

A M/S KALEDONIA JUTE AND FIBRES PVT. LTD.

v.

M/S AXIS NIRMAN AND INDUSTRIES LTD. & ORS.

(Civil Appeal No. 3735 of 2020)

B NOVEMBER 19, 2020

**[S. A. BOBDE, CJI, A. S. BOPANNA AND
V. RAMASUBRAMANIAN, JJ.]**

Companies (Transfer of Pending Proceedings) Rules 2016:

- C rr.5 and 6 – Application seeking transfer of the winding up petition pending before High Court to the National Company Law Tribunal (NCLT) – Refusal by Company Court (High Court) – Correctness of – Second respondent filed a company petition against the first respondent for winding up on the ground that first respondent was not able to pay its debts – Winding up order – Thereafter first respondent sought for recalling the order of winding up and in order to prove bonafides paid the entire amount due to the petitioning creditor (second respondent) – Petitioning creditor had no objection to recall the order – But the official liquidator opposed to recall the order on the ground that the first respondent owed money to various other creditors to the tune of Rs.27 Crores and that unless the said amount was paid, the order of winding up could not be recalled – The Official Liquidator also submitted that he had already taken over charge of the assets of the Company – Company Court passed an order keeping the winding up in abeyance, however, directed the Official Liquidator to continue to be in custody of the assets of the Company – Appellant claiming to be a creditor of the first respondent moved an application before the NCLT under s.7 of the IBC, 2016 on the ground that the first respondent was due and liable to pay a sum of Rs.32 lakhs and that it failed to pay despite repeated demands – Thereafter, the appellant moved an application before the Company Court seeking transfer of the winding up petition to the NCLT – Company Court refused transfer on the sole ground that the requirement of r.24 had already been complied with and that a winding up order had already been passed – Instant appeal filed by appellant-financial creditor – The main issues that arose for consideration were: (i) what are the circumstances under which a winding up proceeding pending on the file of a High Court could

be transferred to the NCLT and (ii) at whose instance, such transfer could be ordered – Held: If the winding up petition has already been served on the respondent in terms of r.26 of the 1959 Rules, the proceedings are not liable to be transferred – But if service of the winding up petition on the respondent in terms of r.26 had not been completed, such winding up proceedings, whether they are under Clause (c) of s.433 or under Clauses (a) and (f) of s.433, shall peremptorily be transferred to the NCLT – In other words, rr.5 and 6 of the Companies (Transfer of Pending Proceedings) Rules 2016, fix the stage of service of notice under r.26, as the stage at which a winding up proceeding can be transferred – This is because the first proviso under Clause (c) of Sub-section (1) of s.434 enables the Central Government to prescribe the stage at which proceedings for winding up can be transferred and sub-section (2) of s.434 confers rule making power on the Central Government – As regards the second question as to who are the parties to the winding up proceedings, 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 – The word “party” appearing in the fifth proviso to Clause (c) of Sub-section (1) of s.434 cannot be construed to mean only the single petitioning creditor or the company or the official liquidator and would take within its fold any creditor of the company in liquidation – Therefore, appellant will come within the definition of the expression “party” appearing in the 5th proviso to Clause (c) of Sub-section (1) of s.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 – Thus, proceedings for winding up pending before the Company Court against the first respondent is ordered to be transferred to the NCLT, to be taken up along with the application of the appellant under s.7 of the IBC – Companies (Court) Rules, 1959 – r.26 – Companies Act, 2013 – s.434(1)(c), fifth proviso, s.447.

Allowing the appeal, the Court

HELD: 1. The first proviso to Clause (c) of Section 434 restricts the transferability of proceedings for winding up from

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- A the High Court to the tribunal, by stipulating that only such proceedings for winding up which are at a stage as may be prescribed by the Central Government, be transferred to the Tribunal. Sub-section (2) of Section 434 empowers the Central Government to make Rules consistent with the provisions of the Act, to ensure timely transfer of all matters pending before the Company Law Board or the Courts, to the Tribunal. Therefore, in exercise of the power conferred by Sub-section (2) of Section 434 of the Companies Act, 2013 read with Sub-section (1) of Section 239 of the IBC, 2016, the Central Government issued a set of Rules known as ‘The Companies (Transfer of Pending Proceedings) Rules, 2016. [Paras 21, 22][813-D-G]
 - 2. For the purpose of transfer, winding up proceedings pending before the High Courts, are classified by Section 434 into two categories namely:- Proceedings for voluntary winding up where notice of resolution by advertisement has been given
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- D under Section 485(1) of the Companies Act, 1956, but the company has not been dissolved before 01.04.2017; and other types of winding up proceedings. The first of the above 2 categories of cases are covered by the fourth proviso under Clause (c) of Sub-section (1) of Section 434, which states 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.
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- F Such cases of voluntary winding up covered by the above proviso shall continue to be dealt with by the High court. It is only (i) cases of voluntary winding up falling outside the scope of the 4th Proviso and (ii) other types of winding up proceedings, that can be transferred by the High Courts to the Tribunal, subject however to the Rules made by the Central Government under Section 434 (2). The transferability, by operation of law, of winding up proceedings, other than those covered by the 4th Proviso, depends upon the stage at which they are pending before the Company Court. But this is left by the law makers to be
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determined through subordinate legislation, in the form of Rules. A
[Paras 23, 24, 25][813-G-H; 814-A-F]

3. Apart from providing for the transfer of certain types of winding up proceedings by operation of law, Section 434 (1)(c) also gives a choice to the parties to those proceedings to seek a transfer of such proceedings to the NCLT. This is under the fifth proviso to Clause (c). The Companies (Transfer of Pending Proceedings) Rule, 2016 issued in exercise of the powers conferred by Section 434 (2) read with Section 239(1) of IBC, 2016 categorise the pending proceedings for winding up into three types namely (i) proceedings for voluntary winding up covered by the fourth proviso to Clause (c) of Sub-section (1) of Section 434, which shall continue to be dealt with in accordance with the provisions of the 1956 Act; (ii) proceedings for winding up on the ground of inability to pay debts; and (iii) proceedings for winding up on grounds other than inability to pay debts. Rule 5 of the aforesaid Rules provides for transfer of proceedings for winding up on the ground of inability to pay debts. Rule 6 of the aforesaid Rules deals with transfer of proceedings for winding up, on grounds other than inability to pay debts. The transferability of a winding up proceeding, both under Rule 5 as well as under Rule 6, is directly linked to the service of the winding up petition on the respondent under Rule 26 of the Companies (Court) Rules, 1959. If the winding up petition has already been served on the respondent in terms of Rule 26 of the 1959 Rules, the proceedings are not liable to be transferred. But if service of the winding up petition on the respondent in terms of Rule 26 had not been completed, such winding up proceedings, whether they are under Clause (c) of Section 433 or under Clauses (a) and (f) of Section 433, shall peremptorily be transferred to the NCLT. [Paras 26, 27, 28, 30, 31, 32][814-F-H; 815-A-C; 816-A-B; 816-D-E] B C D E F

4. Who are “the parties to” the winding up proceedings. G The Companies Act, 1956 does not define the expression “party”. The Companies (Court) Rules, 1959 also does not define the expression “party”. The Companies Act 2013 and the Companies (Transfer of pending proceedings) Rules, 2016 also does not define the expression “party”. Even the IBC, 2016 does not define the expression “party”. But there are certain clues H

- A inherently available in the Companies Act, 1956, to indicate the persons who may come within the meaning of the expression “party to the proceedings”. The provisions which contain such clues are as follows: (i) Section 447 of the Companies Act, 1956, which is equivalent to Section 278 of the Companies Act, 2013
- B states that an order for winding up shall operate in favour of all the creditors and of all the contributories of the company as if it has been made on the joint petition of a creditor and of a contributory. There is a small change between the wording of Section 278 of the 2013 Act and the wording of Section 447 of the 1956 Act. Section 278 of the 2013 Act shows that any petition by
- C a single creditor or contributory is actually treated as a joint petition of creditors and contributories, so that the order of winding up operates in favour of all the creditors and all the contributories. (ii) Under Section 454 (6) of the 1956 Act, any person stating himself in writing to be a creditor shall be entitled to inspect the statement of affairs submitted to the official liquidator. If the claim of such a person to be a creditor turns out to be untrue, such a person is liable to be punished under Section 454(7) of the 1956 Act. (iii) The powers of the liquidator are enumerated in Section 457 of the 1956 Act. Section 457 actually divides the powers of a liquidator into two categories namely (i)
- E those available with the sanction of the Tribunal and (ii) those generally available to the liquidator. But Section 290 of the 2013 Act has done away with such a distinction. However, the 1956 Act, as well as 2013 Act make the exercise of the powers by the liquidator, subject to the overall control of the Tribunal. This is made clear by Section 457(3) of the 1956 Act and Section 290(2) of the 2013 Act. Additionally, Section 457(3) of the 1956 Act enables any creditor or contributory to apply to the Court with respect to the exercise by the Liquidator, of any of the powers conferred by Section 457. (iv) Section 460 of the 1956 Act and Section 292 of the 2013 Act make it clear that in the administration
- G of the assets of the Company and the distribution thereof among its creditors, the liquidator should have regard to any directions given by resolution of creditors at any general meeting. If the liquidator does something, in exercise of his powers, any person aggrieved by such Act or decision of the liquidator, is entitled to apply to the Company Court, under Section 460(6) of the 1956
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Act and Section 292(4) of the 2013 Act. (v) Section 466(1) of the 1956 Act enables any creditor to apply for stay of all proceedings in relation to the winding up. This right can be exercised by any creditor at any time after the making of a winding up order. 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 deemed 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. [Paras 41, 42, 43][818-B-H; 819-A-H; 820-A]

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5. 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 5th proviso to section 434(1)(c), it would be better to recognise the right of such a party to seek transfer directly. [Para 44][820-B-C]

6. The object of IBC will be stultified if parallel proceedings are allowed to go on in different fora. If the 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. Therefore, the petitioner 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

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- A 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 order of the High court rejecting the petition for transfer on the basis of Rule 26 of the Companies (Court) Rules, 1959 is flawed. [Paras 45, 46][820-C-F]
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Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd. [2019] 2 SCR 477 – relied on.

Case Law Reference

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| C | [2019] 2 SCR 477 | relied on | Para 36 |
| CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3735 of 2020. | | | |
| D | From the Judgment and Order dated 24.02.2020 of the High Court of Judicature at Allahabad in Civil Miscellaneous Application No. 23 of 2020. | | |

Huzefa Ahmadi, A. Nadkarni, Sr.Advs., Sadapurna Mukherjee, Rajat Mittal, Preshit Vilas Surshe, Gp. Capt. Karan Singh Bhati, Ms. Chitrangda Rastravara, Advs. for the appearing parties.

- E The Judgment of the Court was delivered by
V. RAMASUBRAMANIAN, J.
 - 1. Leave granted.
 - 2. Aggrieved by an order passed by the Company Court (High Court of Allahabad), refusing to transfer the winding up petition pending therein, to the National Company Law Tribunal (NCLT for short), a financial creditor has come up with this appeal.
 - 3. Heard Mr. Huzefa Ahmadi, learned senior counsel appearing for the appellant, Mr. A.N.S. Nadkarni, learned senior counsel appearing for the 1st respondent-corporate debtor and Gp. Capt. Karan Singh Bhati, learned counsel appearing for the official liquidator.
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Background Facts

- 4. One M/s Girdhar Trading Co., the 2nd respondent herein, filed a petition in Company Petition No.24 of 2015 before the High Court of Allahabad under Section 433 of the Companies Act, 1956, for the winding

up of the first respondent company, on the ground that the Company was unable to pay its debts. The Company Court ordered notice to the 1st respondent herein, but the 1st respondent failed to appear before the Company Court.

5. Therefore, by an order dated 08.01.2016 the Company Court ordered the admission of the Company Petition and also directed publication of the advertisement of the petition in accordance with Rule 24 of the Companies (Court) Rules, 1959. Pursuant to the said order, the 2nd respondent herein (petitioning creditor) effected a publication of the advertisement in the Official Gazette in Form No. 48 on 30.01.2016. Newspaper publications were also made, indicating the date of hearing of the Company Petition as 29.02.2016.

6. Thereafter, the Company Court passed an order dated 10.03.2016 directing the winding up of the 1st respondent Company on the ground that the Company has been unable to pay its debts and that it was just and equitable to wind up the 1st respondent Company.

7. By the aforesaid order dated 10.03.2016, the Company Court appointed the official liquidator attached to the High Court of Allahabad as the Liquidator and directed him to take over the assets and books of accounts of the Company. The order of winding up was also directed to be advertised in Form 53 in two newspapers, as required under Rule 113 of the Companies (Courts) Rules 1959.

8. Thereafter, the 1st respondent filed an application for recalling the order of winding up dated 10.03.2016. The 1st respondent, in order to prove their bonafides paid the entire amount due to the petitioning creditor (the second respondent herein) along with costs. Therefore, the petitioning creditor had no objection to the recall of the order of winding up.

9. But the official liquidator opposed the application for recall on the ground that the 1st respondent-Company owed money to various creditors to the tune of Rs.27 Crores and that unless the said amount is paid, the order of winding up cannot be recalled. The Official Liquidator also submitted that he had already taken over charge of the assets of the Company.

10. In the light of the rival contentions, the Company Court passed an order on 22.08.2016 keeping the winding up order dated 10.03.2016 in abeyance. However, the Company Court directed the Official Liquidator to continue to be in custody of the assets of the Company.

- A 11. While things stood thus, the appellant herein, claiming to be a creditor of the first respondent herein, moved an application before the NCLT, Allahabad under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short the 'IBC, 2016'). The claim of the appellant herein before the NCLT was that the 1st respondent was due and liable to pay a sum of Rs.32 lakhs and that despite repeated demands, the 1st respondent failed to pay the said amount.
- B 12. Thereafter, the appellant moved an application in Civil Miscellaneous Application No. 23 of 2020 before the Company Court (High court) seeking a transfer of the winding up petition to the NCLT, Allahabad. This application was rejected by the Company Court by a cryptic order dated 24.02.2020, on the sole ground that the requirement of Rule 24 had already been complied with and that a winding up order had already been passed. It is against this order of the High court, refusing to transfer the winding up proceedings from the Company Court to the NCLT that the financial creditor has come up with this civil appeal.

D **Issues for Consideration**

- E 13. The main issues that arise for consideration in this appeal are:
- (i) what are the circumstances under which a winding up proceeding pending on the file of a High court could be transferred to the NCLT and
- (ii) at whose instance, such transfer could be ordered.

Discussion

- F 14. Though the Companies Act, 2013 (Act 18 of 2013) received the assent of the President on 29.08.2013 and it was published in the Gazette of India dated 30.08.2013 and corrected through corrigenda published on 01.01.2014, various provisions of the Act came into force on various dates. While some of the provisions came into force w.e.f. 12.09.2013, some other provisions came into force w.e.f. 01.04.2014.

- G 15. Clauses (a) and (b) of Sub-section (1) of Section 434 as well as Sub-section (2) of Section 434 came into force w.e.f. 01.06.2016 *vide* S.O.1934 (E) dated 01.06.2016. Clause (c) of Sub-section (1) of Section 434 came into force on 15.12.2016 *vide* S.O. 3677(E) dated 01.12.2016.

- H 16. It may be noted here that Section 434 as it originally stood when the Companies Act, 2013 was enacted, was different from what it is today. Section 434 as it was incorporated originally in the Companies

Act, 2013, was actually substituted by the Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), which came into force on 15.11.2016. A

17. Section 434 as it stood originally in the Companies Act, 2013 (Act 18 of 2013) and Section 434 as substituted by IBC, 2016 (Act 31 of 2016) together with subsequent amendments thereto, are presented in a tabular column for easy appreciation.

Sec. 434 as it was originally drafted in Act 18 of 2013	Sec. 434 as it was substituted under IBC, Act 31 of 2016
<p><i>“434. Transfer of certain pending proceedings.-</i>(1) On such date as may be notified by the Central Government in this behalf,-</p> <p>(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;</p> <p>(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;</p>	<p>[434. Transfer of certain pending proceedings.-(1) On such date as may be notified by the Central Government in this behalf,-</p> <p>(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;</p> <p>(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:</p>
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A	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;	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
B		(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;
C		(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:
D		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:
E		[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 Court shall be transferred to the Tribunal:
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<p>Reconstruction under the sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) immediately before the commencement of this Act shall stand abated:</p> <p>Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make a reference to the Tribunal under this Act within one hundred and eighty days from the commencement of this Act in accordance with the provisions of this Act:</p> <p>Provided further that no fees shall be payable for making such reference under this Act by a company whose appeal or reference or inquiry stands abated under this clause.</p> <p>(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 court, to the Tribunal under this section.”</p>	<p>[Provided also that-]</p> <ul style="list-style-type: none"> (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; <p>shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:]</p> <p>[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.]</p> <p>[Provided further that any party or parties to any proceedings relating to the winding up of companies pending before the any Court immediately before the commencement of the Insolvency and Bankruptcy Code</p>	<p>A</p> <p>B</p> <p>C</p> <p>D</p> <p>E</p> <p>F</p> <p>G</p> <p>H</p>
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A		(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).]
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E 18. It is important to note that what is extracted in the right hand side column of the above Table includes, apart from what was substituted by Act 31 of 2016, a couple of amendments made to Section 434. Those amendments were made under:-

- F (i) The Companies (Removal of Difficulties) Fourth Order, 2016 published on 07.12.2016, which came into effect on 15.12.2016;
- (ii) The Companies (Removal of Difficulties) Order, 2017 published on 29.06.2017 which came into effect on the same date; and
- G (iii) The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 namely 26 of 2018, which came into force w.e.f. 06.06.2018.

H 19. A careful look at Section 434 as it stands today would show that Clause (b) of Sub-section(1) of Section 434 has nothing to do with

what Section 434 in entirety purports to deal with. Section 434 in entirety purports to deal with the transfer of proceedings pending either before the Board of Company Law Administration or before the Company Court (the High Court or the District Court). Clause (b) of Sub-section (1) deals with the right of appeal to the High Court against any decision of the Company Law Board and hence Clause (b) is actually a misfit in the scheme of Section 434.

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20. Be that as it may, clause (c) of Sub-section (1) is the provision that actually provides for the transfer of all the proceedings under the Companies Act, 1956 pending before any District Court or High Court, to the Tribunal. Broadly Clause (c) makes a mention about proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up. But Clause (c) is not limited in its application to proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up. This is due to the usage of the words “All proceedings.....including” in Clause (c).

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21. However, the first proviso to Clause (c) which was not there in the original Section 434, but which was inserted only under IBC Act of 2016 when Section 434 was substituted, circumscribes what is contained in the main part of Clause (c). The first proviso to Clause (c) restricts the transferability of proceedings for winding up from the High Court to the tribunal, by stipulating that only such proceedings for winding up which are at a stage as may be prescribed by the Central Government, be transferred to the Tribunal.

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22. Sub-section (2) of Section 434 empowers the Central Government to make Rules consistent with the provisions of the Act, to ensure timely transfer of all matters pending before the Company Law Board or the Courts, to the Tribunal. Therefore, in exercise of the power conferred by Sub-section (2) of Section 434 of the Companies Act, 2013 read with Sub-section (1) of Section 239 of the IBC, 2016, the Central Government issued a set of Rules known as ‘The Companies (Transfer of Pending Proceedings) Rules, 2016.

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23. Before we have a look at the Rules it is necessary to note that for the purpose of transfer, winding up proceedings pending before the High Courts, are classified by Section 434 into two categories namely:-

(a) Proceedings for voluntary winding up where notice of resolution by advertisement has been given under Section 485(1) of the

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- A Companies Act, 1956, but the company has not been dissolved before 01.04.2017; and
- (b) Other types of winding up proceedings.
24. The first of the above 2 categories of cases are covered by the fourth proviso under Clause (c) of Sub-section (1) of Section 434, which states:
- "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".*
- Such cases of voluntary winding up covered by the above proviso shall continue to be dealt with by the High court. It is only (i) cases of voluntary winding up falling outside the scope of the 4th Proviso and (ii) other types of winding up proceedings, that can be transferred by the High Courts to the Tribunal, subject however to the Rules made by the Central Government under Section 434 (2).
25. The transferability, by operation of law, of winding up proceedings, other than those covered by the 4th Proviso, depends upon the stage at which they are pending before the Company Court. But this is left by the law makers to be determined through subordinate legislation, in the form of Rules.
26. Apart from providing for the transfer of certain types of winding up proceedings by operation of law, Section 434 (1)(c) also gives a choice to the parties to those proceedings to seek a transfer of such proceedings to the NCLT. This is under the fifth proviso to Clause (c).
27. Keeping in mind the above scheme of Section 434, let us now turn to the Rules. As stated earlier, The Companies (Transfer of Pending Proceedings) Rule, 2016 were issued in exercise of the powers conferred by Section 434 (2) read with Section 239(1) of IBC, 2016.
28. The aforesaid Rules categorise the pending proceedings for winding up into three types *namely (i)* proceedings for voluntary winding up covered by the fourth proviso to Clause (c) of Sub-section (1) of Section 434, which shall continue to be dealt with in accordance with the

provisions of the 1956 Act; (ii) proceedings for winding up on the ground of inability to pay debts; and (iii) proceedings for winding up on grounds other than inability to pay debts. A

29. Rule 4 of the aforesaid Rules deals with cases of voluntary winding up covered by the fourth proviso to Section 434(1)(c). We are not concerned in this case with such types of cases. B

30. Rule 5 of the aforesaid Rules provides for transfer of proceedings for winding up on the ground of inability to pay debts. It 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 (c) 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: C

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. E

Provided further that any party or parties to the petitions shall, after the 1st 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: F

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 G

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- A *Tribunal, even if the petition has not been served on the respondent."*

31. Rule 6 of the aforesaid Rules deals with transfer of proceedings for winding up, on grounds other than inability to pay debts. It reads as follows:-

- B *"6. Transfer of pending proceedings of Winding up matters on the grounds other than inability to pay debts.—All petitions filed under clauses (a) and (f) of section 433 of the Companies Act, 1956 pending before a High Court and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal exercising territorial jurisdiction and such petitions shall be treated as petitions under the provisions of the Companies Act, 2013 (18 of 2013)."*

- C 32. The transferability of a winding up proceeding, both under Rule 5 as well as under Rule 6, is directly linked to the service of the winding up petition on the respondent under Rule 26 of the Companies (Court) Rules, 1959. If the winding up petition has already been served on the respondent in terms of Rule 26 of the 1959 Rules, the proceedings are not liable to be transferred. But if service of the winding up petition on the respondent in terms of Rule 26 had not been completed, such winding up proceedings, whether they are under Clause (c) of Section 433 or under Clauses (a) and (f) of Section 433, shall peremptorily be transferred to the NCLT.

- D 33. In other words, Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules 2016, fix the stage of service of notice under Rule 26 of the Companies (Court) Rules, 1959, as the stage at which a winding up proceeding can be transferred. This is because the first proviso under Clause (c) of Sub-section (1) of Section 434 enables the Central Government to prescribe the stage at which proceedings for winding up can be transferred and sub-section (2) of section 434 confers rule making power on the Central Government.

- E 34. Rule 26 of the Companies (Court) Rules, 1959 reads as follows:
- H "Service of petition-** Every petition shall be served on the respondent, if any, named in the petition and on such other persons as the Act or these rules may require or as the Judge or the Registrar may direct. Unless otherwise ordered, a copy

of the petition shall be served along with the notice of the petition.” A

35. The normal requirement of Rule 26, as seen from its last limb is that the copy of the petition under the Act shall be served on the respondent along with the notice of the petition, unless otherwise ordered. The notice of the petition, required under Rule 26 to be served along with the copy of the petition, should be in Form No.6, due to the mandate of Rule 27. B

36. Due to the usage of the words “*was admitted*” in Form No.6, there was a confusion as to whether the service referred to in Rule 26, is of a pre-admission notice or post-admission notice, in a winding up proceeding. Different High Courts took different views. Eventually, this Court settled the position in ***Forech India Ltd.*** vs. ***Edelweiss Assets Reconstruction Co. Ltd.***¹ by holding “*that Rules 26 and 27 clearly refer to a pre-admission scenario.*” C

37. After so interpreting Rules 26 and 27 of the Companies (Court) Rules, 1959, this Court pointed out in ***Forech India Ltd.***(supra) that “*when the Code was enacted, only winding up petitions where no notice under Rule 26 was served, were to be transferred to NCLT and treated as petitions under the Code*”. However, after Section 434 was substituted by a new provision under Act 31 of 2016 and the 5th proviso was inserted by Act 26 of 2018, the transfer of the winding up proceedings, even at the instance of the party or parties to the proceedings became permissible. This change of position was also noted by this Court in ***Forech India Limited*** (supra). D

38. But while noting the change of position after the insertion of the 5th proviso through Act 26 of 2018, this Court indicated in para 17 of the Judgment as though “*any person could apply for transfer of such petitions to the NCLT under the Code*”. Taking advantage of this, it is contended by the learned senior counsel for the petitioner that “*any person*” (and not necessarily a party to the proceeding) could apply for transfer. E

39. But we do not think that the decision in ***Forech India Limited*** (supra) is an authority for the proposition that the 5th proviso to Clause (c) of Sub-section (1) of Section 434 could be invoked by any person who is not a party to the proceeding for winding up. The 5th proviso G

¹2019 (2) SCR 477 H

- A which we have already extracted uses the words “*any party or parties to any proceedings relating to the winding up of companies pending before any Court.*”

40. In other words, *the right to invoke the 5th proviso is specifically conferred only upon the parties to the proceedings.*

- B Therefore, on a literal interpretation, such a right should be held to be confined only to “*the parties to the proceedings.*”

41. That takes us to the next question as to who are “*the parties to*” the winding up proceedings. The Companies Act, 1956 does not define the expression “*party*”. The Companies (Court) Rules, 1959 also

- C does not define the expression “*party*”. The Companies Act 2013 does not define the expression “*party*”. The Companies (Transfer of pending proceedings) Rules, 2016 also does not define the expression “*party*”. Even the IBC, 2016 does not define the expression “*party*”.

- D 42. But there are certain clues inherently available in the Companies Act, 1956, to indicate the persons who may come within the meaning of the expression “*party to the proceedings*”. The provisions which contain such clues are as follows:

- E (i) Section 447 of the Companies Act, 1956, which is equivalent to Section 278 of the Companies Act, 2013 states that *an order for winding up shall operate in favour of all the creditors and of all the contributories of the company as if it has been made on the joint petition of a creditor and of a contributory.* There is a small change between the wording of Section 278 of the 2013 Act and the wording of Section 447 of the 1956 Act. This change may be appreciated, if both these provisions are presented simultaneously in a tabular column:

	<i>Section 447 of 1956 Act</i>	<i>Section 278 of 2013 Act</i>
G	<i>Effect of winding up order.- An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if it has been made on the joint petition of a creditor and of a contributory.</i>	<i>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.</i>

- H Section 278 of the 2013 Act shows that *any petition by a single creditor or contributory is actually treated as a joint petition of*

creditors and contributories, so that the order of winding up operates in favour of all the creditors and all the contributories. A

(ii) Under Section 454 (6) of the 1956 Act, **any person stating himself in writing to be a creditor** shall be entitled to inspect the statement of affairs submitted to the official liquidator. If the claim of such a person to be a creditor turns out to be untrue, such a person is liable to be punished under Section 454(7) of the 1956 Act. B

(iii) The powers of the liquidator are enumerated in Section 457 of the 1956 Act. Section 457 actually divides the powers of a liquidator into two categories *namely* (i) those available with the sanction of the Tribunal and (ii) those generally available to the liquidator. But Section 290 of the 2013 Act has done away with such a distinction. However, the 1956 Act, as well as 2013 Act make the exercise of the powers by the liquidator, subject to the overall control of the Tribunal. This is made clear by Section 457(3) of the 1956 Act and Section 290(2) of the 2013 Act. Additionally, Section 457(3) of the 1956 Act enables any creditor or contributory to apply to the Court with respect to the exercise by the Liquidator, of any of the powers conferred by Section 457. C

(iv) Section 460 of the 1956 Act and Section 292 of the 2013 Act make it clear that in the administration of the assets of the Company and the distribution thereof among its creditors, the liquidator should have regard to any directions given by resolution of creditors at any general meeting. If the liquidator does something, in exercise of his powers, any person aggrieved by such Act or decision of the liquidator, is entitled to apply to the Company Court, under Section 460(6) of the 1956 Act and Section 292(4) of the 2013 Act. D

(v) Section 466(1) of the 1956 Act enables any creditor to apply for stay of all proceedings in relation to the winding up. This right can be exercised by any creditor at any time after the making of a winding up order. E

43. 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 G

H

- A 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.
- 44. 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 5th proviso to section 434(1)(c), it would be better to recognise the right of such a party to seek transfer directly.

- 45. 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.

- 46. 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.

- 47. Therefore, the appeal is allowed, the impugned order is set aside and the proceedings for winding up pending before the Company Court (Allahabad High Court) against the first respondent herein, is ordered to be transferred to the NCLT, to be taken up along with the application of the appellant-*herein* under Section 7 of the IBC. There will be no order as to costs.