

Forech India Ltd. vs Edelweiss Assets Reconstruction Co. ... on 22 January, 2019

Equivalent citations: AIRONLINE 2019 SC 2413

Author: Rohinton F. Nariman

Bench: Navin Sinha, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 818 OF 2018

FORECH INDIA LTD.

.. APPELLANT(S)

VERSUS

EDELWEISS ASSETS RECONSTRUCTION
CO. LTD.

.. RESPONDENT(S)

JUDGMENT

ROHINTON F. NARIMAN, J.

1. The present matter arises from an Operational Creditor's appeal to continue with a winding up petition that has been filed by the said creditor way back in 2014. The facts relevant for disposal of this appeal are as follows:-

2. A winding up petition, being No. 42 of 2014, was filed by the present appellant before the High Court of Delhi on 10.01.2014, against Respondent No. 2-Company, alleging (under Section 433(e) of the Companies Act) inability to pay dues.

Notice in this petition had been served, as is recorded by an order dated 20.01.2014 of the High Court of Delhi. Further orders which have been pointed out to us by learned counsel for the appellant, have gone on to state that there is a debt or liability which is, in fact, admitted.

3. It was also pointed out by learned counsel for the appellant that a Reference had been made by the Company itself on 14.07.2015 to the Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies Act, 1985, which, according to the learned counsel for the appellant, has abated as on 11.12.2016. It transpires that another operational creditor, viz., SKF India Ltd. had filed an application under Section 9 of the Insolvency & Bankruptcy Code, 2016 (in

short 'the Code'), against Respondent No. 2, which was allowed to be withdrawn so that the aforesaid operational creditor could go to the High Court in a winding up petition which would then be heard along with the Company Petition No. 42/2014.

4. Meanwhile, Respondent No. 1, being a financial creditor of the self- same corporate debtor, moved the National Company Law Tribunal (NCLT) in an insolvency petition filed under Section 7 of the Code sometime in May/June 2017. This petition was admitted on 07.08.2017. Against the aforesaid order, an appeal was filed by the appellant herein which was dismissed by the Appellate Tribunal, in which Section 11 of the Code was referred to, and it was held by the Appellate Tribunal that since there was no winding up order by the High Court, the financial creditor's petition would be maintainable, as a result of which the appellant's appeal has been dismissed.

5. Learned counsel appearing on behalf of the appellant has painstakingly taken us through the record, and has referred to the Code, together with Notifications from the Ministry of Corporate Affairs, which, in exercise of powers under Section 239 of the Code, have made Rules called the Companies (Transfer of Pending Proceedings) Rules, 2015. She has also referred to amendments made up to date in the Eleventh Schedule to the Code and has argued before us that the winding up petition that had been preferred by her would clearly fall within the ambit of Rule 5 of the aforesaid Rules inasmuch as notice under Rule 26 of the Companies (Court) Rules had been served much prior to the commencement of the Code. This being the case, this winding up petition should, therefore, have carried on and should be allowed to carry on before the High Court. The necessary concomitant of this argument was that the winding up proceedings before the High Court should continue and not proceedings filed by other creditors under the Code.

6. Mr. Sanjiv Sen, learned senior counsel appearing on behalf of Respondent No. 1, countered these submissions and has placed before us all the relevant materials, statutory and otherwise, to state that the whole object of the Code would be frustrated if petitions for winding up in the High Court were to continue in the face of the insolvency petitions that have been filed under the Code. He referred to some of our judgments to buttress this submission and, in particular, to Section 238 of the Code. According to him, as has been held in some of our judgments, the proceedings that were initiated under Section 7 or Section 9 of the Code are independent proceedings, which must reach their logical conclusion unhampered by any winding up petition that may be pending in a High Court. According to him, it is also important to remember that the basic objective of the Code is to infuse life into a corporate debtor who is in the red, and it is only if the resuscitation process cannot be completed in accordance with the provisions of the Code that liquidation takes place under the Code. Keeping this in mind, it is obvious that the judgment of the Appellate Tribunal can be sustained on the grounds argued by him and the appeal must, therefore, be dismissed.

7. At this stage, it is important to advert to some of the provisions contained in the Code. Section 255 of the Code reads as under:

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

8. In pursuance of this Section, the Eleventh Schedule to the Code made various amendments to the Companies Act, 2013 on 15.11.2016 with effect from 01.12.2016. Section 434 of the Companies Act, 2013 was substituted as follows:-

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

(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 10-E of the Companies Act, 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, 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. (2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.”

9. On and from 17.08.2018, Section 434 was substituted again. This time, the provision reads as follows:-

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

(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 10-E of the Companies Act, 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, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government:

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

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

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;

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

Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any Court immediately before the commencement of

the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.” (Emphasis supplied.)

10. When the Code was enacted with effect from 01.12.2016, two Notifications both dated 07.12.2015 were made. The first Notification, which was titled as the Companies (Transfer of Pending Proceedings) Rules, 2016 laid down in Rule 5 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 under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required 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 Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.”

11. Simultaneously, on the same date, by the Companies (Removal of Difficulties) Fourth Order, 2016, it was made clear in sub-Clause 2 of the said Order as follows:-

“(2) In the Companies Act, 2013, in Section 434, in sub-section (1), in clause (c), after the proviso, the following provisos shall be inserted, namely:-

“Provided further that – xxx xxx xxx

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959”

12. By a Notification dated 29.06.2017, titled the Companies (Transfer of Pending Proceedings) Second Amendment, Rules, 2017, Rule 5 was substituted as follows:-

“(5) Transfer of pending proceedings of Winding up on the ground of inability to pay debts.--(1) All petitions relating to winding up of a company under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under Rule 26 of the Companies (Court) Rules, 1959, shall be transferred to the Bench of the Tribunal established under sub-Section (4) of Section 419 of the Companies Act, 2013, exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under Sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this Rule and remains in the High Court and where there is another petition under clause (e) of Section 433 of the Act for winding up against the same company pending as on 15 th December, 2016 such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

13. Rules 26 and 27 of the Companies (Court) Rules, 1959 read as follows:

“Rule 26. 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.

Rule 27. Notice of petition and time of service - Notice of every petition required to be served upon any person shall be in Form No. 6, and shall, unless otherwise ordered by Court or provided by these rules, be served not less than 14 days before the date of hearing.

Provided always that such notice when by the Act or under these Rules is required to be served on the Central Government, the same shall, unless otherwise ordered by the Court, be served not less than 28 clear days before the date of hearing.”

14. Form No. 6 appended to Rule 27 reads as under:

(See Rule 27) [Heading as in Form No. 1] Company Petition No..... of 19
NOTICE OF PETITION Take notice that a petition under Sec..... of the
Companies Act, 1956, for presented by on the
day of 19..... was admitted on the day of
.....19..... and that the said petition is fixed for hearing before the
Company Judge on the

day of 19..... If you desire to support or oppose the petition at the
hearing, you should give me notice thereof in writing so as to reach me not later
than..... days before the date fixed for the hearing of the petition, and appear at
the hearing in person or by your advocate. If you wish to oppose the petition, the
grounds of opposition or a copy of your affidavit should be furnished with your
notice. A copy of the petition will be furnished to you if you require it on payment of
the prescribed charges for the same/is enclosed herewith.

Dated..... (Sd/ -)..... Name.....

(Advocate for
petitioner)

Address:

[This notice should be served on or before the day of
.....19.....] NOTE: Where the notice is to a respondent named in the
petition, a copy of the petition should be served on him alongwith the notice.”

15. Shri Sen pointed out to us that there was a divergence of views in the interpretation of the aforesaid rules. The Bombay High Court in Ashok Commercial Enterprises vs. Parekh Aluminex Limited, (2017) 4 Bom. CR 653, stated that the notice referred to in Rule 26 was a pre-admission notice and hence, held that all winding up petitions where pre-admission notices were issued and served on the respondent will be retained in the High Court. On the other hand, the Madras High Court in M/s. M.K. & Sons Engineering v/s. Eason Reyrolle Ltd. in CP/364/2016 has held that the notice under Rule 26 is referable to a post-admission position of the winding up petition and accordingly held that only those petitions where a winding up order is already made can be retained in the High Court. For this purpose, the Madras High Court strongly relied upon Form No. 6 appended to Rule 27 and the expression “was admitted” occurring in the Notice of Petition contained in the said Form.

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 vs. Jaipur Metals & Electricals Ltd. Through its Managing Director &Ors., being a judgment by a Division Bench of this Court dated 12.12.2018.

18. After referring to the statutory scheme, as aforesaid, this Court held:

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

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

appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. The 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."

19. Mr. Sen also referred us to a judgment of the learned Single Judge of the High Court of Bombay reported, in (2018) 2 AIR Bom R 350 in PSL Limited vs. Jotun India Private Limited. The Learned Single Judge, after referring to the self-same provisions of the Code and subordinate legislation made thereunder, held as follows:-

"93. The fact that post notice winding up petitions continue to be governed by the Companies Act, 1956, only means – that to those proceedings it will be the Companies Act, 1956 which will apply. It does not, however, mean that if, in a post-notice winding up petition a new proceeding is filed under IBC, and where orders are passed by NCLT, including under Section 14 of IBC, the consequences provided for under IBC will not apply to post notice proceeding, whatever their stage may be.

xxx xxx xxx

98. Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC, vis-a-vis the company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation. This is contrary to the plain language of IBC. If the contentions of petitioner were to be accepted, it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator appointed, provisions of IBC can never apply to such companies for all times to come.

xxx xxx xxx

100. The mere fact that post notice winding up proceedings are to be "dealt with" in accordance with the provisions of the Companies Act, 1956, does not bar the applicability of the provisions of IBC in general to proceedings validly instituted

under IBC, [nor] does it mean that such proceeding can be suspended.”

20. This judgment was upheld by a Division Bench of the Bombay High Court. We may hasten to add that the law declared by this judgment has our approval.

21. The resultant position, therefore, is that we agree with the learned counsel for the appellant that the Appellate Tribunal’s reasoning is not correct. Section 11 of the Code specifies which persons are not eligible to initiate proceedings under it. In particular, Section 11(d) reads as follows:

“11. Persons not entitled to make applications- The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely:-

xxx xxx xxx

(d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.”

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.

24. With these observations, we dispose of the aforesaid appeal.

.....J. (R.F. Nariman)J. (Navin Sinha) Delhi, Dated: January 22, 2019.