

Court No. - 17

Case :- COMPANY PETITION No. - 2 of 1994

Petitioner :- M/S Bajaj Hindusthan Limited Palia Kalan

Respondent :- Sumac International Limited

Counsel for Petitioner :- J.N. Mathur,Dhruv Mathur,Rajesh Tewari

Counsel for Respondent :- P.K. Khare,Asit Srivastva,Radha Kant Sinha

Hon'ble Manish Mathur,J.

C.M. Application No. 15 of 2023

1. Application has been filed seeking condonation of delay in seeking recall of order dated 26.04.2023 whereby the application for transfer of company proceedings to the National Company Law Tribunal has been rejected.
2. Objections to the application have been filed by the opposite party.
3. There appears to be about five months delay in filing the aforesaid application.
4. In paragraph 3 onwards, explanation for delay has been indicated particularly with regard to the fact that earlier the applicant had filed another application for review of the order dated 26.04.2023 bearing diary no. 6154 of 2023 which was rejected as defective by the Registry, thereafter, the present application has been filed. It has been submitted that the earlier application had been filed on 27.07.2023.
5. Cause shown in the affidavit filed in support of the application is sufficient and as such, delay in filing the application for recall of order dated 26.04.2023 is condoned.
6. Application is **allowed**.

C.M. Application No.16 of 2023

1. Heard Mr. J.N. Mathur, learned Senior Counsel assisted by Mr. Rajesh Tewari, learned counsel for the applicant and Ms. Pushpila Bisht along with Mr. Radha Kant Sinha, learned counsel for opposite party.
2. Application has been filed seeking recall of order dated 26.04.2023 whereby earlier application preferred by the present applicant for transfer of company petition to the National Company Law Tribunal had been rejected.
3. Delay in filing the application has already been condoned and objections to this application have also been filed.
4. It has been submitted by learned counsel for applicant that while passing the earlier order dated 26.04.2023, this Court had rejected the application for transfer primarily on the ground that since affidavits have already been exchanged and only final hearing remains, it would not be expedient in the interest of justice that the matter be transferred to the Company Law Tribunal. It is submitted that this Court has not adverted to the specific provisions and judgments rendered by the Hon'ble Supreme Court thereupon clearly mandating transfer of company petitions to the Tribunal where no irreversible sequence of events have taken place or orders have been passed.
5. Learned counsel has submitted that earlier Section 434(1)(c) of the Companies Act, 2013 provided for transfer of all proceedings under the Companies Act, 1956 including winding up petitions pending immediately before the District Court or High Court to the Tribunal with the proviso providing that only such proceedings relating to winding up of companies would stand transferred to the Tribunal and at a stage which would be prescribed by the Central Government.

6. It is submitted that subsequently, the Companies (Transfer of Pending Proceedings) Rules, 2016 were notified with effect from 15.12.2016 with the stipulation that they would come into force from 01.04.2017. Rule 5 and 6 thereof provided for transfer of company petitions which were pending before the Company Court in the High Courts concerned and refer to three types of proceedings with stipulation that only those proceedings which were at the stage of pre-service of notice of winding up petition would stand compulsorily transferred to the Tribunal. It is submitted that subsequently a fifth proviso to Section 434(1)(c) of the Companies Act, 2013 was included by means of amendment whereafter, the transfers of company petitions pertaining to winding up did not stand restricted to any particular stage of winding up proceeding.

7. It is further submitted that the aforesaid aspects have already been subsequently considered by the Hon'ble Supreme Court in the case of **Jaipur Metals and Electricals Employees Organization, Jaipur vs. Jaipur Metals and Electricals Limited and others** reported in (2019) 4 SCC 227 wherein it has been held that by virtue of insertion of the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 with effect from 17.08.2018, any party to a winding up proceeding may file application for transfer of such proceedings to the Tribunal which then was mandatorily required to transfer such proceedings.

8. Learned counsel has also adverted to subsequent judgments of the Hon'ble Supreme Court in the case of **Kaledonia Jute and Fibres Private Limited vs. Axis Nirman and Industries Limited and others** reported in (2021) 2 SCC 403, **Action Ispat & Power Ltd. vs. Shyam Metalics and Energy Ltd.** reported in (2021) 2 SCC 641 as well as **A. Naveenchandra Steels Private Limited vs. S.R.E.I. Equipment Finance**

Limited and others reported in (2021) 4 SCC 435 to buttress his submissions.

9. It is therefore submitted that in view of the specific statutory provisions as interpreted by the Hon'ble Supreme Court to the aforesaid case laws, it is incumbent upon the Company Court to transfer all petitions pertaining to winding up and was a factor which has not been noticed by this Court while passing the order dated 26.04.2023 and therefore the said order is *per incuriam*. It has been submitted that although there is no specific provision for review of orders passed by the Company Court, however in view of the aforesaid factors, there is inherent power upon the Company Court to adjudicate upon orders passed earlier.

10. Learned counsel appearing on behalf of opposite party has refuted submissions advanced by learned counsel for applicant with the submission that the present application in its format is not maintainable particularly once admittedly the applicant had earlier filed an application seeking review of the order passed by this Court. It has been submitted that although the aforesaid application did not see light of day since it remained defective, even the present application seeking recall is not maintainable since there is no such specific power conferred upon the Company Court for either recalling or reviewing orders passed by it earlier.

11. It is further submitted that earlier the company petition was dismissed vide order dated 10.01.2019 on the grounds of limitation where against the applicant filed appeal which was allowed vide order dated 01.10.2019 and it is necessary to indicate that as on that date, application for transfer of company petition dated 25.09.2018 was already pending but no arguments thereupon were raised. It is submitted that the

aforesaid application for transfer of company petition was not pressed even at the appellate stage and therefore the applicant would be deemed to have waived its rights.

12. It has been further submitted that hearing in this company petition is now required to continue in terms of orders passed by the Division Bench dated 01.10.2019.

13. Learned counsel has adverted to Rule 9 of the Companies (Code) Rules, 1959 to submit that only an inherent power akin to Section 151 of the Code of Civil Procedure has been made available to a Company Court but even in the aforesaid event, since the order of which recall has been sought has not been passed on the grounds of fraud or any irregularity in proceeding, the application would therefore not be maintainable.

14. Upon consideration of submissions advanced by learned counsel for parties, perusal of material on record and perusal of order dated 26.04.2023, it is evident that the application seeking transfer of company petition has been rejected primarily on the ground that the company petition had been filed in the year 1994 and was dismissed initially in the year 2019 on the ground of limitation only whereafter it is required to be heard on merits as per the order passed in appeal remitting the dispute. The order also states that since it is the admitted case of the parties that affidavits in the case have already been exchanged and only final hearing requires to be done without leading of any evidence, the Court should exercise discretion to hear the case on merits instead of transferring it to the Tribunal particularly since the company petition is pending consideration for the past 29 years and requires a quietus.

15. A perusal of the order dated 26.04.2023 therefore quite evidently indicates that the transfer application has been

rejected only on the ground indicated herein-above without considering any statutory provisions or judgments of the Hon'ble Supreme Court on the point.

16. So far as the aspect of maintainability of the present application is considered, it is evident from the record that admittedly the earlier application filed by present applicant seeking review of the order dated 26.04.2023 apparently was found defective by the Registry and did not see light of day since the defect was not removed. Considering the said fact, the said application is not on record of this company petition and therefore in the considered opinion of this Court, would not have any bearing on the maintainability of present application nor would it be barred in terms of principles of *res judicata* and therefore the present application requires to be seen on its own merit.

17. It is also evident from the pleadings indicated in present application that statutory provisions pertaining to transfer of company petitions have been specifically indicated along with judgments of the Hon'ble Supreme Court interpreting the same. The order dated 26.04.2023 evidently has been passed without considering the aforesaid statutory provisions and enunciation by the Hon'ble Supreme Court, which pertain to the very aspect of jurisdiction of this Court to continue the proceedings of winding up petition.

18. It is now settled law that the aspect of jurisdiction can be raised and be adjudicated upon at any stage of a proceeding particularly where an earlier order is claimed to have been passed *per incuriam*.

19. In the light of discussion made herein-above, it is evident that the order dated 26.04.2023 having been passed without adjudication with regard to statutory provisions and

pronouncements by the Hon'ble Supreme Court, could very well come within the category of *per incuriam*.

20. The provision of Rule 9 of the Companies (Code) Rules, 1959 indicates inherent powers of the Company 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 Court.

21. So far as submission of learned counsel for opposite party regarding waiver is concerned, that the petitioner had not emphasized on the application for transfer at the time when the company petition was initially dismissed or even in the Company Appeal No.1 of 2019, it is evident from the judgment and order dated 01.10.2019 passed in Company Appeal that the aforesaid application for transfer of proceedings of company petition to the Tribunal had been stressed upon at the appellate stage as indicated in the paragraph no.20 of the order, but the trial Court while remanding the matter for decision on merits, has permitted the petitioner to press the application for transfer before the Company Court which was required to decide the application before deciding the matter on merits.

22. In view of the aforesaid, the ground of waiver taken by the opposite party does not hold good ground and is rejected.

23. Since by means of present application, the aspect of continuing jurisdiction of this Court to hear the company petition is an aspect required to be considered particularly to secure ends of justice and to prevent abuse of process of Court on that score also the present application is held to be maintainable.

24. Considering therefore said facts that the statutory stipulations and enunciations of the Hon'ble Supreme Court are required to be taken into consideration, the order dated 26.04.2023 is hereby recalled, restoring the Misc. Application

No.108903 of 2018 to its original number.

25. The present application, therefore, stands **allowed**.

C.M. Application No.108903 of 2018

1. Heard Mr. J.N. Mathur, learned Senior Counsel assisted by Mr. Rajesh Tewari, learned counsel for the applicant and Ms. Pushpila Bisht along with Mr. Radha Kant Sinha, learned counsel for opposite party.

2. Application has been filed seeking transfer of present company petition before the National Company Law Tribunal. No objections to the application has been filed till date.

3. The present application had earlier been rejected vide order dated 26.04.2023 whereafter an application for its recall bearing C.M. Application No.16 of 2023 along with an application for condonation of delay registered as C.M. Application No.15 of 2023 were filed and have been allowed by means of order passed today itself.

4. By consent of learned counsel for parties, the present application having been restored to its original number is also being decided today itself.

5. In the application seeking transfer of company petition to the Tribunal, it has been stated that by virtue of notification dated 06.06.2018, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated incorporating Proviso to Section 434(1)(c) of the Companies Act, 2013 providing for a provision for transfer of winding up petitions to the National Company Law Tribunal. The application further states that the Ordinance having been promulgated, the aforesaid petitions should be transferred to the Company Law Tribunal for being heard and decided under the Insolvency and Bankruptcy Code, 2016.

6. Learned counsel for applicant has submitted that during pendency of the present petition, the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 was promulgated and was deemed to have come into force on 06.06.2018 providing for settlement of dues raised against a company. It is submitted that the procedure indicated in the Code was in material variance with the Companies Act, 1956 inasmuch as the Code provided for provisions of resuscitation of the Company and for solving disputes between the creditor and the debtor with such procedure being absent in the Companies Act which provided only for winding up of a company against which dues were indicated and established.

7. It is further submitted that the procedure for transfer of cases after the establishment of the Company Law Tribunal were indicated in the Companies (Transfer of Pending Proceedings) Rules, 2016 with Rule 5 pertaining to transfer of pending proceedings of winding up on the ground of inability to pay debts and Rule 6 providing for transfer of pending proceedings of winding up matters on grounds other than inability to pay debts. It is submitted that Rule 5(1) subsequently stipulated that all such pending petitions filed under Section 433(e) of the erstwhile Companies Act on the ground of inability to pay debts were required mandatorily to be transferred to a Bench of the Tribunal established under sub-section (4) of Section 419 of the Companies Act, 2013.

8. It is submitted that by means of the aforesaid Rules of 2016, transfers were required to be made only of those proceedings which were at the stage of pre-service of notice of the winding up petition. It has been submitted that in the present case, only notices have been served upon the opposite parties who have thereafter put in appearance and have filed their counter affidavit whereafter no further proceedings took place in view

of order passed on 10.01.2019, whereby the company petition was dismissed on the ground of limitation and appeal filed there against was allowed only on 01.10.2019, whereafter the matter was remanded for hearing on merits as well as for hearing on the application seeking transfer of proceedings.

9. Learned counsel has thereafter adverted to subsequent judgments of the Hon'ble Supreme Court in the case of **Action Ispat & Power Ltd. vs. Shyam Metalics and Energy Ltd.** reported in (2021) 2 SCC 641 as well as **A. Naveenchandra Steels Private Limited vs. S.R.E.I. Equipment Finance Limited and others** reported in (2021) 4 SCC 435 to buttress his submissions.

10. It is therefore submitted that in view of the specific statutory provisions as interpreted by the Hon'ble Supreme Court to the aforesaid case laws, it is incumbent upon the Company Court to transfer all petitions pertaining to winding up.

11. Learned counsel for the opposite party has refuted submissions of learned counsel for applicant and submitted that earlier the company petition was dismissed vide order dated 10.01.2019 on the grounds of limitation against which the applicant filed appeal which was allowed vide order dated 01.10.2019 and it is necessary to indicate that as on that date, the application for transfer of company petition dated 25.09.2018 was already pending but no arguments thereupon were raised. It is submitted that the aforesaid application for transfer of company petition was not pressed even at the appellate stage and therefore the applicant would be deemed to have waived its rights.

12. It has been further submitted that hearing in this company petition is now required to continue in terms of orders passed

by the Division Bench dated 01.10.2019.

13. Upon consideration of submissions advanced by learned counsel for parties and perusal of material as well as law on the subject, it is evident that earlier provision for transfer of petitions for winding up in terms of Section 433 of the Companies Act were provided for in Section 434(c) of the Companies Act, 2013 which prescribed for winding up cases to be transferred at a stage which may be prescribed by the Central Government. This change was brought by the Amendment Act No.18 of 2013 with effect from 01.12.2016 whereby Section 434 of the Companies Act was substituted. In pursuance thereof, the Companies (Transfer of Pending Proceedings) Rules, 2016 were notified with effect from 15.12.2016 wherein Rules 5 and 6 required transfer of such cases in three types of proceedings and only those proceedings which were at the stage of pre-service of notice of winding up the petition was it compulsorily required to be transferred to the Tribunal. However, the result of such amendment in the Companies Act and the notification of Transfer Rules, 2016 was that parallel proceedings could continue under both statutes. In order to ameliorate this situation, a fifth proviso to Section 434(1)(c) was incorporated on and from 17.08.2018 which provided that any party or parties to any proceedings relating to winding up of companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was entitled to file an application for transfer of such proceedings which was required to be dealt with by the Tribunal in terms of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

14. The aforesaid aspects have been considered by Hon'ble the Supreme Court in the case of **Jaipur Metals and Electricals and Employees Org. and E Ltd. (supra)** and it has been held

that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the Sick Industrial Companies Act pending before the High Courts was required to be transferred to the Tribunal.

15. In the case of **Kaledonia Jute and Fibres Private Limited (supra)** it was held that in proceedings which are covered by the fifth proviso to Section 434(1)(c), the Rules 5 and 6 of the Companies (Transfer of Pending Proceedings) Rules, 2016 would be inapplicable.

16. In the case of **Action Ispat & Power Ltd. (supra)**, the following has been noticed :-

"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 Employees Organization v. Jaipur Metals & Electricals Ltd.

25. Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding up petition even after it is admitted. Thus, in a winding up proceeding where the petition

has not been served in terms of Rule 26 of the Companies (Court) Rules, 1959 at a pre- admission stage, given the beneficial result of the application of the Code, such winding up proceeding is compulsorily transferable to the NCLT to be resolved under the Code. Even post issue of notice and pre admission, the same result would ensue. However, post admission of a winding up petition and after the assets of the company sought to be wound up become in custodia legis and are taken over by the Company Liquidator, section 290 of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and may even sell the company as a going concern. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding up proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that the Company Court must proceed with the winding up, instead of transferring the proceedings to the NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case."

17. Upon appreciation of judgments of the Hon'ble Supreme Court on the aforesaid aspect, particularly in the cases of **Jaipur Metals and Electricals and Employees Org. and E Ltd. (supra)**, **Action Ispat & Power Ltd. (supra)** as followed in **A. Naveenchandra Steels Private Limited (supra)**, it is now evident that a company petition which is at a pre-admission stage would be compulsorily transferable to the National Company Law Tribunal to be resolved in terms of the Code giving the beneficial result of the application of the Code. Even post admission of a winding up petition and even after the assets of the company sought to be wound up become in *custodia legis* and are taken over by the Company Liquidator in terms of Section 290 of the Companies Act, 2013, the company

petitions are required to be transferred to the Tribunal so long as no actual sales of immovable or movable properties have taken place and nothing irreversible has been done which would warrant a Company Court staying its hands on a transfer application made to it.

18. The aforesaid aspect has clearly been enunciated by the Hon'ble Supreme Court in the case of **Action Ispat & Power Ltd. (supra)** which also holds that it is only where the winding up proceedings have reached an irreversible stage making it impossible to set the clock back that the Company Court must proceed with the winding up, instead of transferring it to the Tribunal.

19. In the present case, however, it is quite evident that no such irreversible stage has been attained as yet and the present company petition is only at the status of counter affidavit having been filed by the opposite party.

20. The submission of learned counsel for opposite parties regarding waiver has already been dealt with while deciding application for recall and is reiterated.

21. In view of the aforesaid pronouncements of the Hon'ble Supreme Court as well as the statutory conditions indicated herein above, the application is **allowed**.

22. The present Company Petition no.2 of 1994 shall stand transferred to the appropriate Bench of the National Company Law Tribunal as per its jurisdiction.

(Manish Mathur, J.)

Order Date :- 25.4.2024

Arnima