**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**COMPANY APPLICATION NO.572 OF 2017**
**IN**
**COMPANY PETITION NO.434 OF 2015**

PSL Limited ….Applicant/Org. Respondent

***IN THE MATTER BETWEEN :***

Jotun India Private Limited ….Petitioner

Vs.

PSL Limited ....Respondent

**WITH**
**COMPANY APPLICATION (L) NO.333 OF 2017**
**IN**
**COMPANY PETITION NO.434 OF 2015**

Jotun India Private Limited ….Petitioner

Vs.

PSL Limited ....Respondent

**WITH**
**COMPANY APPLICATION (L) NO.417 OF 2017**
**IN**
**COMPANY PETITION NO.434 OF 2015**

Edelweiss Asset Reconstruction Co. Ltd. ….Petitioner

Vs.

PSL India Limited ....Respondent

**WITH**
**COMPANY PETITION NO.434 OF 2015**

Jotun India Private Limited ….Petitioner

Vs.

PSL Limited ....Respondent

**WITH**
**COMPANY PETITION NO.1048 OF 2015**

SK Networks Company Ltd. & Anr. ….Petitioners

Vs.

M/s. PSL Limited ....Respondent

**WITH**
**COMPANY PETITION NO.878 OF 2015**

Hanwa Company Limited ….Petitioner

Vs.

PSL Limited ....Respondent

**WITH**
**COMPANY PETITION NO.256 OF 2016**

M/s. J.P. Engineering ….Petitioner

Vs.

M/s. PSL Limited ....Respondent

**WITH**
**COMPANY PETITION NO.392 OF 2016**

M/s. Bhotika Trade & Services Pvt. Ltd. ….Petitioner

Vs.

M/s. PSL Limited ....Respondent

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Mr. Janak Dwarkadas, senior advocate a/w. Ms. Ankita Singhania, Mr. Amir Arsiwala, Mr. Omprakash Jha and Mr. Raghav Shekhar i/b. The Law Point for applicant/original respondent.
Mr. Zal Andhyarujina a/w. Ms. Akanksha Agarwal, Ms. Silpa Nair, Ms. Lizum Wangdi and Mr. Akshay Aurora i/b. Trilegal for petitioner in CP/434/2015 and for respondent in CA/572/2017.
Ms. Arundathi Venkataraman i/b. Khaitan and Co. for petitioner in CP/878/2015.
Mr. Kunal Chheda a/w. Mr. Arsh Misra i/b. M.V. Kini and Co. for petitioner in CP/1048/2015.
Mr. Rohit Gupta a/w. Mr. Nikhil Rajani i/b. V. Deshpande and Co. for applicant in CAL/417/2017 (Intervenor).

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**CORAM : K.R.SHRIRAM, J.**
**RESERVED ON : 24th NOVEMBER, 2017**
**PRONOUNCED ON : 5th JANUARY, 2018**

**P.C.:**

1 Respondent-applicant-PSL Limited, who is respondent in the company petitions, has filed this application seeking the order dated 19th July 2017 in company application (lodging) no.333 of 2017 be

vacated/recalled. By this non-speaking order, the Learned Company Judge was pleased to stay the proceedings filed by respondent-applicant under Section 10 of Insolvency and Bankruptcy Code, 2016 ("**IBC**") before National Company Law Tribunal (NCLT), Ahmedabad for insolvency resolution.

The issue which arises for consideration in the present application is whether the Company Court has any jurisdiction to stay the proceedings filed by a Corporate Debtor before NCLT even though a previously instituted company petition by a creditor may have been admitted (and therefore does not get transferred to NCLT) but where a provisional liquidator has not been appointed.

2 On 10th March 2015 company petition no.434 of 2015 was filed by petitioner - Jotun India Private Limited against respondent-applicant (org. respondent) under Sections 433 and 434 of the Companies Act, 1956, claiming an outstanding sum of Rs.7.25 Crores with interest in respect of unpaid invoices for goods supplied. For the purpose of this application, I am not considering the facts in other company petitions.

On 19th June 2015, respondent-applicant made a reference to Board of Industrial and Financial Reconstruction (BIFR) under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

3 On 1st December 2016 the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, ("**Repeal Act**") was notified, and hence SICA came to be repealed.

Simultaneously, Insolvency and Bankruptcy Code, 2016, ("**IBC**") was also brought into force. Section 4(b) of the Repeal Act (as amended by IBC) allowed a company whose reference was pending before BIFR as on the 1st December 2016 to file before NCLT an application under section 10 of IBC within a period of 180 days from the notification of the Repeal Act, i.e., on or before the 31st of May 2017 for commencement of the corporate insolvency resolution process and for an order of moratorium.

4 On 9th March 2017, order admitting the present company petition no.434 of 2015 was passed. Whilst admitting the company petition, the Learned Judge observed,

> *"… since all assets of the respondent company are secured assets in favour of the secured creditors and are under their control, I do not propose to appoint official liquidator at this stage. The petitioner will be at liberty to apply for appointment of the official liquidator at the latter stage if it is found that the assets of the respondent company are jeopardized.*

5 On 29th May 2017 respondent-applicant filed an application before NCLT, Ahmedabad under section 10 of IBC, being C.P (IB) No. 37/10/NCLT/AHM/2017 ("**IBC Application**"), i.e., within the window of 180 days prescribed by the Repeal Act, for the commencement of the

corporate insolvency resolution process.

In this application the fact that the above company petition had been filed has been expressly disclosed.

6 On 18th July 2017, IBC Application made by respondent-applicant was taken up for hearing by NCLT, Ahmedabad, and the secured creditors to whom notice of IBC Application was given, were also heard. After hearing the parties, NCLT, Ahmedabad, reserved the matter for orders and directed the same to be listed on 20th July, 2017.

On the same day, petitioner herein, filed company application (lodging) no.333 of 2017 seeking the appointment of a Provisional Liquidator.

7 On 19th July 2017, petitioner herein, mentioned the company application (lodging) No.333 of 2017 before this Court for the appointment of a provisional liquidator.

After hearing the counsels, the Learned Judge was pleased to pass an order restraining the Hon'ble NCLT, Ahmedabad, from continuing with IBC Application and placed the company application (lodging) No.333 of 2017 to be heard on 26th July 2017. This order for convenience is hereinafter referred to as "impugned order dated 19th July 2017".

8 On 20th July 2017 appeal (lodging) no.280 of 2017 was filed by respondent-applicant challenging the order dated 19th July 2017.

9 On 1st August 2017 order was passed by the Division Bench of this Court in the said appeal-clarifying that the question whether the Learned Single Judge, acting as the Company Court, had the jurisdiction to pass the impugned order would expressly be kept open and left for determination. Upon this express liberty, respondent-applicant withdrew the appeal.

10 On 15th September 2017 the present application was filed for recalling/vacating the impugned order dated 19th July 2017. This impugned order dated 19th July 2017, according to respondent-applicant, is an order in excess of jurisdiction conferred upon a company court and hence is liable to be recalled/vacated.

11 **The submissions of Mr. Dwarkadas, counsel for respondent-applicant basically are as under** :

(a) The stay granted by the Learned Single Judge is continuing, and causing great prejudice to the statutory rights of respondent-applicant and all of its creditors, whether secured, unsecured, financial or operational, from seeking the benefit of the remedies provided under IBC, i.e., the commencement of corporate insolvency resolution process.

(b) IBC is a later and special statute dealing with the subject of the insolvency resolution of corporate persons in a time bound manner for maximisation of value of assets of such persons and to balance the interests of all stakeholders, and is a successor statute

to SICA. The Companies Act, 1956, which is an earlier statute must give way to IBC (***Allahabad Bank v. Canara Bank***[1] ).

(c) Besides, Section 238 of IBC contains an overriding provision. There being no similar provision in the Companies Act, 2013, the provisions of IBC must prevail over the provisions of Companies Act, 2013.

(d) Whether a winding up petition filed in the High Court (notice whereof has been given to respondent company) was liable to be stayed by reason of a subsequent petition filed by another creditor before NCLT came to be considered by Dhanuka J. in the matter of ***Ashok Commercial Enterprises v. Parekh Aluminex Ltd.***[2]. Dhanuka J. has held that the intention of the legislature is clear from the transfer notification dated 7th December 2016 that both proceedings, i.e., the winding up and NCLT proceedings can continue simultaneously.

(e) Section 63 of IBC, bars jurisdiction of Civil Court to entertain proceedings on the issue over which NCLT has jurisdiction. This Section is pari-materia to Section 34 of SARFAESI Act, 2002. Section 231 of IBC, specifically curtails the power of Civil Court or any other authority to restrain any action taken or to be taken before NCLT. This clearly curtails the power of this Court to pass any injunction against respondent-applicant from pursuing the pending IBC Application.

(f) The impugned order dated 19th July 2017 is clearly contrary to the view taken in *Ashok Commercial Enterprises (Supra)* in as

1. (2000) 4 SCC 406 para 40/pg.427
2. Order dated 11th April 2017 in Company Petition No.136 of 2014. Alternatively, (2017) 202 Comp Cas 148 (Paragraphs 57-63)

much as in the impugned order, primacy has been given to winding up proceedings filed before this court. This despite the mandate of Section 64 (2) of IBC which is an express bar against any court granting any injunction in respect of proceedings before NCLT. [***GhanshyamSarda v. Shiv Shankar Trading Company***[3] ***and Mardia Chemicals Ltd. & Ors. v. Union of India & Ors.***[4]]

(g) The statutory bar against a corporate debtor from filing an application under section 10 of IBC operates, if and only if, there is an order of liquidation against the corporate debtor.

Mr. Dwarkadas also relied upon the following judgments:

***1. Innoventive Industries Ltd. Vs. ICICI Bank and Anr.***[5]

***2. Mobilox Innovations Private Limited V/s. Kirusa Software Private Limited***[6]

***3. National Textile Workers' Union v. P.R. Ramakrishnan & Ors.***[7]

***4. Madura Coats Ltd. v. Modi Rubber Ltd. and Anr.,***[8]

***5. Bank of New York Mellon v. Zenith Infotech***[9]

***6. West Hills Realty Pvt. Ltd. v. Neelkamal Realtors Tower Pvt. Ltd.***[10]

***7. Dr. Writers Food Products Private Limited***[11]

***8. Budhia Swain &Ors v. Gopinath Deb &Ors.***[12]

3. (2015) 1 SCC 298 (para 26-28)
4. (2004) 4 SCC 311 para 41
5. (2017) SCC Online 1025
6. (2017) SCC Online SC 1154
7. (1983) 1 SCC 228)
8. (2016) 7 SCC 603
9. (2017) 5 SCC 1
10. Company Petition No. 331 of 2016 with Company Application (L) No.766 of 2016 dated 23rd December 2016 of the Bombay High Court
11. (2007) 6 Mah LJ 422
12. (1999) 4 SCC 396

***9. Prasanta Kumar Mitra and Ors. vs. India Steam Laundry***[13]

***10. Nahar Industrial Enterprises Ltd. vs. Hong Kong and Shanghai Banking Corporation***[14]

***11. Rentworks India Pvt. Ltd. vs. Small Industries Development Bank of India***[15]

***12. Cotton Corporation of India Limited vs. United Industrial Bank Limited***[16]

***13. Real Value Appliances Ltd. vs. Canara Bank***[17]

***14. M/s. Rishabh Agro Industries Ltd. vs. P.N.B. Capital Services Ltd.***[18]

12 Mr. Gupta, counsel for intervenor - Edelweiss, did not make any oral submissions but simply stated that they adopt the submissions made by Mr. Dwarkadas. **Intervenor's advocates, however, gave written submissions and the submissions are as under :**

**(I) Power to stay proceedings pending before NCLT -**

13 The Insolvency and Bankruptcy Code, 2016 (IBC), is a complete code and provide mechanism to resolve the dispute, revival, restructuring and in the event of failure of scheme, to provide for liquidation of the assets of the company. On admission, IBC, as per Section

13. (2017) 201 CompCas 509 (Cal) paragraphs 16-23
14. (2009) 8 SCC 646
15. 2014 (4) Bom CR 114
16. (1983) 4 SCC 625
17. (1998) 5 SCC 554
18. (2000) 5 SCC 515

14, provides for moratorium of 180 days, where all proceedings initiated against the company gets stayed.

14 IBC provides for mechanism to consider petitioner's claims as well. Therefore, it is not that their rights will get affected, but in fact the right, if any, will get adjudicated. Petitioner, however, for reasons best known to them, is averse to the same and wants the proceedings before NCLT to be stayed.

15 The issue is whether this Court can stay proceedings before NCLT, especially in light of the provisions of IBC, which specifically bars such intervention? It cannot, otherwise, in light of the fact that on admission of petition before NCLT, petition before this Hon'ble Court gets stayed as per Section 14, it will make provisions of IBC meaningless.

16 Section 63 of IBC bars jurisdiction of Civil Courts to entertain proceedings on the issue over which NCLT has jurisdiction. This Section is pari-materia to Section 34 of SARFAESI Act, 2002. Section 231 of IBC, specifically curtails the power of Civil Courts or any other authority to restrain any action taken or to be taken before NCLT. This clearly curtails the power of this Court to pass any injunction against the Bank/Intervenor from pursuing the pending application.

17 The power of this Court to pass order to restrain proceedings before any other Court is under Section 446. The provisions of IBC, by virtue of Section 238 of IBC will override the provisions of the Companies Act to that extent.

18 Further, the powers of this Court, while acting as a Company Court under Companies Act, 1956, is in exercise of its ordinary and original jurisdiction and not any extraordinary or inherent jurisdiction. In furtherance thereto, while acting so, this Court will not have jurisdiction to stay the proceedings before NCLT. In fact, both the Company Court as well as NCLT are created under the provisions of Companies Act, 2013 itself. In order to support this contention, reference may be made to the judgment of ***Official Liquidator, Uttar Pradesh v. Allahabad Bank and Ors.***[19].

19 In the matter of *M/s. Innoventive Industries (Supra)*, the Hon'ble Apex Court, after considering the provisions of IBC, more particularly Section 238, came to a conclusion that even Statutory Injunction under Maharashtra Relief Undertaking Act (MRU Act) will not come in the way of Secured Creditor to initiate proceedings under IBC.

20 Similar overriding provision came up for consideration of Hon'ble Supreme Court in the matter of ***Jagdish Singh Vs. Heeralal & Ors.***[20] where the Apex Court has held that the provision of SARFAESI Act,

19. (2013) 4 SCC 381
20. (2014) 1 SCC 479)

2002, will override the provisions of Civil Procedure Code and no injunction order can be granted.

21 Further, Section 446 of the Companies Act, 1956 is not applicable to the present petition and therefore, no leave, as stipulated thereunder has to be obtained. This position has been settled by the Supreme Court in the case of ***Allahabad Bank v. Canara Bank and Ors.***[21] wherein the issue of the impact of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act") on the provisions of the Companies Act, 1956 arose. The Supreme Court has held that leave of the Company Court is not required in order to commence proceedings under RDB Act, for the reason that RDB Act is a special law which would prevail over the Companies Act, 1956 being the general law and even assuming that both the statutes are special enactments, the latter one would prevail over the former, if the latter law contains a provision giving an overriding effect. In the case at hand, in view of Section 34 of RDB Act, it was held that the said Act overrides the Companies Act, to the extent of any inconsistency between the two enactments. Therefore, applying the ratio of this judgment to the present case, in view of Section 238 of IBC, provisions of IBC shall supersede and prevail over the Companies Act, to the extent of any inconsistency between the two. This judgment has been approved by a larger bench of the Supreme Court in

21. AIR 2000 SC 1535

the case of ***Rajasthan State Financial Corporation v. Official Liquidator***[22].

**(II) Whether NCLT can entertain a petition after the order of admission or appointment of Provisional Liquidator by Company Court?**

22 The order of admission or the order of appointment of Provisional Liquidator, will not create any bar on filing of petition and passing of orders by NCLT as the order of admission is merely commencement of proceedings and not final order of winding up which is passed under Section 481 of the Companies Act, 1956. Till the company is ordered to be wound up, i.e., the final order is passed, NCLT can entertain a petition or an application.

23 A similar issue had come up before the Hon'ble Supreme Court in the case of *Madura Coats Ltd. (Supra)* where the Hon'ble Supreme Court stayed the proceedings before the Company Court, in view of the applicability of Section 15 and 22 of SICA even when the Company Court has directed that the Company be wound up. It is not out of place to mention that Section 15 of SICA wherein a reference to BIFR is made and consequently, all the proceedings pending before other courts are stayed as per Section 22 of SICA, the situation is analogous to the filing of petition under Section 7 of IBC by virtue of which, NCLT is empowered to declare

22. (2005) 8 SCC 190

Moratorium under Section 14 of IBC.

24 In view of the aforesaid, the legislative intent behind the enactment of IBC is to consolidate provisions of SICA and Companies Act. Section 15 of SICA is pari-materia to section 10 of IBC and section 22 of SICA is similar to Section 14 of IBC.

25 IBC has been enacted to revive the Corporate Debtor by declaring a Moratorium of various proceedings and appointing an Interim Resolution Professional (IRP) to manage the affairs of the Corporate Debtor. Similarly, both SICA and IBC contains non-obstante provisions to the effect of overriding the provisions of any other law in force except as excluded expressly. There is in fact no inconsistency between the provisions of IBC and Companies Act. However, in the event of any inconsistency, the provisions of IBC will prevail in view of Section 238 of IBC. The provisions give overriding effect to any other law for time being in force, in case of any inconsistency or conflict with respect thereof. In view of Section 238, the judgment relied upon will apply with much greater force. The judgment followed the law laid down in the earlier pronouncement of Apex Court even in the matter of *Real Value Appliances Ltd. (Supra)* and various High Courts took the same view.

26 Even under the Companies Act, 1956, where Section 391, provided mechanism for restructuring of the Company, various Courts

have time and again held that petition under Section 391 of the Companies Act, 1956 was maintainable even after order of winding up. The Hon'ble Apex Court in the matter of ***Meghal Homes (P) Ltd. Vs Shree Niwas Girni K.K. Samiti***[23] has, in no uncertain terms, held that the application under Section 391 is maintainable, even after the order of admission but before dissolution of the company.

27 **Mr. Andhyarujina, counsel for petitioner opposing this application submitted as under :**

**(I) Saved winding up petitions :**

28 The petitions filed under Section 433 (e) of the Companies Act, 1956 (the 1956 Act), pending in the Hon'ble High Court as on 15th December 2016 (Saved Petitions), have been saved under the following provisions –

a. Section 434 of the Companies Act, 2013 (the 2013 Act), inter alia, deals with the transfer of the proceedings, pending under the 1956 Act before any District Court or High Court, to the Tribunal upon its constitution.

b. IBC, which came into effect in 2016, amended Section 434 of the 2013 Act. Section 255 read with the Eleventh Schedule of IBC, inter alia, amends the 2013 Act in the following manner –

23. (2007) 7 SCC 753)

> *"**255. Amendments of Act 18 of 2013** – The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule."*
>
> ***"The Eleventh Schedule***
> ***Amendments to the Companies Act, 2013***
>
> ***34.** For section 434, the following section shall be substituted, namely: —*
>
> *434. **Transfer of certain pending proceedings. —***
> *(1) On such date as may be notified by the Central Government in this behalf,—*
> *(a) ……*
> *(b) …..*
> *(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."*

c. Further, Section 239 (1) of IBC empowers the Central Government to make rules for carrying out the provisions of IBC and states as follows -

> ***"239. Power to make rules***
> *(1) The Central Government may, by notification, make rules for carrying out the provisions of this Code.*
> *(2)….."*

d. Therefore, in accordance with Section 434 of the 2013 Act read with Section 239 of IBC, the Central Government issued the Companies (Transfer of Pending Proceedings) Rules 2016 (hereinafter

referred to as "the Transfer Rules") on 7th December 2016. Rule 5 of the Transfer Rules, inter alia, provided that all petitions filed under Section 433 (e) of the 1956 Act in the High Court which had not been served upon respondent shall be transferred to NCLT and therefore, the petitions served upon respondent-applicant, would continue under the jurisdiction of the High Court.

e. The provisions of the Transfer Rules were discussed and elaborated by Hon'ble Mr. Justice S. C. Gupte in the judgment dated 23rd December 2016 in *West Hills Realty Pvt. Ltd. (Supra)* and further, clarified in his order dated 17th January 2017.

f. The Transfer Rules were amended by the Central Government vide the Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017 notified on 29th June 2017 (hereinafter referred to as "**the Amended Transfer Rules**"). Rule 5 of the Amended Transfer Rules, inter alia, provided that the petitions under Section 433(e) of the 1956 Act filed against the same company (as other Saved Petitions), shall not be transferred to the Tribunal, even if the petition has not been served on respondent.

g. Therefore, the Transfer Rules and the Amended Transfer Rules clearly indicate the intent of the legislature in saving the petitions pending in the High Court, to be transferred to NCLT and thereby, creating two

classes of petitions.

g.1 The two classes of petitions under Section 434(e) of the 1956 Act being –

> (i) the Saved Petitions, i.e., petitions pending in the High Court wherein notice was served to respondent and all other petitions pending against the same Company in the High Court where notice was not served to respondent.
>
> (ii) all petitions not saved, i.e., petitions that may have been filed in the High Court, but not served to respondent.

g.2 In terms of the petitions in class (i), the legislative intent is that the petitions shall be dealt with and disposed of in accordance with the 1956 Act to the complete exclusion of IBC.

g.3 In terms of the petitions in class (ii), the legislative intent is clear that those petitions are to be transferred to NCLT and filed as applications under Sections 7, 9 and 10 in accordance with the provisions of IBC and the regulations thereunder.

**(II) Non-obstante provision under Section 238 of IBC not applicable:**

29 The provisions of the 1956 Act are not inconsistent with the provisions of IBC in so far as the Saved Petitions are concerned and therefore, the provisions of IBC do not override the provisions of the 1956 Act under Section 238 of IBC.

30 Upon demurrer, that there is no bar against the proceedings continuing simultaneously before the High Court under the 1956 Act and

NCLT under IBC and that Section 238 of IBC, as relied upon by respondent-applicant, has no application in this present case.

30.1 In the matter of *M/s. Ashok Commercial Enterprises (Supra)*, it has been, inter alia, held that -

> *"62. In my view, it is clear that all winding up proceedings shall not stand transferred to the NCLT. It is clear that if the service of the notice of the Company Petition under Rule 26 of the Companies (Court) Rules, 1959 is not complied before the 15th December 2016 such Petitions shall stand transferred to NCLT whereas all other Company Petitions would continue to be heard and adjudicated upon only by the High Court. The Legislative intent is thus clear that two sets of winding up proceedings would be heard by two different forum i.e. one by NCLT and another by the High Court depending upon the date of service of Petition before or after 15th December 2016. In my view, there is thus, no embargo on this Court to hear this Petition along with other companion Petitions, in view of the admitted position that the notice under Rule 26 of the Companies (Court) Rules, 1959 has been served on the respondent prior to 15th December 2016.*
>
> *63. In my view, since there is no inconsistency in the provisions of the Insolvency and Bankruptcy Code, 2016 and the Companies Act, 2013 or Companies Act, 1956 in respect of the jurisdiction of the Company Court or of the NCLT insofar as winding up proceedings are concerned, reliance placed by Mr. Andhyarujina, the learned Counsel appearing for the respondent on Section 238 of the Insolvency and Bankruptcy Code, 2016 is totally misplaced. The effect of non-obstante provision if any in Section 238 of the Insolvency and Bankruptcy Code, 2016 would have been significant only if there would have been conflict in aforesaid provisions and not otherwise. In my view, Mr. Sen, the learned Counsel appearing for the petitioner is right in his submissions that Section 238 of the Code has no application in this situation on the ground that there is no conflict between the provisions of the Code and the provisions of the Companies Act, 1956 or the Companies Act, 2013."*

30.2 In the matter of *Innoventive Industries Ltd. (Supra)* (paragraph nos.12 – 15), the Ld. Members of NCLT, Mumbai vide its order dated 27th July 2017 has held that –

> *"Therefore, we are of the view that Section 238 will not have any*

> *overriding effect over Section 433(e) proceedings pending before the High Courts, where notice has already been served upon the Corporate Debtor."*

31 The Special Bench of NCLT, Delhi has considered the issues raised before various co-ordinate benches of NCLT with respect to the proceedings pending before the High Court and initiated in NCLT against the same Company. NCLT Delhi has, vide its order dated 21st August 2017, escalated the following issues to a special bench to be constituted by the Hon'ble President of NCLT, in the matter of ***Union Bank of India v Era Infra Engineering Ltd.***[24] -

> *"1. Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions before the respective High Courts or it is to be considered as an independent process?*
>
> *2. In case the process is considered to be not independent, whether the petition filed under the Code is required to be transferred to the concerned High Court which is having seisin over the winding up proceedings or await the outcome of the winding up proceedings by adjourning it sine die?*
>
> *3. Whether the Code gives any room for discretion to be exercised for adjourning it sine die in view of the statutory mandate given under Section 7, 9 and 10 of the Code for expeditious disposal of cases by either admitting or rejecting it within the fixed time frame?*
>
> *4. In case if the petition is adjourned sine die and if the winding up petition is dismissed or set aside in appeal subsequently, whether there is scope in such an eventuality for power of revival within the frame work of the Code conferred on this Tribunal?"*

**(III) Respondent's submissions on the effect of Sections 63 and 64 of IBC :**

32 It is the legislative intention of the saving provisions that the saved petitions shall proceed before the Company Court under the 1956

24. The issues have been heard by the bench constituted by the President of the NCLT and has been reserved for Orders.

Act, as aforesaid.

33 The saving provisions of the 2013 Act, expressly state that the Company Court shall retain its jurisdiction and powers, including the power to stay with regard to the Saved Petitions.

34 Any other reading of the saving provision, i.e., Section 434 (e) of the 2013 Act read with IBC will render the 2013 Act as otiose and therefore, the provisions must be interpreted in a manner to prevent the 2013 Act being otiose.

35 A harmonious and purposive construction of IBC read as a whole must necessarily suggest and lead to the construction that Section 63 and Section 64 of IBC cannot apply to Saved Petitions.

**(IV) Section 14 of IBC :**

36 When an application under IBC is admitted by NCLT, a moratorium under Section 14 of IBC is declared and all proceedings, including the present company petition will be stayed.

In the present matter, this Court has, in exercise of its discretionary powers, stayed the proceedings in NCLT, Ahmedabad prior to admission of the application filed by Respondent under Section 10 of IBC. The proceedings in NCLT have been stayed before declaration of a moratorium under Section 14 of IBC and therefore, the question of the effect of Section 14 on the Saved Petitions does not arise.

37 In fact, the legislative purpose of saving these winding up petitions along with all necessary and consequential power of the Company Court is to give this Company Court the discretion in saved petitions to decide whether to retain the winding up jurisdiction with respect to such companies or to allow the Adjudicating Authority to also deal with application with respect to such Companies.

In this context, it is also relevant, as the operational creditor does not form a part of the Committee of Creditors under Section 21 of IBC and the operational creditor cannot propose or initiate liquidation proceedings against the Company, the operational creditors are in fact at a considerable disadvantage under IBC.

Accordingly, in appropriate cases when Saved Petitions are brought at the instance of such creditors, the Company Court may exercise its discretion to retain such Saved Petitions and to prevent the Adjudicating Authority from exercising its jurisdiction.

38 Assuming that such a question was to arise, it is submitted on demurrer, that a harmonious and purposive construction of Section 14 of IBC and the saving provisions of the 2013 Act must necessarily lead to an interpretation that the inconsistent provisions of IBC, including the moratorium will not apply to Saved Petitions. The effect of Section 14 of IBC would otherwise, snatch away irreversibly the jurisdiction of the

Company Court which is expressly saved under Section 434 of the 2013 Act irretrievably.

39 The fact that if a contrary view is taken, the jurisdiction of the Company Court will be irretrievably lost is apparent from Section 6 to Section 54 of IBC, which result in entering a resolution or a liquidation under IBC. IBC has no provision to permit the Saved Petitions to revive when the effect of the moratorium under Section 14 is taken.

**(V) The High Court shall exercise its powers under the 1956 Act to dispose the Saved Petitions :**

40 With respect to the Saved Petitions including this present Petition, the High Court has the discretion to exercise all powers under the 1956 Act in order to hear and dispose of these proceedings. Accordingly, the High Court has the power to stay and/or restrain proceedings initiated or to be initiated in any other Court so that it may hear and dispose of such Saved Petitions.

41 It is not disputed even by Respondent that the Hon'ble High Court retains its jurisdiction and powers under the 1956 Act with respect to the Saved Petitions.

42 It is also relevant that the Central Government vide its notification dated 7th December 2016, issued the Companies (Removal of Difficulties) Fourth Order, 2016 amending Section 434 of the 2013 Act,

which, inter alia, provides that -

> *"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 only such proceedings relating to cases other than winding-up…..:*
>
> *Provided further that – (i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up…….; 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."*

43 The powers of the Company Court in this regard are plenary as is evident from what is stated below.

a. The Company Court retains its inherent powers, as provided by Rule 9 of the Companies (Court) Rules, 1959 –

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

b. The Company Court may exercise its powers under Sections 442 and 443 of the 1956 Act, to stay or restrain proceedings against the company in any other Court. Section 442 reads as under:

> ***"442. Power of Court to stay or restrain proceedings against Company***
>
> *At any time after the presentation of a winding up petition and before a winding up order has been made, the company, or any creditor or contributory, may-*
>
> (a) *where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, apply to the Court in which*

*the suit or proceeding is pending for a stay of proceedings therein; and*

(b) *where any suit or proceeding is pending against the company in any other Court, apply to the Court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceeding; and the Court to which application is so made may stay or restrain the proceedings accordingly, on such terms as it thinks fit."*

c. It is an admitted position that Section 442 of the 1956 Act remains valid and subsisting and was not deleted by the Companies (Second) Amendment Act, 2002. So also, both parties before this Court have accepted that NCLT as the adjudicating authority is a "Court" for the purpose of Section 442 of the 1956 Act. In this regard see, ***M. Senthil Kumar & Anr. vs. Sudha Mills (India) Pvt. Ltd. & Ors.***[25] that the Court can exercise its powers under Section 442 to stay or restrain proceedings in any other "court", which has been construed as "any adjudicating authority which is required to act judicially and is empowered to pass orders binding on the company" including the Company Law Board.

d. Under the powers conferred under Section 443 (1) (c), the Company Court has the power to issue any interim orders that it thinks fit in aid of the final relief of winding up. Section 443 reads as under –

***443. Powers of Tribunal on hearing petition***

*(1) On hearing a winding up petition, the Tribunal may -*

*(a) dismiss it, with or without costs; or*

*(b) adjourn the hearing conditionally or unconditionally; or*

*(c) make any interim order that it thinks fit; or*

*(d) make an order for winding up the company with or without costs,*

25. 1995 SCC Online Mad 551

*or any other order that it thinks fit:*

*Provided that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.*

*(2)…..*

*(3)….”*

e. The powers conferred upon the Court under Sections 442 and 443 of the 1956 Act are to lend assistance to the High Court in order to effectively exercise its powers under Sections 446 and 466 of the 1956 Act. It was further observed in the matter of the ***Official Liquidator vs. Dharti Dhan Ltd***.[26] that the object of the provisions is to create a right to get speedier adjudication from the Court where the winding up proceeding is taking place.

f. The Company Court may at the final stage of winding up, exercise powers under Sections 446 and 466 of the 1956 Act. As can be seen from Sections 446 and 466, the Company Court’s powers are very wide. Further, Section 466(1) empowers the Company Court at any time after making the winding up order to stay or make an order staying any and all proceedings in relation to the winding up for such time as the Court thinks fit.

## (VI) Impugned Order dated 19th July 2017 :

44 Hon’ble Mr. Justice R. D. Dhanuka and the Hon’ble Mr. Justice

26. 1977 2 SCC 166

A. S. Gadkari have duly exercised their aforesaid discretionary powers in passing the Orders dated 9th March 2017 (hereinafter referred to as the "**Admission Order**") and 19th July 2017 (hereinafter referred to as the "**Stay Order**"), respectively.

45 This Court in the Admission Order, has considered the relevant facts and has exercised its powers under Sections 442 and 443 of the 1956 Act restraining respondent from approaching NCLT. The Hon'ble Judge has in context of the possibility of revival of respondent-applicant observed that the CDR Scheme could not be implemented and that prima facie, respondent-applicant cannot be revived.

46 Hon'ble Mr. Justice A. S. Gadkari J. has exercised powers under Sections 442 and 443 of 1956 Act, in the Stay Order and held as follows-

> *"1. Circulation is granted for 26.07.2017. To be placed high on board.*
>
> *2. In the meantime the National Company Law Tribunal (NCLT), Ahmedabad is directed not to proceed further with CP (IB) No. 37 of 2017."*

**(VII) Harmonious construction of the 1956 Act, the 2013 Act and IBC :**

47 With respect to the Saved Petitions, the provisions of the 1956 Act, the 2013 Act and IBC must be read in a harmonious and purposive manner.

NCLT being the Adjudicating Authority under IBC, in fact derives its powers from the provisions of the 2013 Act.

Section 5(1) of IBC defines the Adjudicating Authority as follows -

> *"Adjudicating Authority for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013."*

The powers of the Adjudicating Authority are derived from the provisions of the 2013 Act, under Chapter XXVII in Sections 407 – 434.

48 After hearing the counsel for opposing parties, I am inclined to agree with the submissions of Mr. Dwarkadas and my views are as under :

**(I) Background and Object – Purpose of Insolvency Code :**

49 The Hon'ble Supreme Court of India, in *Innoventive Industries Ltd. (Supra),* has referred to the report of Bankruptcy Law Reforms Committee 2015 ("**Reforms Committee**") in order to gain an insight into why IBC was enacted and purpose for which it was enacted.

Briefly stated the Reforms Committee examined whether in the case of a company which has committed a default in repaying its debt obligations, whereas secured creditors are able to repossess the fixed assets which are pledged with them, there are several creditors and lenders who are not secured lender and when default takes place lenders are able to recover only 20% of the value of debt on a Net Present Value (NPV) basis.

In short, the Reforms Committee came to the conclusion that those industries which do not have a strong asset base are being deprived of credit which makes it difficult for corporates to raise finance by issuance of long dated corporate bonds (unsecured) which are essential for most infrastructure projects.

The Reforms Committee found that where a default occurs, an unsecured lender was either to take the company into liquidation or to negotiate a debt restructuring, where the creditors accept a reduced amount on NPV basis, in the hope that negotiated value exceeds the liquidation value.

A third possibility would be to sell the firm as a going concern and pay off the creditors. Many hybrid structures of these broad categories can be envisioned.

The Reforms Committee after examination came to the conclusion that it would be better that only one forum evaluates such possibilities and makes a decision, which in opinion of the Reforms Committee was a “Creditors Committee”, where all financial creditors have a vote in proportion to magnitude of debt they held.

As to what should happen to a defaulting firm, in the opinion of Creditors Committee is a business decision and only creditors should make it. The Reforms Committee also came to the conclusion that liquidation is not a viable solution because of delays in implementing

liquidation process which resulted in liquidation value going down with time on account of high economic rate of depreciation. As noted at Pg.7 of *Innoventive (supra)* the Reforms Committee has stated:

> *"The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, the laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."*

The Committee came to the conclusion that the creditors and debtors ought to be left to decide and realise and agree on whether the entity was facing financial failure or business failure and whether it was capable of being revived. The most significant change being, that when a company defaults on its debt, control of the company should shift to creditors rather than the management who was retaining control after default.

It is apparent from a reading of the object and purpose for which IBC has been enacted is to set up an Insolvency and Bankruptcy resolution process, which has to be implemented in a strict time bound manner, by the appointment of an IRP and creation of a creditors Committee. These are powers which can be exercised only by NCLT and not by the Company Court. It is for this reason that pending the Insolvency Resolution Process a moratorium is provided for under Section 14 of IBC.

Therefore, the most fundamental distinction between the

provision of the Companies Act and IBC is, whereas, under the Companies Act winding up would be a matter for the Court alone to decide, under IBC, there is a paradigm shift in as much as it displaces the management of the Company and an IRP is appointed and the Creditors Committee is left to decide the fate of the company.

**(II) Broad comparison between the provisions of SICA and IBC :**

50 Prior to the enactment of IBC, SICA required, what were defined as 'Sick Industrial Companies' to file a reference before BIFR. Once a reference was filed, the moratorium under section 22 of SICA kicked in, as a result whereof proceedings such as winding up, execution and the like could neither be filed nor proceeded with, if filed. SICA, however, did not apply to all companies. It applied to only those industrial undertakings as were set out in the Schedule of the said Act. Experience showed that SICA though enacted with the laudatory object of revival of sick companies was being abused by promoters, who on account of the moratorium available under Section 22 were dragging on the proceedings either before the BIFR or AAIFR interminably, frustrating the object and purpose of the Act and defeating rights of creditors. IBC, on the other hand, as held by the Hon'ble Supreme Court in the case of *M/s Innoventive Industries Ltd. (supra)* and *Mobilox Innovations Private Limited (supra*) has certain features which mark a healthy departure from the failings of SICA. Briefly stated they are:

(i) IBC applies to all companies (public and private);

(ii) Since it is now well settled that a company has various stakeholders other than just shareholders like workmen, creditors etc. as held in *National Textile Workers' Union v. P.R. Ramakrishnan & Ors. (supra)*, a company which has suffered a temporary financial set back maybe revived, by granting it a temporary reprieve by giving it an opportunity to put itself back on its feet.

(iii) Unlike in the case of the erstwhile winding up provisions of the 1956 Act or the 2013 Act, where a single creditor, whose debt was undisputed could wind up a company, thus bringing about its untimely financial death, IBC on the other hand mandatorily requires that an attempt at revival be made by appointing an IRP to examine whether such a company can be revived.

(iv) The process of insolvency resolution is strictly time bound and as held by the Supreme Court in *Innoventive (supra)* "speed is of essence for the working of the bankruptcy code"[27]. The Supreme Court has held that there cannot be any relaxation of the time lines prescribed in the Code[28].

(v) The initial period of attempting a resolution process is 180 days from the admission of the Petition which can be extended by a further

27. Paragraph 16 page 7
28. Paragraph 16 page 7 and Paragraph 28 page 18

period of 90 days only if 75% of the committee of creditors consent.

(vi) What is, however, of crucial importance is that unlike SICA, once an application filed under IBC either by a financial/operational creditor is admitted, the Board of Directors of the company are immediately displaced and the management of the company rests in the hands of IRP.

(vii) The function, power and duty of an IRP is to invite from 'any person' proposal for resolution/revival of the Company in question, which in order to be binding upon the company and all its creditors must be approved by a majority of 75% of the committee of financial creditors (COC);

(viii) If on the other hand, (a) NCLT does not receive a resolution plan under Section 30(6) of IBC, within the expiry of the insolvency resolution process period of 180 days or its further extension by ninety days,[29] or (b) it rejects the resolution plan under 31 for non-compliance of the requirements specified therein[30] or (c) the resolution professional intimates NCLT that the committee of creditors decide to liquidate the corporate debtor[31] or (d) the resolution plan approved by NCLT is contravened by the concerned corporate debtor and any person who is prejudicially affected by such a contravention makes application and upon

29. Section 31(1)(a) of the Code
30. Section 33(1)(b) of the Code
31. Section 33(2) of the Code

determination thereof, it is held that there has been such a contravention,[32] NCLT would pass an order of liquidation under Section 33 of IBC. NCLT is mandatorily required to pass an order of liquidation under Section 33(b)(i) and (ii)and (iii) of IBC.

**(III) IBC has Primacy :**

51 As held by the Supreme Court of India in the case of *Madura Coats Ltd. (Supra)*, that even during the regime of SICA, SICA was held to have primacy over the provisions of the Companies Act.

By the virtue of Section 252 of IBC, SICA stands repealed with effect from 1st December 2016. Under section 4 (b) of the Repeal Act, all proceedings before the BIFR/AAIFR stood abated and in respect of such abated proceedings, provision has been made to permit a Company, to make a reference within a period of 180 days from 1st December 2016 to NCLT, which reference is required to be dealt with in accordance with the provisions of IBC.

52 In the present case, respondent-applicant had filed a reference which was pending before BIFR prior to the repeal of SICA. Respondent-applicant has, within the prescribed period of 180 days, made an application to NCLT by an application under Section 10 of IBC. Of course, counsel for petitioner made certain grievance that respondent-applicant

32. Section 33(3) of the Code

waited until the last few days to make an application to NCLT under Section 10 of IBC and this Court had declined to grant further time or wait till the company applied to NCLT. In my view, these are all irrelevant so long as the application under Section 10 was made in time.

53 It has now been held by the Supreme Court in *Bank of New York Mellon (Supra)* that by virtue of Section 252 of IBC, even in the case of a company where a winding up order has been passed, it is open to such a company, whose reference was deemed to be pending with BIFR, to seek remedies under IBC before NCLT.

**(IV) No carving out of existing winding up proceedings :**

54 Section 252 of IBC has amended the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 in the manner specified in 8th Schedule of IBC. The 8th Schedule provides as under:

> *"In section 4, for sub-clause (b), the following sub-clause shall be substituted, namely—*
> *" (b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act,1985 (1 of 1986) shall stand abated:*
>
> *Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:"*

55 The effect of this substituted Section 4(b) is therefore to confer an express power upon the company to make a reference to NCLT under IBC within 180 days of the commencement of IBC, i.e. 1.12.2016, which reference will be dealt with "in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016."

56 If what petitioner contends is correct, a reference sought to be made by a Company under the provisions of Section 252 of IBC, in a situation where a post notice winding up petition which is governed by the Companies Act, 1956 against the same company (and which is retained by the Company Court), cannot be entertained by NCLT and if entertained will be nullified.

There is no express or implied saving of any substantive provisions of the Companies Act, 1956 to warrant this interpretation.

**(V) Admission of a winding up petition does not entail stay of NCLT proceedings :**

57 It was submitted, and I agree with Mr. Dwarkadas, that admission of the winding up petition by the jurisdictional High Court would not mean that NCLT either loses jurisdiction or cannot exercise jurisdiction in case of a petition which is filed by another creditor (financial, operational or the company itself under section 10 of IBC). The legislature is deemed to be aware of the provisions of an existing law, i.e., the Companies Act, whilst enacting the provisions of IBC (***Competition***

***Commission of India v. Steel Authority of India Ltd. and Anr***.)[33] as well as the fact that company petitions that may have been filed prior to IBC coming into force may have been admitted and pending final disposal in the jurisdictional High Court.

58 In the transfer of proceedings rules dated 7th December 2016 it has been provided that winding up petitions in respect of which notice has been issued to the respondent company or which have been admitted, as held in the unreported judgment dated 23rd December 2016 of Gupte J. in *West Hills Realty Pvt. Ltd (supra)*, remain with the jurisdictional high court whereas, all other winding up petitions get transferred to NCLT.

59 If the legislature intended, that those winding up petitions, of which the jurisdictional high court remain seized, would have primacy over NCLT proceedings which may be filed in respect of the same company by another creditor, the legislature would have said so, either in IBC or in the transfer rules Notification.

60 On the contrary, the provisions of Section 64 (2) of IBC would indicate that the legislature did not intend that the Company Court would have the power to injunct proceedings before NCLT. Furthermore, when IBC was enacted and the provisions of SICA were repealed by the Notification dated 21st December 2016, companies which had filed a

33.(2010) 10 SCC 744

reference under SICA were given a period of 180 days to file a petition under the provisions of IBC. Thus, the period of moratorium which operated vis-à-vis winding up proceedings as a result of Section 22 of SICA could be continued (if found fit by NCLT) under IBC in the time prescribed by the said Notification.

61 It is pertinent to note that on 19th June 2015, respondent-applicant filed a reference under Section 15(1) of SICA with BIFR. This was registered on 9th September 2015 and two hearings took place. On 1st December 2016 SICA came to be repealed. On 29th May 2017 respondent-applicant filed its petition under Section 10 before NCLT, Ahmedabad, i.e., within the prescribed period of 180 days.

62 In fact, the Hon'ble Supreme Court in the case of *Madura Coats Ltd. v. Modi Rubber Ltd. (supra)* has held that the provisions of SICA would prevail over the provisions of the Companies Act and proceedings under the Companies Act must give way to proceedings under SICA. Therefore, since SICA is repealed and replaced by IBC (S. 252 read with VIII Schedule of IBC), the provisions of IBC should prevail over the provisions of the Companies Act, 2013.

**(VI) Effect of Repeal :**

63 Section 255 read with 11th Schedule of IBC has amended the

Companies Act 2013.

In the 11th Schedule, Clause 34 (c) provides as under:

> *"34. For section 434, the following section shall be substituted, namely:—*
>
> *"434. (1) On such date as may be notified by the Central Government in this behalf,—*
>
> *(a)…;*
>
> *(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:*
>
> *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."*

64 The Notification dated 7th December 2016 issued under the provisions of sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 read with sub-section (1) of section 239 of IBC states:

> *"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:*
>
> *…*
>
> *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).”*

65 The Companies (Removal of Difficulties) Fourth Order, 2016 issued under sub-section (1) of section 470 of the Companies Act, 2013 states as under:

> *“1. Short title and commencement.- (1) This Order may be called the Companies (Removal of Difficulties) Fourth Order, 2016.*
>
> *(2) It shall come into force with effect from the 15th December, 2016.*
>
> *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 – (i) …; 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”.*

66 It is clear from a reading of the aforementioned notifications that while pre-notice winding up proceedings (transferred to NCLT) are governed by the provisions of IBC, post notice winding up proceedings (retained in High Court) are required to be “dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959”.

67 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.

In fact, if petitioner's arguments were to be accepted, it would mean that there is no right available for any person covered by Section 6 of IBC to file a proceeding under IBC, in respect of a Company, against whom a winding up petition is retained in the High Court. Such an interpretation is not supported by the language of IBC.

68 Further, there is express as well as an implied intention on the part of the legislature to (i) take away the right to file winding up petitions under the Companies Act, 1956; and (ii) to apply the provisions of IBC without exception to all proceedings undertaken regarding insolvency resolution and revival of companies. This is also apparent from the peremptory and express language of Sections 14, 63 and 64 (2) of IBC.

69 It is also clear from the Companies (Removal of Difficulties) Fourth Order that in fact what is saved are only the proceedings of winding up pending before the jurisdictional High Court and not the Company itself in relation to which such proceedings are saved. That is to say, such a Company is still subject to the provisions of IBC, if invoked and only the

post notice winding up proceedings, which are retained by the High Court, are saved. This does not mean that IBC is inapplicable to the said Company, if it is invoked.

70 It is clear from the above that the winding up petitions retained by the High Court are being decided under the Companies Act, 1956 only as a transitional provision. It only provides that winding up proceedings under Section 433 (1) (e) pending in the High Court would continue in the High Court - *Prasanta Kumar Mitra (Supra)*.

71 Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC, vis-à-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.

72 Even under the 29th June 2017 Notification, it is only those petitions pending in the High Court where a notice may not have been issued which would not get transferred, if a winding up petition against

such a company has already been admitted. But even in such a case, there is no express or implied bar from other creditors of such a company or the corporate debtor from filing fresh proceedings under IBC. If at all, such creditors/corporate debtors are barred from approaching the High Court and not NCLT under IBC.

73 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, or does it mean that such proceeding can be suspended.

**(VII) The Company Court does not have the jurisdiction to restrain NCLT, Ahmedabad, from proceeding with IBC Application :**

74 This is clear from a perusal of the following provisions of IBC:

> ***63. Civil court not to have jurisdiction****: No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code.*
>
> ***64. Expeditious disposal of applications****:*
> *(1) …*
> *(2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.*
> ***231. Bar of jurisdiction****: No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.*

75 The jurisdiction of the Company Court in relation to proceedings under IBC is expressly barred by virtue of section 63 of IBC. Further, by virtue of Section 64(2) of IBC, the Company Court is prohibited from injuncting NCLT from exercising its jurisdiction under IBC. By virtue of section 238 of IBC, it overrides the provisions of the Companies Act, 1956. The Apex Court has, in a few cases, considered provisions similar to Section 64 (2) of IBC. In *GhanshyamSarda v. Shiv Shankar Trading Company (supra),* the Hon'ble Supreme Court considered the bar of the Civil Court's jurisdiction under the Sick Industrial Companies Act, 1985 ("SICA"),

| *Insolvency and Bankruptcy Code, 2016* | *Sick Industrial Companies Act, 1985* |
|---|---|
| *64. (2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.* | *26. Bar of Jurisdiction*<br>*No order passed or proposal made under this Act shall be appealable except as provided therein and no civil court shall have jurisdiction in respect of any matter which the Appellate Authority or the Board is empowered by, or under, this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.* |

The Hon'ble Supreme Court held that in view of the express bar of jurisdiction contained in SICA, the jurisdiction of the Civil Court, even to grant temporary injunctive relief is completely excluded where the

jurisdiction of BIFR is correctly exercised. Paragraphs 29 to 31 read as under :

> *"29. …The Act is a self-contained Code and has conferred upon the BIFR complete supervisory control over a sick industrial company to adopt such methodology as provided in Chapter III for detecting, reviving or winding up such sick company. The authority to determine the existence and extent of sickness of such company and to adopt methodology for its revival are, in the exclusive domain of the BIFR and by virtue of Section 26 there is an express exclusion of the jurisdiction of the Civil Court in that behalf.*
>
> *30. As laid down by this Court the Act is a complete Code in itself. The Act gives complete supervisory control to the BIFR over the affairs of a sick Industrial Company from the stage of registration of reference and questions concerning status of sickness of such company are in the exclusive domain of the BIFR. Any submission or assertion by anyone including the Company that by certain developments the Company has revived itself and/or that its net worth since the stage of registration having become positive no such scheme for revival needs to be undertaken, must be and can only be dealt with by the BIFR. Any such assertion or claim has to be made before the BIFR and only upon the satisfaction of the BIFR that a sick company is no longer sick, that such company could be said to have ceased to be amenable to its supervisory control under the Act. The aspects of revival of such company being completely within its exclusive domain, it is the BIFR alone, which can determine the issue whether such company now stands revived or not. The jurisdiction of the civil court in respect of these matters stands completely excluded.*
>
> *31. Unlike cases where the existence of jurisdictional fact or facts, on the basis of which alone a Tribunal can invoke and exercise jurisdiction, is or are doubted, stand on a different footing from the one where invocation and exercise of jurisdiction at the initial stage is not disputed but what is projected is that by subsequent or supervening circumstances the concerned Tribunal has lost jurisdiction. In the present case the fact that the company was registered as a sick company is not doubted nor has it been contended that the BIFR had wrongly assumed initial jurisdiction. But what is projected is that the net worth having become positive the BIFR has now lost jurisdiction over the company. In our view, the BIFR having correctly assumed jurisdiction and when all the financial affairs of such company were directly under the supervisory control of the*

*BIFR, the power to decide whether it has since then lost the jurisdiction or not, is also in the exclusive domain of the BIFR. The BIFR alone is empowered to determine whether net worth has become positive as a result of which it would cease to have such jurisdiction. Any inquiry into such issue regarding net worth by anyone outside the Act including civil court, would be against the express intent of the Act and would lead to incongruous and undesired results. The suit as framed seeking declaration that the company was no longer a sick company within the meaning of the Act, was therefore not competent and maintainable. The Civil Court was not right and justified in issuing injunction as it did. The counsel who represented the company before the BIFR on 04.04.2013, correctly submitted that before discharging the company the BIFR can examine the audited balance sheet and satisfy itself whether the net worth had turned positive."*

76 In *Mardia Chemicals Ltd. (supra)*, the Hon'ble Supreme Court considered the bar of jurisdiction contained in Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 ("**SARFAESI Act**").

| *Insolvency and Bankruptcy Code, 2016* | *SARFAESI Act, 2002* |
|---|---|
| *64. (2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code* | *34. Civil Court not to have jurisdiction.*<br>*No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).* |

The Hon'ble Supreme Court held as follows:

> *"50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13." (Emphasis supplied)*

**(VIII) No power to Injunct :**

77 NCLT is not a court subordinate to the High Court and hence as prohibited by the provisions of Section 41 (b) of the Specific Relief Act, 1963 no injunction can be granted by the High Court against a corporate debtor from institution of proceedings in NCLT.

78 Section 41 (b) of the Specific Relief Act, 1963 states:

> *"**41.** Injunction when refused.-An injunction cannot be granted-*
> …

*(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought."*

The Hon'ble Supreme Court in the case of *Nahar Industrial Enterprises Ltd. (Supra)* has held that:

*"92. We have held that the Tribunals are neither civil courts nor courts subordinate to the High Court. The High Court ordinarily can be approached in exercise of its writ jurisdiction under Article 226 or its jurisdiction under Article 227 of the Constitution of India."*

79 It has been held by this Hon'ble Court in the case of *Rentworks India Pvt. Ltd. (Supra)* while considering whether DRT was subordinate to the High Court in paragraph 19 that:

*"19. It is, thus, clear that the DRT is not a court subordinate to this court when the latter exercises its ordinary original civil jurisdiction. If that is so, this court cannot, whilst hearing a suit in its ordinary original civil jurisdiction, injunct any bank from prosecuting a proceeding before the DRT."*

80 In the case of *Cotton Corporation of India Limited (Supra),* the Hon'ble Supreme Court has held in paragraph 9 :

*"Viewed from a slightly different angle, it would appear that the legal system in our country envisages obtaining of redressal of wrong or relief against unjust denial thereof by approaching the court set up for the purpose and invested with power both substantive and procedural to do justice that is to grant relief against invasion or violation of legally protected interests which are jurisprudentially called rights. If a person complaining of invasion or violation of his rights, is injuncted from approaching the court set up to grant relief by an action brought by the opposite side against whom he has a claim and which he wanted to enforce through court, he would have first to defend the action establishing that he has a just claim and he cannot be restrained from approaching the court to obtain relief. A person having a legal right and complains of its violation or infringement, can approach the court and seek relief. When such person is injuncted from approaching the court, he has to vindicate the right and then when injunction is vacated, he has to approach*

> *the court for relief. In other words, he would have to go through the gamut over again: When defending against a claim of injunction the person vindicates the claim and right to enforce the same. If successful he does not get relief but a door to court which was bolted in his face is opened. Why should he be exposed to multiplicity of proceedings? In order to avoid such a situation the Legislature enacted Section 41(b) and statutorily provided that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. … At any rate the court is precluded by a statutory provision from granting an injunction restraining a person from instituting or prosecuting a proceeding in a court of coordinate jurisdiction or superior jurisdiction. …"*
>
> *(emphasis supplied)*

81 It may also be noted that apart from there being no provision in the Companies Act, 1956 to injunct proceedings before NCLT instituted under IBC, petitioner cannot take recourse under the inherent powers of the High Court to support the impugned order. This argument has been expressly rejected by the Hon'ble Supreme Court in *Cotton Corporation of India Limited (supra)* while holding at paragraph 21 :

> *"In view of the majority decision, it must be conceded that the court can in appropriate cases grant temporary injunction in exercise of its inherent power in cases not covered by 0.39 C.P.C. But while exercising this inherent power, the court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b) is one such provision. And it must be remembered that inherent power of the court cannot be invoked to nullify or stultify a statutory provision. …"*

82 Besides there is an express bar contained in Section 64 (2) of IBC which prevents any court, tribunal or authority from granting any injunction in respect of any action taken, or to be taken, in pursuance of

any power conferred on NCLT under IBC.

83 If petitioner's arguments were to be accepted it would mean that under the Companies Act, 1956, even after a winding up petition was admitted (or a winding up order was passed) and a reference then came to be made to BIFR, Section 22 of SICA would not apply and the High Court seized of the winding up petition would have the power to injunct proceedings before BIFR. The Supreme Court in the case of *Real Value Appliances Ltd. (supra)* while considering this issue and whether the High Court had the power under the Companies Act, 1956, i.e., the very same provisions which petitioner is now relying on to contend that proceedings under the IBC can be injuncted, has held:

> *"Whether, once the BIFR had registered the reference dated 17.7.97 on 24.7.97 under Section 15 of the Act read with the Regulations, it was permissible for the Division Bench of the High Court to pass orders on 8.8.97 vacating the stay order dated 20.12.96 and confirming the appointment of provisional liquidator on the company side and also whether it was permissible for another Division Bench of the High court to appoint a Receiver on 28.7.97 in the proceedings arising out of the suit, in view of section 22 of the Act?*
>
> …
>
> *Relying on the use of the word 'may' in Section 16(1) of the Act it has been contended in some High Courts that the word 'may' in that section shows that the BIFR has power to reject a reference summarily without going into merits and that it is only when the BIFR takes up the reference for consideration on merits under Section 16(1) that it can be said that the 'inquiry' as contemplated by section has commenced. It is argued that if the reference before the BIFR is only at the stage of registration under Section 15, then section 22 is not attracted. This contention, in our opinion, has no merit. In our view, when Section 16(1) says that the BIFR can conduct the inquiry "in such manner as it may deem fit", the said words are intended only to convey that a wide discretion is vested in the BIFR in regard to the*

*procedure it may follow for conducting an inquiry under Section 16(1) and nothing more. In fact, once the reference is registered after scrutiny, it is, in our view, mandatory for the BIFR to conduct an inquiry. If one looks at the format of the reference as prescribed in the Regulations, it will be clear that it contains more than fifty columns regarding extensive financial details of the Company's assets, liabilities, etc. Indeed, it will be practically impossible for the BIFR to reject a reference outright without calling for information/documents or without hearing the Company or other parties. Further, the Act is intended to revive and rehabilitate sick industries before they can be wound up under the Companies Act, 1956. Whether the Company seeks a declaration that it is sick or some other body seeks to have it declared as a sick Company, it is, in our opinion, necessary that the Company be heard before any final decision is taken under the Act. It is also the legislative intention to see mat no proceedings against file assets are taken before any such decision is given by the BIFR for in the case the Company's assets are sold, or the company wound up it may indeed become difficult later to restore the status quo ante. Therefore, in our view, the High Court of Allahabad in Industrial Finance Corporation v. Maharashtra Steels Ltd., AIR1988All170 , the High Court of Andhra Pradesh in Sponge Iron India Ltd. v. Neelima Steels Ltd., the High Court of Himachal Pradesh in Orissa Sponge Iron Ltd. v. Rishab Ispat Ltd., (1993) 78 Comp. Cas 264 are right in rejecting such a contention and in holding that the inquiry must be treated as having commenced as soon as the registration of the reference is completed after scrutiny and that from that time, action against the Company's assets must remain stayed as stated in section 22 till final decisions are taken by the BIFR.*

*…*

*There can, therefore, be no difficulty in holding that after the amendment to Regulation 19 w.e.f. 24.3.1994, once the reference is* ***registered*** *and when once it is mandatory simultaneously to call for information/documents from the informant and such a direction is given, then inquiry under Section 16(1) must - for the purposes of section 22 - be deemed to have commenced. Section 22 and the prohibitions contained in it shall immediately come into play.*

*…*

*32. For the aforesaid reasons, the order passed by the Division Bench on 28.7.97 appointing Receiver and the order passed by another Bench of the High Court on 8.8.97 restoring the provisional liquidator, are set aside. The Civil appeals are accordingly allowed. There will be no order as to costs. The respondents are free, if need be, to approach the BIFR under section 22 and section 22A of the Act for further orders, if any, in addition to the orders already passed by the BIFR in this behalf."*

84 It has been held in the case of *M/s. Rishabh Agro Industries Ltd. (Supra)* that even after a winding up order is passed the provisions of Section 22 of SICA apply and the Court under the Companies Act, 1956 would have no power to injunct proceedings before BIFR in view of Section 22 of SICA:

> *" It is true that for invoking the applicability of Section 22 it has to be established that an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or sanctioned scheme is under implementation or an appeal under Section 25 to an industrial company is pending. But it cannot be said that despite existence of any of the aforesaid exigencies the provision of Section 22 would not be attracted after the order of winding up of the company is passed. The words "no proceeding for winding up of the industrial company or for execution distress or the like against any of the properties of the industrial company or for the appointment of receiver in respect thereof shall lie or be proceeded with further, leave no doubt in our mind that the effect of the section would be applicable even after the winding up order is passed as no proceeding even thereafter can be proceeded with further under the Companies Act. The High Court appears to have not taken note of the aforesaid words i.e. to be proceeded with further. As the impugned judgment is based upon wrong assumption of the provision of law and completely ignoring the vital words noticed hereinabove, the same cannot be sustained.*

85 In view of the above since the IBC is admittedly a successor statute to SICA, and Section 64 (2) of IBC being pari-materia to Section 22 of SICA, the argument that the Company Court has the power to injunct proceedings before under NCLT in cases of pending winding up petitions is entirely misplaced and contrary to legislative intent.

**(IX) The Company Court has the jurisdiction to recall an earlier order :**

86 As per rule 6 of the Companies (Court) Rules, 1959, the

provisions of the Code of Civil Procedure, 1908, will apply to proceedings under the Companies Act, 1956, unless such application would be contrary to the express provisions of the said rules. Rule 9 of the Companies (Court) Rules, 1959, provides that the Company Court may exercise its inherent powers. Section 141 of the Code of Civil Procedure, 1908, makes it applicable to all proceedings in any court of civil jurisdiction. A combined reading will show that the Company Court has ample powers to recall any order previously passed by it [*Dr. Writers Food Products Private Limited (supra)]*.

**(X) An order can be recalled if it was passed without jurisdiction :**

87 The Hon'ble Supreme Court of India has held that an order may be recalled by a court or tribunal if there was an inherent lack of jurisdiction to pass such an order [*Budhia Swain &Ors v. Gopinath Deb &Ors (supra)]*.

88 In the circumstances, there is no bar on NCLT, Ahmedabad from proceeding with IBC application. This application, therefore, has to succeed. The impugned order dated 19th July 2017 is recalled/vacated.

Company application accordingly stands disposed.

**(K.R. SHRIRAM, J.)**

*Gauri Gaekwad*