

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE**

**INTERIM APPLICATION NO.1 OF 2019
IN
WRIT PETITION NO.11366 OF 2019**

Hindustan Antibiotics Ltd. ... Applicant

IN THE MATTER BETWEEN:

Hindustan Antibiotics Ltd. & anr. ... Petitioners

Vs

Union of India & Ors. ... Respondents

Mr.D.Ray Choudhuri, Senior Advocate i/b D.G. Dhanure for the
Petitioner

Mr.K.Katariya with Pooja Bhaidkar i/b Aagam D. Joshi for
Respondent Nos.7 and 10

**CORAM: S.C. DHARMADHIKARI &
R.I. CHAGLA, JJ.**

DATED: DECEMBER 6, 2019

P.C.:

1. This Interim Application has been placed before us at the instance of the original petitioner M/s.Hindustan Antibiotics Ltd. M/s.Hindustan Antibiotics Ltd. had filed a Writ Petition in this Court on 4.5.2019 seeking the following reliefs:

“(a) Rule be issued;

(b) this Hon’ble Court may be pleased to hold and declare that the provisions of Insolvency and Bankruptcy Code, 2016 and more particularly Section 3(8), Section 3(23) and Section 238 and also Sections 7, 8 & 9 are unfair, illegal, drastic, unreasonable and arbitrary and are in direct conflict with statutory provisions of Companies Act, 2013 and they are also violative of Article 14 of the Constitution of India so far as “*Government companies*” are concerned and therefore the same are required to be declared as ultra vires, invalid, null and void.

(c) Pending the hearing and final disposal of the above Writ petition, the recovery proceedings initiated by the Respondent Nos.7 namely Mr.Harsh S. Pinge and the Respondent No.8 namely M/s.Galpha Laboratories Ltd., and the Respondent No.10 namely Mr.K.K. Lonkar against the Petitioners before the Respondent No.3 [(NCLT Bench Nos.III, II & III at Mumbai respectively)] may kindly be stayed forthwith;

(d) Pending the hearing and final disposal of the above Writ Petition, the recovery proceedings initiated by the Respondent No.9 against the Petitioners before the Controlling Authority under the payment of Gratuity Act, 1972 and notice dated 06-03-2019 issued the Respondent No.9 under the IBC Code may kindly be stayed forthwith;

(e) Pending the hearing and final disposal of the above Writ Petition, the recovery proceedings initiated by the Respondent Nos.4 to 6 against the Petitioners under the provisions of either Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or under the provisions of Insolvency and Bankruptcy Code, 2016 may kindly be stayed forthwith;

(f) Pending the hearing and final disposal of the above Writ Petition, notice dated 19-06-2018 issued by the Respondent No.4 i.e. UCO Bank, notice dated 17-02-2018 issued by the Respondent No.5 i.e. Vijay (sic) Bank & notice dated 14-09-2018 issued by the Respondent No.6 i.e.



Punjab National Bank to the Petitioners may kindly be stayed forthwith;

(g) Pending the hearing and final disposal of the above Writ Petition, the Respondent Nos.4 to 10 may be restrained from taking further steps for recovering their alleged dues against the Petitioners.

(h) Ad-interim and interim reliefs in terms of prayer clause (c) to (g) above be granted;

(i) Costs of the Writ Petition;

(j) Any other and further reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case;"

2. This petition, after it was filed on 4.5.2019, is pending.

3. During the pendency of this petition, the petitioner had contended before the National Company Law Tribunal where it is facing proceedings under Insolvency and Bankruptcy Code, 2016 that it has filed this Writ Petition and it is pending. They pointed out that M/s.Hindustan Antibiotics Ltd. is a Government of India enterprise and Government company under the control and supervision of Department of Pharmaceuticals, Ministry of Chemicals and Fertilisers, Government of India. The Honourable President of India holds 100% shares of M/s.Hindustan Antibiotics Ltd. The Managing Director and other Directors of the Board have been appointed by the honourable President of India. The nominee



Directors have been appointed by the Central Government. Thus, this is an entity under the direct control of the Central Government for administration, policy making and all aspects dealing with the management and day to day affairs.

4. The employees of the company had moved the Company Petition No.CP (IB) No.2482 of 2018 under section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, 'IBC'). That was taken up by the NCLT Bench at Mumbai. The petitioner – applicant before the NCLT had brought to its notice that there are intricate, legal and constitutional issues involved. A substantive petition challenging the Insolvency and Bankruptcy Code, particularly, its applicability to entities like the petitioner before us, is pending in this Court. The composition and constitution being peculiar, the request was that the IBC ought not to be applied to the petitioner. These and various other contentions were raised and the bench comprising of the Member (Judicial) and Member (Technical) were divided in their opinion. They could not agree on the applicability of the Code. Thereafter, their differing views led to they requesting the President of NCLT, New Delhi, by order dated 16.7.2019, copy of which is at exhibit B to this Interim Application,

to take appropriate steps including referring the matter to a third member. Thereafter, a third member (Judicial) was nominated to take up the matter. When the parties appeared before the third Member, once again objections were raised and particularly about the matter being pending here, that a bench of a Judicial and Technical Member could not have decided the matter in the manner it purported to decide, when the fundamental and basic issue was can the Code be invoked at all in cases of the entities like the petitioner. The arguments have been noted but what the apprehension of the petitioner before us is that all these proceedings are totally without jurisdiction from the inception and particularly in the light of the constitutional challenge, the NCLT could not have taken cognisance of the application.

5. The apprehension of the learned Senior Counsel Shri Ray Choudhuri appearing for the applicant before us is that the matter now stands referred to a third member. He is likely to retire by the end of this month (December, 2019). If in his haste, he passes an order, the entire petition before this Court could be rendered infructuous.



6. On the other hand, it is argued before us by the learned Advocate Shri Katariya, appearing for the contesting respondent, the original applicant before the NCLT, that the petitioner has committed a default in making a payment of Rs.17,16,442/- alongwith interest. The employee before the NCLT was employed with the petitioner from 19.7.1991 to 31.8.2016 and at the time of his retirement, he was drawing a monthly gross salary of Rs.84,463/-. The dues on the eve of his retirement are the admitted dues. The applicant has not been paid the sum claimed by him. It is in these circumstances and when the Gratuity and other amounts are not released, he could have legitimately approached the NCLT.

7. We would not wish to express any opinion on the maintainability of all the proceedings before the NCLT. We do not think that once the petition was pending in this Court, can we prevent M/s.Hindustan Antibiotics Ltd. to proceed with it only because some orders have been passed by the NCLT in the company petition. These orders also have not gained finality on account of the reference to a third member. Further, on the core issue about the applicability of the Code to M/s.Hindustan



Antibiotics Ltd., the members of the National Company Law Tribunal are divided in their opinion. There is now a reference made to the third member. We do not think that the National Company Law Tribunal should precipitate the matter when a constitutional challenge is pending before this Court. None can dispute that it is only this Court which can deal with the challenge raised to the constitutional validity of the provisions of the IBC. That the NCLT exercises the jurisdiction conferred on it by the IBC is undisputed. That such an issue with regard to the constitutional validity of the provisions of the IBC, therefore, cannot be decided by the National Company Law Tribunal which is but a creature of the IBC. We do not also think that the issue is concluded by a judgment relied upon by the Counsel appearing for the original applicant, the contesting respondent before us. To our mind, we would have to probe a little deeper into this aspect particularly to decide whether the judgment of the Hon'ble Supreme Court rendered in Writ Petition (Civil) No.1074 of 2019 (Hindustan Construction Company Ltd. & anr. vs. Union of India & others with other connected matters, decided on 27.11.2019, clinches or concludes the issue against the petitioner. Pertinently therein, the issue of constitutional validity of section 87 of the Arbitration and

Conciliation Act, 1996 was considered and decided. During the course of arguments, an incidental issue was raised and although the paragraphs relied upon by the learned Counsel appearing for the original applicant does make a reference to IBC and some of the consequences of IBC, still, we cannot forget prima facie the underlying challenge. The question whether this judgment concludes the issue in favour of the applicant before the NCLT itself will have to be decided.

8. For all these reasons, we do not think that the NCLT would be well advised in proceeding with the matter. We think that the petitioner has made out a strong prima facie case for grant of interim relief and balance of convenience is also in its favour. It will suffer grave loss, irreparable harm and injury in the event the proceedings are concluded.

9. Therefore, we pass the following order on the Writ Petition:

- i) Issue notice to the learned Attorney General for India on the point as to whether the provisions of IBC, as alleged, are *ultra vires* Article 14 and other relevant Articles of the Constitution of India.

ii) Notice be also issued to other respondents, returnable on **22.1.2020**. We grant leave to serve the notices privately in addition to the service by Court. The applicant before the NCLT is represented before us by the advocate for respondent Nos.7 and 10. Therefore, they waive service of the notice. Their advocate accepts notice and says that Vakalatnama would be duly filed.

iii) Pending further orders of this Court, there will be a stay of further proceedings in Company Petition i.e., CP (IB) No.2482 of 2018 on the file of the NCLT Bench, Mumbai.

9. S.O. to 22.1.2020.

(R.I. CHAGLA, J.)

(S.C. DHARMADHIKARI, J.)