Action Ispat And Power Pvt. Ltd. vs Shyam Metalics And Energy Limited on 15 December, 2020

Equivalent citations: AIR 2021 SUPREME COURT 309, AIRONLINE 2020 SC 894

Author: R.F. Nariman

Bench: Krishna Murari, K.M. Joseph, Rohinton Fali Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4041 OF 2020
(ARISING OUT OF SLP (CIVIL) NO.26415 OF 2019)

ACTION ISPAT AND POWER PVT. LTD. …APPELLANT

VERSUS

SHYAM METALICS AND ENERGY LTD. …RESPONDENT

WITH
CIVIL APPEAL Nos. 4042-4043 OF 2020
(ARISING OUT OF SLP (CIVIL) NOS.2033-2034 OF 2020)

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. These appeals arise out of a judgment of the Division Bench of the Delhi High Court dated 10.10.2019 by which a Single Judge's order dated 14.01.2019 transferring a winding up proceeding pending before the High Court to the National Company Law Tribunal ["NCLT"] was upheld. The brief facts necessary to appreciate the controversy involved in these appeals are as follows:

> 2.1. A winding up petition under sections 433(e) and (f), 434 and 439 of the Companies Act, 1956, being Co. Pet. No.731 of 2016 was filed by one Shyam Metalics and Energy Limited (Respondent No.1 herein), seeking winding up of the appellant

company inasmuch as for goods supplied to the appellant company, a sum of Rs.4.55 crore was still due. The learned Company Judge in the Delhi High Court passed the following order in the aforesaid petition on 27.08.2018:

"ORDER 27.08.2018

1. This petition is filed under sections 433(e) and (f), 434 and 439 of the Company Act, 1956 (hereinafter referred to as 'the Act') seeking winding up of the respondent company.

2. It has been pleaded in the petition that the respondent company had approached the petitioner company for supply of Iron Pellets. A specified quantity of 11612.34MTs of the goods was supplied to the respondent company. After making partial payment, a sum of Rs.4,55,00,000/- is due and payable by the respondent company to the petitioner. The respondent company from time to time issued 17 post-dated cheques.

However, 13 of the cheques when presented with its bankers, were returned by the bankers unpaid. Statutory notice was issued on 15.06.2016 but no payments have been received by the petitioner.

3. No reply has been filed by the respondent. On the last date of hearing, the learned counsel for the respondent had taken time to settle the matter with the petitioner.

4. Today, the learned counsel for the respondent company submits that the respondent is not in a position to settle the matter on account of the fact that the unit of the respondent is shut.

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.

6. List on 09.01.2019.

7. A copy of this order be given dasti under the signatures of the court master." 2.2. An application was then filed before the learned Company Judge by the State Bank of India ["SBI"] (Respondent No. 2 herein), being a secured creditor of the appellant company, seeking transfer of the winding up petition to the NCLT in view of the fact that SBI had filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 ["Code"] which was pending before the NCLT. By order dated 14.01.2019, the learned Company Judge transferred the winding up petition as prayed for as follows:

> "ORDER 14.01.2019
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> 1. This application is filed seeking transfer of the present petition being Co.Pet. No.731/2016 to NCLT. This application has been filed by State Bank of India stating that an application under section 7 of the IBC is pending before NCLT. It has been pleaded that the respondent company had failed to pay outstanding dues of about Rs.722 crores to the applicant bank and hence this proceeding have been initiated before NCLT. The applicant bank is also a lead bank of the consortium of banks which have outstanding dues of about Rs.1100 crores.
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> 2. This court had admitted the present winding up petition on 27.08.2018 and appointed the OL as the provisional liquidator of the respondent company.
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> 3. The learned counsel appearing for the OL submits that the OL has already sealed the registered office of the respondent company at New Delhi and factory premises at Orissa. He further submits that the OL has incurred heavy expenses in protecting the factory premises at Orissa in the given facts and circumstances.
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> 4. The Ex. Management however objects to transfer of this petition. They have submitted that they have had no opportunity to defend the proceedings before NCLT.
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> 5. Learned counsel for SBI states that the creditors will reimburse the expenses of the OL.
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> 6. Section 434 of the Companies Act, 2013 reads as follows:
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> "[434. Transfer of certain pending proceedings–(1) On such date as may be notified by the Central Government in this behalf,—
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> (a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order: Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(c) all proceedings under the Companies Act, 1956 (1 of 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 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."

7. This court has already in CP 152/2016 vide decision dated 27.9.2018 in Rajni Anand vs. Cosmic Structures Limited held that the power under section 434(1)(c) of the Companies Act, 2013 for transfer of a petition to NCLT 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.

8. In my opinion, it would be in the interest of justice and in the interest of the respondent company and the creditors that the matter be transferred to NCLT in exercise of the discretionary powers of the court under section 434 of the Companies Act, 1956. The order appointing the OL is a recent order and not much time has elapsed since then. The OL has only taken steps to seize the office of the respondent company and the factory premises and further exercise is yet to be carried out. The application is allowed as above. The present petition is transferred to NCLT.

9. In view of the above order, the present petition is transferred to NCLT. All pending applications, if any, stand disposed of. The order admitting the petition and appointing the OL as the provisional liquidator dated 27.08.2018 stands revoked.

10. The OL will give details of necessary expenses to SBI.

The costs/expenses will be borne by SBI and also consortium of banks. The OL will hand over the possession of the assets as directed by NCLT.

11. Parties to appear before NCLT on 04.02.2019." 2.3. It is from this order that the appellant company's appeal to the Division Bench has been dismissed by the impugned order in which the learned Division Bench held as follows:

> "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."

3. Shri Sidharth Luthra, learned Senior Advocate appearing on behalf of the appellant company, referred to three judgments of this Court, namely, Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd., (2019) 4 SCC 227 ["Jaipur Metals"], Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd., 2019 SCCOnLine SC 87 ["Forech"], and M/s Kaledonia Jute & Fibres Pvt. Ltd. v. M/s Axis Nirman & Industries Ltd. & Ors., 2020 SCCOnLine SC

943 ["Kaledonia"]. According to him, none of the judgments apply to the facts of the present case inasmuch as, on the facts in the present case, once a winding up order has been passed by the Company Judge, winding up proceedings alone must continue before the High Court and parallel proceedings under the Code cannot continue. He argued that Jaipur Metals (supra) makes it clear that even independent proceedings under the Code can only continue when the stage is before a winding up order is passed, which was the case on the facts before the Court. Likewise, in Forech (supra) also, the stage of the winding up proceeding was post service of notice of the winding up petition and before a winding up order was passed, as a result of which the 5th proviso to section 434(1)(c) of the Companies Act, 2013 was applied. Likewise, in Kaledonia (supra), though a winding up order had been passed on the facts of that case, the aforesaid order had been kept in abeyance. On facts therefore, these three cases are entirely distinguishable and would have no application to a scenario in which a winding up order has been passed and the Official Liquidator has in fact seized the assets of the company in order to begin the process of distribution to creditors and others which would ultimately result in dissolution of the company.

4. Shri K.K. Venugopal, learned Attorney General for India appearing on behalf of SBI, countered all these submissions. According to him, this Court has unequivocally laid down that the 5 th proviso to section 434(1)(c) of the Companies Act, 2013 now makes it clear that a discretion is vested in the Company Court to transfer winding up proceedings to the NCLT without reference to the stage of winding up. Even post admission, according to the learned Attorney General, if no irreversible steps have been taken, then a combined reading of the 5th proviso to section 434(1)(c) and section 238 of the Code would lead to the result that the winding up proceeding be transferred to the NCLT, as not only is the Code a special enactment with a non-obstante clause which would, in cases of conflict, do away with the Companies Act, 2013, but also that, given the judgment of this Court in Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17 ["Swiss Ribbons"], winding up is a last resort after all efforts to revive a company fail. According to him, the discretion exercised by the Company Court and the Division Bench has been judiciously and correctly exercised, warranting no interference at our hands.

5. In Swiss Ribbons (supra), this Court had occasion to deal with the raison d'être for the enactment of the Code. The judgment of this Court referred to the Statement of Objects and Reasons for the Code as follows:

> "25. The Statement of Objects and Reasons for the Code have been referred to in Innoventive Industries [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] which states: (SCC pp.

421-22, para 12) "12. ... The Statement of Objects and Reasons of the Code reads as under:

> 'Statement of Objects and Reasons.—There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debts Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2.The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating NCLT and DRT as the adjudicating authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, the Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008, and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives.'" (emphasis in original) The Court then went on to state:

> "27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] at para 83, fn 3).

28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends." Having so held, the Court ended stating:

> "Epilogue

> 120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners.
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> 121. We are happy to note that in the working of the Code, the flow of financial resource to the commercial sector in India has increased exponentially as a result of financial debts being repaid. Approximately 3300 cases have been disposed of by the adjudicating authority based on out-of-court settlements between corporate debtors and creditors which themselves involved claims amounting to over INR 1,20,390 crores. Eighty cases have since been resolved by resolution plans being accepted. Of these eighty cases, the liquidation value of sixty-three such cases is INR 29,788.07 crores. However, the amount realised from the resolution process is in the region of INR 60,000 crores, which is over 202% of the liquidation value. As a result of this, Reserve Bank of India has come out with figures which reflect these results. Thus, credit that has been given by banks and financial institutions to the commercial sector (other than food) has jumped up from INR 4952.24 crores in 2016-

2017, to INR 9161.09 crores in 2017-2018, and to INR 13,195.20 crores for the first six months of 2018-2019. Equally, credit flow from non-banks has gone up from INR 6819.93 crores in 2016-2017, to INR 4718 crores for the first six months of 2018-2019. Ultimately, the total flow of resources to the commercial sector in India, both bank and non-bank, and domestic and foreign (relatable to the non-food sector) has gone up from a total of INR 14,530.47 crores in 2016-2017, to INR 18,469.25 crores in 2017-2018, and to INR 18,798.20 crores in the first six months of 2018-2019. These figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained. The result is that all the petitions will now be disposed of in terms of this judgment. There will be no order as to costs."

6. Viewed in this backdrop, let us now examine some of the judgments of this Court dealing with transfer of winding up petitions from the Company Court to be tried by the NCLT under the Code.

7. Section 255 of the Code reads as follows:

"255. Amendments of Act 18 of 2013.—The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule." In pursuance of this section, the Eleventh Schedule to the Code made various amendments to the Companies Act, 2013. They have been set out in detail in Jaipur Metals (supra) in paragraphs 10 and

11. Suffice it to say that the first step to transferring winding up proceedings to the NCLT was taken by the Companies (Transfer of Pending Proceedings) Rules, 2016 ["Transfer Rules, 2016"], which compulsorily transferred all winding up proceedings pending before High Courts to the NCLT at a stage prior to the service of the petition in terms of Rule 26 of the Companies (Court) Rules, 1959. By an amendment made on 17.08.2018, the 5 th proviso to section 434(1)(c) was added which states as follows:

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

(a) xxx xxx xxx

(b) xxx xxx xxx

(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:

xxx xxx xxx 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)."

8. The Court in Jaipur Metals (supra) was directly concerned with a special category of cases dealt with by Rule 5(2) of the aforesaid Transfer Rules which was omitted later on. Despite the omission, the Court applied this Rule, read with the amendment made to section 434 of the Companies Act, 2013 on 17.08.2018, stating:

"17. However, though the language of Rule 5(2) is plain enough, it has been argued before us that Rule 5 was substituted on 29-6-2017, as a result of which, Rule 5(2) has been omitted. The effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SIC Act to NCLT, as otherwise, a specific

rule would have to be framed transferring such cases to NCLT, as has been done in Rule 5(1). The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, only once, on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court. It was unnecessary to continue Rule 5(2) even after 29-6-2017 as on 15-12-2016, all pending cases under Section 20 of the SIC Act were to continue to be dealt with by the High Court before which such cases were pending. Since there could be no opinion by the BIFR under Section 20 of the SIC Act after 1-12-2016, when the SIC Act was repealed, it was unnecessary to continue Rule 5(2) as, on 15-12- 2016, all pending proceedings under Section 20 of the SIC Act were to continue with the High Court and would continue even thereafter. This is further made clear by the amendment to Section 434(1)(c), with effect from 17-8- 2018, where any party to a winding-up proceeding pending before a court immediately before this date may file an application for transfer of such proceedings, and the Court, at that stage, may, by order, transfer such proceedings to NCLT. The proceedings so transferred would then be dealt with by NCLT as an application for initiation of the corporate insolvency resolution process under the Code. It is thus clear that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the SIC Act pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings post 17-8-2018.

Once this is done, the High Court must transfer such proceedings to NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code.

18. The High Court judgment, therefore, though incorrect in applying Rule 6 of the 2016 Transfer Rules, can still be supported on this aspect with a reference to Rule 5(2) read with Section 434 of the Companies Act, 2013, as amended, with effect from 17-8-2018." In a significant passage, the Court then went on to hold:

"19. However, this does not end the matter. It is clear that Respondent 3 has filed a Section 7 application under the Code on 11-1-2018, on which an order has been passed admitting such application by NCLT on 13-4-2018. 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 3 at any time before a winding-up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code 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." The Court therefore finally held:

"20. ... We are of the view that 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. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. NCLT proceedings will now continue from the stage at which they have been left off. 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 [Jaipur Metals and Electricals Ltd., In re, 2018 SCC OnLine Raj 1472]."

9. In Forech (supra), this Court, after setting out the aforesaid Rules and the 5th proviso to section 434(1)(c), then held:

"16. We are of the view that Rules 26 and 27 clearly refer to a pre-admission scenario as is clear from a plain reading of Rules 26 and 27, which make it clear that the notice contained in Form No. 6 has to be served in not less than 14 days before the date of hearing. Hence, the expression "was admitted" in Form No. 6 only means that notice has been issued in the winding up petition which is then "fixed for hearing before the Company Judge" on a certain day. Thus, the Madras High Court view is plainly incorrect whereas the Bombay High Court view is correct in law.

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 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. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jaipur Metals & Electricals Employees Organization Through General Secretary Mr. Tej Ram Meena v. Jaipur Metals & Electricals Ltd. Through its Managing Director, being a judgment by a Division Bench of this Court dated 12.12.2018." Resultantly, the Court thereafter held:

"22. This Section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this Section, it does not follow that until a liquidation order has been made against the corporate debtor, an Insolvency Petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code.

23. Though, we are not interfering with the Appellate Tribunal's order dismissing the appeal, we grant liberty to the appellant before us to apply under the proviso to Section 434 of the Companies Act (added in 2018), to transfer the winding up proceeding pending before the High Court of Delhi to the NCLT, which can then be treated as a proceeding under Section 9 of the Code."

10. In Kaledonia (supra), the question which arose before the Court arose after a winding up order had been passed, but which had been kept in abeyance by the Company Court. The vexed question before the Court was whether the expression "any person could apply for transfer ..." contained in paragraph 17 of the judgment of this Court in Forech (supra) would refer to persons who are not parties to the proceeding. This Court, after setting out section 278 of the Companies Act, 2013, then held:

"44. Thus, the proceedings for winding up of a company are actually proceedings in rem to which the entire body of creditors is a party. The proceeding might have been initiated by one or more creditors, but by a deeming fiction the petition is treated as a joint petition. The official liquidator acts for and on behalf of the entire body of creditors. Therefore, the word "party" appearing in the 5th proviso to Clause (c) of Sub-section (1) of section 434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator. The words "party or parties" appearing in the 5th proviso to Clause (c) of Sub-section (1) of Section 434 would take within its fold any creditor of the company in liquidation.

45. The above conclusion can be reached through another method of deductive logic also. If any creditor is aggrieved by any decision of the official liquidator, he is entitled under the 1956 Act to challenge the same before the Company Court. Once he does that, he becomes a party to the proceeding, even by the plain language of the section. Instead of asking a party to adopt such a circuitous route and then take recourse to the 5 th proviso to section 434(1)(c), it would be better to recognise the right of such a party to seek transfer directly.

46. As observed by this Court in Forech India Limited (supra), the object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. If the Allahabad High Court is allowed to proceed with the winding up and NCLT is allowed to proceed with an enquiry into the application under Section 7 IBC, the entire object of IBC will be thrown to the winds.

47. Therefore, we are of the considered view that the petitioner-herein will come within the definition of the expression "party" appearing in the 5th proviso to Clause

(c) of Sub-section (1) of Section 434 of the Companies Act, 2013 and that the petitioner is entitled to seek a transfer of the pending winding up proceedings against the first respondent, to the NCLT. It is important to note that the restriction under Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016 relating to the stage at which a transfer could be ordered, has no application to the case of a transfer covered by the 5th proviso to clause (c) of sub-section (1) of Section 434. Therefore, the impugned order of the High court rejecting the petition for transfer on the basis of Rule 26 of the Companies (Court) Rules, 1959 is flawed." (emphasis in original)

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

(i) 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.

(ii) This was done by the Transfer Rules, 2016 (supra) 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.

(iii) The result therefore was that post notice and pre admission 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 (supra), is not restricted to any particular stage of a winding up proceeding.

(iv) 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?

12. The Companies Act, 2013 deals with winding up of companies in a separate chapter, being Chapter XX. When a petition to wind up a company is presented before the Tribunal, the Tribunal is given the power under Section 273 to dismiss it; to make any interim order as it thinks fit; to appoint a provisional liquidator of the company till the making of a winding up order; to make an order for the winding up of the company; or to pass any other order as it thinks fit – see section 273(1).

13. Sections 278 and 279 of the Companies Act, 2013 then follow, which state:

> "278. Effect of winding-up order.—The order for the winding-up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories." "279. Stay of suits, etc., on winding-up order.—(1) When a winding-up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:
>
> Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.
>
> (2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

14. Once a winding up order is made, and a Company Liquidator is appointed, such liquidator is then to submit a report to the Tribunal under section 281 as follows:

> "281. Submission of report by Company Liquidator.— (1) Where the Tribunal has made a winding-up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:—
>
> (a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:
>
> Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;
>
> (b) amount of capital issued, subscribed and paid- up;
>
> (c) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given,

whether by the company or an officer thereof, their value and the dates on which they were given;

(d) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;

(e) guarantees, if any, extended by the company;

(f) list of contributories and dues, if any, payable by them and details of any unpaid call;

(g) details of trademarks and intellectual properties, if any, owned by the company;

(h) details of subsisting contracts, joint ventures and collaborations, if any;

(i) details of holding and subsidiary companies, if any;

(j) details of legal cases filed by or against the company; and

(k) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

(2) The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.

(3) The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company.

(4) The Company Liquidator may also, if he thinks fit, make any further report or reports.

(5) Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts therefrom on payment of the prescribed fees."

15. The Tribunal is then to consider the aforesaid report and fix a time limit within which the proceedings shall be completed and the company dissolved, which time limit may be revised – see section 282(1).

16. Importantly, the company's properties shall, on the order of the Tribunal, be taken over by the Company Liquidator and be deemed to be in custodia legis – see section 283(1) and 283(2).

17. Thereafter, the Tribunal is to settle a list of contributories under section 285. The Company Liquidator is then to make periodical reports to the Tribunal with respect to the progress of the winding up proceedings as follows:

> "288. Submission of periodical reports to Tribunal.— (1) The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding-up of the company in such form and manner as may be prescribed.
>
> (2) The Tribunal may, on an application by the Company Liquidator, review the orders made by it and make such modifications as it thinks fit."

18. Section 290 is important because it lays down the powers and duties of the Company Liquidator as follows:

> "290. Powers and duties of Company Liquidator.—(1) Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding-up of a company by the Tribunal, shall have the power—
>
> (a) to carry on the business of the company so far as may be necessary for the beneficial winding-up of the company;
>
> (b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;
>
> (c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;
>
> (d) to sell the whole of the undertaking of the company as a going concern;
>
> (e) to raise any money required on the security of the assets of the company;
>
> (f) to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;
>
> (g) to invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act;

(h) to inspect the records and returns of the company on the files of the Registrar or any other authority;

(i) to prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(j) to draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(k) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;

(l) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;

(m) to take all such actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary,—

(i) for winding-up of the company;

(ii) for distribution of assets;

(iii) in discharge of his duties and obligations and functions as Company Liquidator;

and

(n) to apply to the Tribunal for such orders or directions as may be necessary for the winding- up of the company.

(2) The exercise of powers by the Company Liquidator under sub-section (1) shall be subject to the overall control of the Tribunal.

(3) Notwithstanding the provisions of sub-section (1), the Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf."

19. Under section 292, subject to the provisions of the Companies Act, 2013, the Company Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting – see section 292(1).

20. It is only when the affairs of the company have been completely wound up that an application is to be made to the Tribunal to dissolve the company under section 302, which is set out hereinbelow:

> "302. Dissolution of company by Tribunal.—(1) When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the Tribunal for dissolution of such company. (2) The Tribunal shall on an application filed by the Company Liquidator under sub-section (1) or when the Tribunal is of the opinion that it is just and reasonable in the circumstances of the case that an order for the dissolution of the company should be made, make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly. (3) The Tribunal shall, within a period of thirty days from the date of the order,—
>
> (a) forward a copy of the order to the Registrar who shall record in the register relating to the company a minute of the dissolution of the company; and
>
> (b) direct the Company Liquidator to forward a copy of the order to the Registrar who shall record in the register relating to the company a minute of the dissolution of the company. "

21. Where a company has been dissolved, such dissolution may be set aside within a period of two years from the date of such dissolution under section 356 of the Companies Act, 2013.

22. 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.

23. In the facts of the present case, the concurrent finding of the Company Judge and the Division Bench is that despite the fact that the liquidator has taken possession and control of the registered office of the appellant company and its factory premises, records and books, no irreversible steps towards winding up of the appellant company have otherwise taken place. This being so, the Company Court has correctly exercised the discretion vested in it by the 5 th proviso to section 434(1)(c). Resultantly, civil appeal arising out of SLP (Civil) No.26415 of 2019 stands dismissed. Civil Appeal Nos. 4042-4043 of 2020 (arising out of SLP (Civil) Nos. 2033-2034 of 2020):

> Given the fact that the matter has been transferred by the High Court to the NCLT to verify the necessary facts and circumstances of the case, after which relief can be given to the appellant herein, we do not find any reason to interfere with the aforesaid order. The appeals are therefore dismissed.

…… J. (ROHINTON FALI NARIMAN)

…… J.

(K.M. JOSEPH) …… J.

(KRISHNA MURARI) New Delhi;

December 15, 2020.