* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 29.08.2019

% Judgment delivered on: 10.10.2019

\+ **Co. App 11/2019 & C.M. No. 31047/2019, C.M. No. 34726/2019**

ACTION ISPAT & POWER PVT. LTD ..... Appellant

Through: Ms. Maneesha Dhir, Ms. Varsha Banerjee, Mr. Kund Godhwani and Mr. Kunal Godwani, Advs.

versus

SHYAM METALICS & ENERGY LIMITED & ORS. .... Respondents

Through: Mr. Ramji Srinivasan, Sr. Adv. with Ms. Sylona Mohapatra, Mr. R.S. Lakshman, Mr. Sindhu T P, Mr. Ashwini Kumar Singh and Mr. P.V. Dinesh, Advs. for R-2 along with Mr. Kishan Lal, AGM, SBI.
Mr. Arjun Nanda and Ms. Shreya Nair, Advs. for Applicant in C.M. No. 34726/19.
Mr. J. Amol Anand and Mr. Ytharth Kumar, Advs. for UOI.
Mr. Ruchi Sindhwani, Sr. Standing Counsel, Ms. Megha Bharara, Mr. Deepak Anand and Mr. Ayushman, Advs. for Official Liquidator

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

VIPIN SANGHI, J.

1. The instant appeal has been preferred in the name, and on behalf of the appellant company, by Mr. Naresh Kumar Aggarwal, who claims himself to be the Managing Director of the said appellant company, to assail the order dated 14.01.2019 passed by the Ld. Company Judge in Application – C.A. No. 1240/2018, in Co. Pet. No. 731/2016. By the impugned order, the Ld. Company Judge allowed the said Application preferred by respondent No.2 – SBI, and directed transfer of the Company Petition to the National Company Law Tribunal (NCLT). The Learned Company Judge revoked the order dated 27.08.2018 admitting the winding up petition and appointing the Official Liquidator as the provisional Liquidator.

2. Shyam Metalics & Energy Ltd., Respondent No.1, filed the aforesaid winding up petition under Sections 433(e) and 433(f) of the Companies Act, 1956 before the Ld. Company Judge, on the ground of appellant's inability to pay its debts. On 22.08.2016, notice of the winding up petition was duly served on the appellant. However, no representation was made in its behalf. The matter was adjourned to 7.11.2016. Thereafter, attempts were made to settle the issue before the Delhi High Court Mediation and Conciliation Centre. However, on 26.02.2018, the failure of mediation was reported to the Ld. Company Judge.

3. On 27.08.2018, the winding up petition was admitted and Official Liquidator (hereinafter "OL") was appointed in respect of the appellant company and he was directed to take over all the assets, books of accounts and records of the appellant company forthwith. The relevant extract of this

Order reads as follows:

> *"5. In these circumstances,* ***the petition is admitted and the Official Liquidator attached to this Court is appointed as the Liquidator. He is directed to take over all the assets, books of accounts and records of the respondent-company forthwith****. The citations be published in the Delhi editions of the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing. The cost of publication is to be borne by the petitioner who shall deposit a sum Rs.75,000/- with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent-company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the respondent-company.*
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> *6. List on 09.01.2019."* (emphasis supplied)

4. Thus, the Ld. Company Judge directed the O.L. to secure the assets/ books of the appellant and to take a stock thereof. It also directed publication of the citation, to inform the creditors, contributories and all others concerned of their development. However, evidently because the winding up proceedings were still at an early stage, by the order dated 27.08.2018, the Ld. Company Judge did not direct liquidation of any of the assets of the appellant company.

5. During the pendency of the petition, but much before the passing of

the winding up order on 27.08.2018, the Insolvency and Bankruptcy Code (hereinafter referred as IBC) was notified on 01.12.2016. Respondent No. 2 (SBI) – a secured creditor of the appellant company made an application under Section 7 of IBC before NCLT, seeking Corporate Insolvency Resolution Process (CIRP) *vis-à-vis* the appellant company.

6. While the winding up proceedings were still at the nascent stage – as taken note of hereinabove, respondent No. 2 preferred Application No. 1240/2018 on or about 08.10.2018 before the Ld. Company Judge, seeking transfer of the winding up proceedings (in Co. Pet. 731/2016) to the NCLT. Additionally, Respondent No. 2 filed an impleadment application bearing No. 1241/2018 in the pending winding up petition. The application for transfer was opposed by the ex-management and by the Official Liquidator (OL) as well. The OL claimed that he had already sealed the registered office of the company at New Delhi and the factory premises at Orissa, and had incurred heavy expenditure in securing the factory premises.

7. The Ld. Company Judge vide the impugned order dated 14.01.2019 held that the power to transfer a petition to NCLT under Section 434(1)(c) of the Companies Act, 2013 is *'discretionary'* and *'has to be exercised in the facts and circumstances of the case so as to expeditiously deal with the proceedings/winding up'.* The court observed that liquidation was at the initial stage since after the appointment of the OL, the office and factory premises of appellant were sealed but further exercise was yet to be carried out. The court opined that such transfer was in the interest of justice, as well as in the interest of appellant company and the creditors involved. Hence, the order admitting the petition and appointing the OL was revoked. The Ld.

Company Judge ordered the transfer of the winding up proceedings to the NCLT.

Submissions:

8. Learned counsel for the appellant Ms. Maneesha Dhir submitted that vide order dated 27.08.2018, the Ld. Single Judge appointed the Official Liquidator as the Liquidator of the appellant company, and directed him to take over all the assets and books/ records of the appellant company. Hence, she submits that the Court had already passed the 'winding up order'. According to the appellant, the company stood wound up, and the company petition could not be transferred to the NCLT.

9. The submission of the appellant is that the winding up proceedings, necessarily, had to continue before the Ld. Company Judge and the Official Liquidator alone has jurisdiction to liquidate the assets of the appellant company and settle the claims of all the creditors and contributors.

10. Reliance has been placed by Ms. Dhir upon the judgment of the Supreme Court in the case of ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd***, Civil Appeal No. 818 of 2018 wherein, it had been observed that such proceedings, where only notice has been served, and which are pending in the High Courts can be transferred to NCLT. The relevant extract from this decision relied upon by the appellant reads as follows:

> *"17.....In accordance with this objective, the Rules kept being amended, until finally section 434 was itself substituted in 2018, in which a proviso was added by which* ***even in winding up***

> ***petitions where notice has been served and which are pending in the High Courts****, any person could apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the Adjudicating Authority and treated as an insolvency petition under the Code…"* (emphasis supplied)

11. Further, Ms. Dhir submits that consequent to the passing of the winding up order by the Ld. Company Judge under Section 433(e) of the Companies Act, 1956, no party has the right to seek transfer of proceedings, as, once a winding up order is passed, the creditors are required to approach the Liquidator and file their respective claims. Reliance is placed on ***Jaipur Metals & Electricals Employees Organisation v. Jaipur Metals & Electricals Ltd.*** Civil Appeal No. 12023 of 2018, wherein the Supreme Court held:

> *"However, this does not end the matter. It is clear that Respondent No.3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No.3 at any time* ***before a winding up order is passed*** *to apply under section 7 of the Code…"* (emphasis supplied)

12. Ms. Dhir also questions the power of the Ld. Company Judge to recall a winding up order.

13. Ms. Dhir has emphasized upon the distinction between a winding up order, and a dissolution order. After the dissolution order is passed under section 481 of the Act, 1956, the Company ceases to exist. She submits that the Supreme Court in ***Jaipur Metals*** (supra), consciously referred to the

stage of winding up, and not the stage of dissolution, while holding that such proceedings could not be transferred to the NCLT.

14. Ms. Dhir also raised objection to the transfer at the instance of Respondent No. 2 (SBI), who is not a party to the winding up proceedings. She submitted that the scope of proviso to Section 434 is restricted to 'parties' to the winding up proceedings. Thus, only a party to such proceedings, can seek the transfer of proceedings to NCLT**.**

15. Further, Ms. Dhir pointed out that no OL or Provisional Liquidator had been appointed in ***Forech India*** (supra) and ***Jaipur Metals*** (supra) by the Company Court. An OL was appointed in a writ petition filed by a worker's union, and not in the winding up petition. In the present case, the Ld. Company Judge had already appointed the OL, following which the assets and books of account of the appellant were seized by the OL. Therefore, transfer of the winding up proceedings to the NCLT at this stage would be impermissible.

16. Submissions have been made on behalf of the OL to support the appellant. Learned counsel submits that in ***Forech India*** (supra) and ***Jaipur Metals*** (supra), no appointment of Liquidators were made, in contrast to the instant case wherein, the OL is in possession of the registered office of the appellant company, the factory premises and all its records/books of account as well. The winding up order is a proceeding *in rem*, and all creditors are entitled to file their claim before the Liquidator. Transfer at this stage would derail the winding up and dissolution proceedings. Therefore, reliance on these cases by Respondent No. 2 (SBI) is misplaced, since these cases are

distinguishable on facts.

17. Emphasis was placed on the word *'may'* used in the amended section 434 of the Companies Act whereby, the court '*may transfer*' such proceedings when an application in this regard is made by reference to proviso to Section 434; and the expression '*at any time before a winding up order is passed*. Reliance was also placed upon ***Jotun India Pvt. Ltd. v. PSL Ltd***., (2019) 150 CLA 117, where the court held as under:

> *"We are of the view that allowing both the forums i.e. Company Court and the NCLT to go ahead with the liquidation proceedings/winding up proceedings simultaneously would not serve any purpose. There is likelihood of creation of confusion and complexity. To harmonize this likely situation, we observe that* ***the Company Judge, in saved petitions, would exercise jurisdiction in case revival efforts by NCLT fails****."*
>
> (emphasis supplied)

18. Ld. counsel submitted that the Companies (Transfer of Pending Proceeding) Rules, 2016 have been framed by virtue of the Rule making power conferred under Section 239 of IBC, 2016. These Rules are an integral part of Companies Act, 2013, and IBC 2016. Therefore, the non-obstante clause contained in Section 238 of the IBC is not applicable to these Rules. It was further submitted that the legislative intent was to harmonize the Companies Act and IBC.

19. Per contra, Ld. Senior Counsel for the Respondent No.2 SBI submitted that the transfer was fully in compliance with the provisions of law, and the Ld. Company Judge had rightly transferred the matter to NCLT, Delhi in view of the IBC, that paves the way for corporate insolvency

resolution process; resolution of the debts, and; revival of the corporate debtor.

20. Mr. Srinivasan submits that the object of IBC was aimed towards the protection of interests of the creditors; the corporate debtor, and, to maximize the value of the assets of the corporate debtor. Hence, proceedings before the NCLT for initiation of corporate insolvency resolution process under IBC seek to resolve the debts of the Company and are also aimed at its revival.

21. Mr. Srinivasan placed reliance upon the ***Jaipur Metals*** (supra), wherein, while discussing the issue of transfer of the winding up proceedings under Section 434 of the Companies Act, 1956 and Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016, the Court held that, "*a proceeding under section 7 of IBC is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court".* It was further held that*, "it was open for the Respondent No.3 at any time before a winding up order is passed to apply under section 7 of the Code.*" Hence, it was clear that unless a final winding up order i.e. an order for dissolution of the company was passed, there was no bar against the proceedings under section 7 of the IBC.

22. Mr. Srinivasan submitted that vide order dated 27.08.2018 the Learned Co. Judge merely "admitted" the winding up petition, but did not pass a liquidation order. The Liquidator was given only the limited mandate to take over all the assets, book of accounts and records of the Company, to publish citations in newspapers, to prepare a complete inventory of all the

assets of the Company, to conduct valuation of the Company and to take steps to protect the premises and assets of the company. Hence, it could be said that no liquidation proceedings had commenced, and the winding up of the company had not been achieved.

23. In order to proceed with the matter, we must take note of the changes brought about by the recent amendments to Company Law and IBC (Code).

24. Section 255 of IBC reads as under:

> *"255. Amendments of Act 18 of 2013.- The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule."*

25. In pursuance of Section 255, the Eleventh Schedule to the Code made various amendments to the Companies Act, 2013 on 15.11.2016, with effect from 01.12.2016. Section 434 of the Companies Act, 2013 was substituted. The same, after further amendment, on and from 17.08.2018, insofar as it is relevant, reads as under:-

> ***"434. Transfer of certain pending proceedings.-*** *(1) On such date as may be notified by the Central Government in this behalf,—*
>
> ***(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.

Provided further that only such proceedings relating to cases other than winding up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:

Provided also that—

(i) all proceedings under the Companies Act,1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts; shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.

Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of Section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.

Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment)Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(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."

26. Rule 5 of the Companies (Transfer of Pending Proceedings) Rules as amended reads as follows:

"(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." (emphasis supplied**)**

Reasons and Conclusion

27. At the outset, we may observe that the *locus standi* of the appellant – who is masquerading himself as the company under winding up, but is, in fact, the erstwhile management of the said company is itself in doubt in relation to the issue of transfer of the winding up proceedings to the NCLT, particularly, when the same is juxtapositioned with the *locus standi* of the respondent No. 2 – State Bank of India – a secured creditor of the appellant company. Since the winding up order had been passed by the learned Company Judge, which would lead to the process of liquidation and dissolution of the appellant company, it was the creditors – more particularly the secured creditors of the appellant company, who had the prerogative of calling the shots, insofar it concerns the manner in which the process of liquidation and/ or revival of the appellant company should be undertaken. The stake of the creditors – more particularly the secured creditors of the appellant company, is much higher and it is their claims which would have to be first met, before turning to the ex-management. More often than not, it is the ex-management of the company under winding up/ liquidation which is responsible for the state of affairs that the company finds itself in. Thus, in our view, when the plea of a creditor – particularly the secured creditor, to transfer the proceedings to the NCLT from the Company Court is pitted against the plea of the ex-management not to do so, unless very strong reasons for accepting the plea of the ex-management are brought forth –

such as a clear statutory bar, the Company Court would lean in favour of transferring the winding up proceedings pending before it to the NCLT. This is also for the reason that the scope of the proceedings before the Company Court after admission of the winding up petition is uni-directional inasmuch, as, the liquidator acts with the mandate of liquidating the assets of the company with a view to satisfy the claims of the secured and other creditors. On the other hand, the NCLT is a specialized body which looks to revive the company, if feasible, and only if the revival of the company is not feasible, proceeds to take steps to wind it up. Even in this respect, the option exercised by the creditor/ secured creditor deserves to be respected, unless there is a clear legal impediment in acceding to the request for transfer of the winding up proceedings to the NCLT from the Company Court.

28. At this stage, we may undertake an analysis of the statutory scheme – which is found in Section 434 of the Companies Act, 2013 read with Rule 5 of the Companies (Transfer of Pending Proceedings) Rules.

29. Section 434(1)(c), inter alia, provides that all proceedings under the Companies Act, 1956 including proceedings relating to winding up of companies, pending before any District Court or the High Court "*shall stand transferred to the Tribunal ... ...*". The first proviso stipulates that only such proceedings relating to winding up of the companies shall be transferred, which may be at the stage as may be prescribed by the Central Government. The third proviso, inter alia, provides that proceedings relating to winding up of companies which have not been transferred from High Court to the Tribunal (NCLT), shall be dealt with in accordance with the provisions of

the Companies Act, 1956 and the Companies (Court) Rules, 1959. The fifth proviso enables any party or parties to proceedings relating to winding up of companies pending before any Court before commencement of the Code, to file an application for transfer of such proceedings, and the Court "*may*" transfer such proceedings to the Tribunal. Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, which is referable to the first proviso to Section 434(1)(c), states that a petition for winding up on the ground of inability to pay debts, which has not been served on the respondent under Rule 26 of the Company (Court) Rules 1959, "*shall be transferred to the Bench of the Tribunal… … … … …*". Conjoint reading of Section 434(1)(c) and Rule 5(1) of the Companies (Transfer of Pending Proceedings) Rules shows that petitions for winding up filed on grounds of inability to pay debts (i.e. under clause (e) of Section 433 of the Companies Act) are bound to be transferred by the Company Court to the NCLT, provided the condition stipulated in clause (1) of Rule 5 of the Companies (Transfer of Pending Proceedings) Rules are satisfied, i.e. in cases where the petition has not been served on the respondent company, i.e. the company of which the winding up is sought under Rule 26 of the Companies (Code) Rules 1959. In such circumstances, the Company Court has no discretion in the matter.

30. But that is not the only category of cases in which the transfer of the winding up petition "*may*" be ordered by the Learned Company Judge. The fifth proviso to Section 434(1)(c) shows that the transfer of winding up proceedings to the Tribunal is not restricted only to the situation provided for in Rule 5(1) of the aforesaid Rules. Transfer of the pending winding up

proceedings (on whichever ground preferred), could be sought by any party or parties to the proceedings. This itself shows that even the respondent in the winding up proceedings – which necessarily would include the company under winding up itself, could move an application for transfer of such proceedings, and if such an application is moved, "*the Court may by order transfer such proceedings to the Tribunal ... ...*". Thus, even after service of notice on the respondent/ company in respect of whom the winding up proceedings are filed, an application for transfer is maintainable and the Court "*may*" transfer the proceedings to the Tribunal, i.e. the NCLT. Thus, the jurisdiction vested in the Company Court to order transfer of the proceedings to the Tribunal is discretionary and not limited to cases squarely covered by Rule 5 of the aforesaid Rules.

31. In ***Rajni Anand v. Cosmic Structures Ltd***, 2018 SCCOnline Del 12107, this Court held that the power of the Court to order transfer of the winding up proceedings to the NCLT is discretionary in nature. This decision of the learned Single Judge was affirmed by the Division Bench in ***Shree Shyam Pulp & Board Mills (In Liquidation) v. Tata Capital Financial Services Ltd.***, 2018 SCC Online Del 12777, wherein the Division Bench held that it was in the best interest of all the creditors that has to be looked at while deciding on the aspect of the transfer of the winding up proceedings to the NCLT.

32. IBC is a special code, that overrides other laws, including the Companies Act, by virtue of its *non-obstante clause* employed in Section 238, which reads as follows:

> *"**238. Provisions of this Code to override other laws.**—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.*

33. In ***Jotun*** (supra), decided by the Bombay High Court, which has been affirmed by the Supreme Court in ***Forech India*** (supra), the Bombay High Court held that the IBC is a special statute *vis a vis* the Companies Act, 1956, and even if the two statues are held to be special statues in the field that they operate in, IBC is a later enactment, and keeping in view the statement and objects and the purpose for which it was enacted, the provisions relating to revival/ resolution of the company – incorporated in Chapter II, would have to be given primacy over the provisions of winding up, contained in the Companies Act. In ***Jotun*** (supra), the Bombay High Court held as follows:

> *"35. The general legal principles of interpretation of statute state that the general law should yield to the special law.* ***In the context of the present statute i.e. IBC 2016, we are of the view that the Companies Act 1956 could be treated as general law and IBC, 2016 to be a special statute to the extent of the provisions relating to revival or resolution of the company as per provision under Chapter II of the IBC. Even if the Companies Act and the IBC 2016 are considered as special statutes operating in their respective field, we are of the view that the IBC 2016 being later enactment and in view of the statement and objects and the purpose for which it was enacted, the provisions relating to revival/resolution of the company incorporated under Chapter II will have to be given primacy over the provisions of the winding up proceeding pending before the Company Courts which are referred as saved petitions.****"*** (emphasis supplied)

34. The object behind introduction of IBC, as well as its special status has been elaborated upon in paragraph 17 of **Forech India** (supra) as follows:

> *"17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally section 434 was itself substituted in 2018, in which a proviso was added by which even winding up petitions where notice has been served and which are pending in the High Courts,* ***any person could apply for transfer of such petitions to the NCLT under the Code,which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code****…"* (emphasis supplied)

35. Learned counsel on behalf of the OL contended that the present case is not affected by the overriding effect of IBC by virtue of the *non-obstance clause* under Section 238, since the Rules are part and parcel of the Code itself. We are not in agreement with this submission, as the Supreme Court in ***Jaipur Metals*** (supra) has categorically rejected an argument on similar lines and held as under:

> *"18. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of*

the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. .... Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment."

36. Thus, the proceedings under IBC are independent and have an object different from the one envisaged under the scheme of liquidation provided in the Company Law. The former aims resolution by way of revival in a manner that benefits all stakeholders, the creditors as well as the company. Thus, the scope of the proceedings before the NCLT is wider – with the object of preserving the company and its business/ commercial activities. When transfer of winding up petition can aid in achieving the aforementioned objective, it ought to be allowed in the interest of justice. The court must be sensitive to the scheme and object of the Code; running of parallel proceedings will indeed be futile, create chaos and confusion as held in ***Jotun*** (supra). Reliance placed by the appellant on ***Jotun*** (supra) is misconstrued, in that it failed to appreciate the true *rationale* of the case, wherein the court was clearly of the opinion that the parties would benefit from such transfer, and the court would try the petition only if revival efforts by NCLT were unsuccessful. The Court observed in ***Jotun*** (supra) as follows:

> *"45. In view of the aforestated reasoning and the case laws cited, we are of the considered opinion that the Company Court while dealing with the winding up petitions (saved petitions) shall have no jurisdiction to stay the proceedings before the NCLT in respect of the revival or resolution issue. We may further state that in case the forum under IBC, 2016 i.e. NCLT fails to revive or successfully implement the resolution plan, then the Company Judge seized with the winding up petitions (saved petitions) would deal with the petition in accordance with the law. We are of the view that allowing both the forums i.e. Company Court and the NCLT to go ahead with the liquidation proceedings/ winding up proceedings simultaneously would not serve any purpose. There is likelihood of creation of confusion and complexity. To harmonize this likely situation, we observe that the Company Judge, in saved petitions, would exercise jurisdiction in case revival efforts by NCLT fails"*

37. An order passed by the Company Court admitting the petition and ordering its winding up is not irrevocable. When the Court passes such an order, all that it means is that the Court is satisfied that the conditions stipulated in one or more of the clauses (a) to (i) of Section 433 are satisfied, and with a view to achieve the liquidation of the assets; settlement of the claims of the creditors and shareholders of the company, and; eventually to dissolve the company, the liquidator is appointed. Winding up of a company is a process, and it is not achieved merely upon an order for winding up being passed. When an order is passed by the Company Court directing a company to be wound up, and a liquidator is appointed for that purpose, the Company Court only sets the ball rolling. The process of winding up entails liquidation of the assets, invitation of claims of creditors, adjudication of the claims made upon the company, and; their settlement in accordance with the formula that the Court may evolve considering the

overall position of the liquidated assets versus the nature and quantum of claims presented before the Court. On the day when the winding up order is passed, the company does not stand dissolved. Such an order of winding up can be re-called by the Company Court in exercise of the inherent power of the Court recognized in Rule 9 of the Company Court Rules, 1959. The said Rule 9 reads as follows:

> ***"Rule 9. Inherent Powers of Court****.-Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

38. The Supreme Court in ***Sudarshan Chits v. Sukumaran Pillai***, AIR 1984 SC 1579 has recognized the well settled position "*that a winding up order once made can be revoked or recalled but till it is revoked or recalled it continues to subsist*." This position was also recognized in ***G.T. Swamy v. M/s. Goodluck Agencies***, ILR 1988 KAR 3147. The Karnataka High Court had the occasion to again deal with the aforesaid issue in ***Government of Karnataka v. NGEF Limited (In Liquidation),*** 2017 SCCOnline Kar 4817. In this case, a winding up order passed 13 years earlier was recalled on 22.06.2017 in the interest of equity and justice by invoking the inherent power of the Court recognized in Rule 9 of the Company Court Rules. The Karnataka High Court held that there is no compulsion in law that the winding up must finally culminate into the dissolution order in all cases. The relevant extract from this decision reads as follows:

> *"20. ..**There is no compulsion in law that the winding up order must finally culminate into a Dissolution order in all the cases.** If during the process of winding up, the sale of some*

assets are enough to pay off all the secured and unsecured liabilities of the Company, as in the present case, and the Company is still left with surplus assets, it can certainly apply to the Court for staying the winding up process permanently or for recall of the winding up order and revival of the Company.

21. It is true that there is no specific provision for taking a 'U-turn' after the winding up order is passed under the provisions of the Companies Act, 1956 and to recall the winding up order, ***but at the same time, it is equally true that there is no prohibition either for the same****…****It is only the live, operating and working companies or business, which contribute to the economic welfare of the country and not the process of winding up of limited companies by sale of its assets and distribution of the proceeds amongst the various stakeholders, which achieves this objective of larger public good."***

22. The purpose of enacting Rules 6 and 9 in the Companies (Court) Rules, 1959, giving wide and vast, inherent and residuary powers to the Company Court, in the absence of any specific prohibition in the Act itself, is purposely to leave it to the discretion of the Company Court concerned to pass appropriate orders, to meet the situations and facts arising before it from time to time. There are no restrictions, inhibitions or prohibition enacted in the Act and the Rules. Therefore, the powers of this court are not restricted in any manner and are plenary in nature…

x x x x x x x x x

39. ***The legal position therefore which emerges is, that there is no prohibition or restraint on the Company Court to recall the winding up order if the facts and circumstances requiring such a recall are established by any of the applicants****…"*

(emphasis supplied)

39. Aforesaid being the position, merely because the learned Company Judge had ordered the winding up of the appellant company on 03.08.2004, it does not follow that the appellant company should necessarily be

liquidated and dissolved. The other options available, namely to resolve/ revive the appellant company can and should always be explored for which purpose the NCLT is invested with jurisdiction, unless irrevocable steps towards liquidation have already been undertaken.

40. We find no merit in the submission of the appellant that respondent No.2 not being a party to the winding up petition could not have moved the application for transfer of the proceedings to the NCLT. Firstly, the SBI-Respondent No.2 had moved an application for impleadment. Entertainment of the application of SBI to transfer the proceedings to the NCLT itself shows that the Learned Company Judge impliedly allowed the impleadment application. Respondent No. 2 being the secured creditor of the appellant clearly has a stake in the proceedings for winding up and their impleadment was really a foregone conclusion. Thus, we reject this submission of the appellant.

41. The process under IBC is meant to find the best possible solution in a given case, which is beneficial to the company concerned as well as its creditors and other stakeholders. Therefore, in the interest of equity and justice, and keeping in mind the special nature of the IBC, if the Learned Company Judge has found it fit to transfer the winding up petition to NCLT on the application of respondent No. SBI– who is a secured creditor, this Court would not ordinarily interfere with the judgment of the Learned Company Judge, and that too, on the asking of the erstwhile management. The Learned Company Judge rightly recalled the order of appointment of Official Liquidator and admission of petition, since the liquidation was at its initial stage and the learned Company Judge was fully competent to do so.

After the passing of the winding up order, the OL had not proceeded to take any effective or irreversible steps towards liquidation of the assets of the appellant company. All that he appears to have done is to take possession and control of the Registered office of the appellant company and its factory premises and its records and books.

42. Pertinently, the respondent No. 2 has already initiated proceedings before the NCLT in respect of the appellant company which, in any event, would continue. The continuation of the liquidation proceedings at the hands of the OL in terms of the order passed by this Court would be incongruous with the proceedings that the NCLT has undertaken and would undertake under the IBC. Continuation of two parallel proceedings – one before the Company Court for liquidation, and the other before the IBC for resolution/ revival, would serve no useful purpose. The statutory scheme found in Section 434(1)(c) clearly is that the proceedings for winding up pending before the Company Court could be transferred to the NCLT and there is no provision for transfer of proceedings from the NCLT to the Company Court.

43. We, thus uphold the impugned order passed by the Ld. Company Judge in C.A. No. 1240/2018, dated 14.01.2019 and dismiss the appeal.

44. C.M. No. 34726/2019 had been preferred for release of sum of Rs. 84, 57, 615/- in respect of expenses incurred by 'Manasvi Security Services' for providing security guards in the concerned premises on the directions of the OL for the period of September 2018 to May 2019. Another application, i.e. C.M. No. 31047/2019 was made by Respondent No. 2 (SBI) for the release

of mortgaged property, in view of the SARFAESI proceedings with respect to the portion of the property sealed by the OL appointed in the instant case.

45. Since the matter stands transferred to NCLT, the prayers made by Manasvi Security Services would be considered by the NCLT after verification of all the necessary facts & circumstances of the case. So far as the application of respondent No.2/SBI for release of the mortgaged property – in view of the proceedings initiated by it under the SARFAESI Act is concerned, we are clearly of the view that the respondent No.2 is entitled to invoke its statutory remedy qua the mortgaged property and the Official Liquidator cannot create any obstruction in respondent No.2 exercising their statutory rights under the SARFAESI Act. The Receiver already stands appointed by the concerned Magistrate to take possession of the mortgaged asset. We, therefore, direct the Official Liquidator to forthwith deseal the mortgaged asset and to deliver possession thereof to the Receiver appointed in proceedings under the SARFAESI Act.

46. Parties shall bear their own costs.

(VIPIN SANGHI)
JUDGE

(SANJEEV NARULA)
JUDGE

OCTOBER 10, 2019