant to 5th proviso to Section 434(1)(c) of the Companies Act, 2013.

2. When the matter was listed on 21st July 2023, the Official Liquidator was directed to file his response. Thereafter, the Official Liquidator has filed his reply dated 12th September 2023 submitting that the Official Liquidator had issued statutory notices dated 2nd November 2017 to all concerned authorities and also issued notices under Sections 454, 468 of the Companies Act, 1956 and notice under Rule 130 of the Companies (Court) Rules 1959 (the “said Rules”) to all ex-directors of the company in liquidation. That, the Official Liquidator had fixed a meeting on 9th November 2017 with all the ex-directors for personal interview under Rule 130 of the said Rules and another meeting for discussion with all concerned parties regarding the disclosure of the details of the properties owned by the company in liquidation and to decide the modalities for taking possession of the movable and immovable assets along with books of accounts and records of the company in liquidation. However, only one ex-director came for the said meeting. It is submitted that in the said meeting, Mr.Kumar Bhansali (ex-director), Rushabh Thacker, Advocate for Kumar Bhansali and Dinesh Bhatia, Advocate for Edelweiss Asset Reconstruction Company Limited instructed by Manilal Kher Ambalal and Company, Shashwat Singh (senior manager) for Invent Assets Securitization and Reconstruction Private Limited, Mr.Manin Lalwani (Chartered Accountant) for ex-director, Mr.Suresh Choudhary of Canara bank were present. That, thereafter, on 6th November 2017, the Official Liquidator took possession of the registered office of the company, which Mr.Khan, learned Counsel for the Official Liquidator submits has been handed over to Edelweiss Asset Reconstruction Company Limited pursuant to order dated 23rd January 2018 passed in Company Application Lodging No. 606 of 2017.

3. Mr.Khan, learned Counsel for the Official Liquidator would submit that possession of the other properties referred to in the affidavit have already been taken over by Edelweiss Asset Reconstruction Company Limited, as a secured creditor, pursuant to Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) proceedings and that, at present, the Official Liquidator is not in possession of any of the properties of the company.

4. Mr.Khan would submit that the Official Liquidator has not invited any claims from the creditors or workers as per the requirement of Rule 148 of the said Rules. Mr.Khan refers to the affidavit in reply and submits that in view of the decision of the Hon'ble Supreme Court in the case of A. Navinchandra Steels Private Limited vs. SREI Equipment Finance Ltd. & Others¹ the power of this Court to transfer the petitions pending before it, even after an order of winding up under Section 434 of the Companies Act is a discretionary power and that this Court may exercise the same, if deemed appropriate, subject however, to the Applicant being directed to deposit liquidation expenses/cost of the Official Liquidator.

5. On 1st March 2024, when the matter was listed, the Counsel for the Petitioner in the winding up petition had expressed the Petitioner's no objection, to the proceedings being transferred to the NCLT, however, time was sought to file reply, which was granted.

6. Today, when the matter is called out, the reply dated 2nd May 2024 has been tendered across the bar on behalf of the Petitioner and Mr.Siwach, learned Counsel for the Petitioner, submits that since the Official Liquidator has not invited any claims from the creditors or workers of the company in liquidation, the transfer of proceedings to the NCLT would ensure speedier resolution of the corporate insolvency resolution process while also allowing for a more technical consideration of issues and that further proceedings before the NCLT allows for the creditors to be active and final determinants of how the insolvency resolution process would take place. Learned Counsel would submit that since the power to transfer is discretionary under Section 434 of the Companies Act, this Court may pass appropriate orders.

7. In the case of A. Navinchandra Steels Private Limited vs. SREI Equipment Finance Ltd. & Others (supra) the Hon'ble Supreme Court relying upon the decision in the case of Kaledonia Jute & Fibres (P) Ltd. vs. Axis Nirman & Industries Ltd.² and Action Ispat and Power Private Limited vs. Shyam Metalics and Energy Limited³ observed that even post admission of the winding up petition, and even after the Official Liquidator has become custodia legis and taken over the company's assets, but so long as no actual sales of the immovable or movable properties have taken place, nothing

¹Civil Appeal Nos.4230-4234 of 2020 decided on 1st March 2021

² (2021) 2 SCC 403

³ (2021 2 Supreme Court Cases 641

irreversible is done which would warrant a Company Court staying its hands on a transfer application and that it is only where the winding up proceedings have reached a stage where it would be irreversible making it impossible to set the clock back, that the Company Court must proceed with the winding up instead of transferring the proceedings to the NCLT. The Hon'ble Supreme Court has observed that as long as nothing irreversible is done which would warrant a Company Court staying its hand on a transfer application made to it by a creditor or any other party to the proceeding, the Company Court can go ahead and transfer the said proceedings to the NCLT. Paragraphs 23 and 24 of the decision in the case of A. Navinchandra Steels Private Limited vs. SREI Equipment Finance Ltd. & Others (supra) usefully quoted as under:

“23. In *Kaledonia Jute and Fibres Pvt. Ltd. v. Axis Nirman and Industries Ltd.*, 2020 SCC OnLine SC 943 [“Kaledonia”], this Court decided as to whether a winding up proceeding in the Company Court could be transferred despite the fact that the winding up order had been passed and then been kept in abeyance. This Court, in paragraph 25 held: (SCC p.413) “25. Apart from providing for the transfer of certain types of winding up proceedings by operation of law, Section 434(1)(c) also gives a choice to the parties to those proceedings to seek a transfer of such proceedings to the NCLT. This is under the fifth proviso to Clause (c).”

The Court then went on to hold that in a winding up proceeding that has been admitted, since all creditors would be parties to such proceeding in rem, a secured creditor being such a party could, therefore, move the Company Court under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 to transfer the aforesaid proceeding to the NCLT to be tried as a proceeding under Section 7 or Section 9, as the case may be.

24. In *Action Ispat & Power Pvt. Ltd. vs. Shyam, Metalics & Energy Ltd.*, (2021) 2 SCC 641, this Court was faced with a proceeding in which a winding up petition had been admitted by the High Court and then transferred to the NCLT to be tried as a proceeding under the IBC. After referring to the judgments in *Jaipur Metals* (supra), *Forech* (supra), and *Kaledonia* (supra), and after setting out various Sections dealing with winding up of companies under the Companies Act, 2013, this Court then held: (Action Ispat Case, SCC pp. 659 & 663-64, paras 14 and 25)

“14. What becomes clear upon a reading of the three judgments of this Court is the following:

14.1. So far as transfer of winding up proceedings is concerned, the Code began tentatively by leaving proceedings relating to winding up of companies to be transferred to NCLT at a stage as may be prescribed by the Central Government.

14.2 This was done by the Transfer Rules, 2016 [Companies (Transfer of Pending Proceedings) Rules, 2016] which came into force with effect from 15.12.2016. Rules 5 and 6 referred to three types of proceedings. Only those proceedings which are at the stage of pre-service of notice of the winding up petition stand compulsorily transferred to the NCLT.

14.3 The result therefore was that post notice and preadmission of winding up petitions, parallel proceedings would continue under both statutes, leading to a most unsatisfactory state of affairs. This led to the introduction of the 5th proviso to section 434(1)(c) which, as has been correctly pointed out in Kaledonia [Kaledonia Jute & Fibres Pvt. Ltd. v. Axis Nirman & Industries Ltd., 2020 SCC OnLine SC 943], is not restricted to any particular stage of a winding up proceeding.

14.4 Therefore, what follows as a matter of law is that even post admission of a winding up petition, and after the appointment of a Company Liquidator to take over the assets of a company sought to be wound up, discretion is vested in the Company Court to transfer such petition to the NCLT. The question that arises before us in this case is how is such discretion to be exercised?" xxx xxx xxx

25. Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding up petition even after it is admitted. Thus, in a winding up proceeding where the petition has not been served in terms of Rule 26 of the Companies (Court) Rules, 1959 at a pre-admission stage, given the beneficial result of the application of the Code, such winding up proceeding is compulsorily transferable to the NCLT to be resolved under the Code. Even post issue of notice and pre-admission, the same result would ensue. However, post admission of a winding up petition and after the assets of the company sought to be wound up become in custodia legis and are taken over by the Company Liquidator, section 290 of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and may even sell the company as a going concern. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is

done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding up proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that the Company Court must proceed with the winding up, instead of transferring the proceedings to the NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case.”

8. In view of 5th proviso to Section 434(1)(c), any party or parties to any proceedings relating to the winding up of company pending before any Court may file an application for transfer such proceedings and the Court may, by order, transfer such proceedings to the Tribunal which was then to be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016. It is observed from the affidavit filed on behalf of the Official Liquidator and the submissions made by the learned Counsel that the Official Liquidator had handed over possession of the registered office of the company, which was the only property of which the Official Liquidator had taken possession, to Edelweiss Asset Reconstruction Company Limited, pursuant to order dated 23rd January 2018 passed in Company Application Lodging No. 606 of 2017, and that, as on the date of this application, is not in possession of any of the properties of the company and the properties of the company are in possession of the Applicant-creditor, who, statedly, is an assignee of Edelweiss Asset Reconstruction Company Limited. That, no notice inviting claims of creditors/workers etc. under Rule 148 of the said Rules has been published. That, in the facts, no steps have been taken by the Official Liquidator which can be said to be irreversible, such that the winding up proceedings have to be proceeded with by this Court. It is only where the winding up proceedings have reached the stage where it would be irreversible, making it impossible to set the clock back, that the Company Court must proceed with the winding up instead of transferring the proceedings to NCLT to be decided in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. In the facts of this case, in my view, there is, therefore, no question of any such irreversible stage having reached. Moreover, as submitted by Mr.Siwach for the Petitioner in the winding up petition, that since the Official Liquidator has not invited any claims from the creditors or workers of the company in liquidation, the transfer

of proceedings to the NCLT would ensure speedier resolution of the corporate insolvency resolution process while also allowing for a more technical consideration of issues and that further proceedings before the NCLT allows for the creditors to be active and final determinants of how the insolvency resolution process would take place. This Court had also expressed apprehensions in respect of the claims of the workmen as the Official Liquidator had not invited any claims in respect of the creditors/workmen as per the requirement of Rule 148 of the said Rules. Mr.Khan for the Official Liquidator and Ms.Cheema for the Applicant have clarified that Section 53(1)(b) read with Section 15(1)(c) read with Regulations 6(2)(c) and 12(1) of the Insolvency and Bankruptcy Code, 2016 (the “IBC”) would take care of the same. Therefore, in my view, exercise of power under the 5th proviso to Section 434(1)(c) would be appropriate.

9. Mr.Khan has submitted that this Court keep in mind the liquidation expenses and costs of the Official Liquidator before passing any order.

10. Ergo, this Court is of the view that, subject to deposit of costs of Rs.3 lacs by the Applicant with the Official Liquidator towards liquidation costs/expenses, Company Petition No.317 of 2012 be transferred to the NCLT, Mumbai, having jurisdiction under the Insolvency and Bankruptcy Code, 2016, to be decided in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016.

11. Subject to deposit of costs of Rs.3 lakhs by the Applicant with the office of the Official Liquidator, within a period of four weeks, the Application is allowed in terms of prayer clause (a), which reads thus :

“(a) Pass an order transferring the present company petition no. 317 of 2012 to the Hon’ble National Company Law Tribunal, Mumbai having the jurisdiction to entertain the matter under Insolvency & Bankruptcy Code, 2016.”

12. Subject to the above, the order of admission dated 28th September 2017 is recalled/revoked.

13. The Company Petition shall be treated by the NCLT as an application for initiation of the Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016.

14. Till such time the NCLT, Mumbai initiates the Corporate Insolvency Resolution Process, the company/its directors shall not sell, alienate, encumber, part with possession or create any third party rights or interest in respect of any of the movable/immovable/fix assets of the company or the monies lying in the bank accounts of the company.

15. All concerned to act on an authenticated copy of this order.

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