

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY PETITION NO. 136 OF 2014

M/s.Ashok Commercial Enterprises,)
a partnership firm duly registered under)
the Indian Partnership Act, 1932 and)
having its office at 126, Free Press House,)
215, Nariman Point, Mumbai – 400 021)
though it's partner)
Mr.Ramesh Ramchandani) **..... Petitioner**

VERSUS

**Parekh Aluminex Limited,)
a company registered under the Companies)
Act, 1956 and having its office at)
601, Auto Commerce House,)
Kennedy Bridge, Nana Chowk,)
Mumbai – 400 007 and also at)
G-11, Everest Building, 8th Floor,)
Tardeo, Mumbai Central, Mumbai – 400 034) Respondent**

**ALONGWITH
COMPANY APPLICATION NO. 932 OF 2015
IN
COMPANY PETITION NO. 136 OF 2014**

**M/s.Ashok Commercial Enterprises,)
a partnership firm duly registered under)
the Indian Partnership Act, 1932 and)
having its office at 126, Free Press House,))
215, Nariman Point, Mumbai – 400 021)
though it's partner)
Mr.Ramesh Ramchandani)**

**..... Applicant
(Orig. Petitioner)**

IN THE MATTER OF

**M/s.Ashok Commercial Enterprises,)
a partnership firm duly registered under)
the Indian Partnership Act, 1932 and)**

having its office at 126, Free Press House,))
 215, Nariman Point, Mumbai – 400 021))
 though it's partner))
 Mr.Ramesh Ramchandani)) Petitioner

VERSUS

Parekh Aluminex Limited,))
 a company registered under the Companies))
 Act, 1956 and having its office at))
 601, Auto Commerce House,))
 Kennedy Bridge, Nana Chowk,))
 Mumbai – 400 007 and also at))
 G-11, Everest Building, 8th Floor,))
 Tardeo, Mumbai Central, Mumbai – 400 034)) Respondent

ALONGWITH
COMPANY APPLICATION (L) NO. 887 OF 2015
IN
COMPANY PETITION NO. 136 OF 2014

Ashok C. Babu,))
 Adult, Indian Inhabitant,))
 Navinbhai Patel Chawl,))
 Mayawanshi Falia, Dadra Nagar Haveli,))
 Silvassa)) Applicant

IN THE MATTER OF

MESSRS. ASHOK COMMERCIAL))
 ENTERPRISES,))
 a partnership firm duly registered under))
 the Indian Partnership Act, 1932 and))
 having its office at 126, Free Press House,))
 215, Nariman Point, Mumbai – 400 021)) Petitioner

VERSUS

PAREKH ALUMINEX LIMITED,))
 A company registered under the Companies))
 Act, 1956 and having its office at))
 601, Auto Commerce House,))

**Kennedy Bridge, Nana Chowk,)
Mumbai – 400 007 and also at)
G-11, Everest Building, 8th Floor,)
Tardeo, Mumbai Central, Mumbai – 400 034)
CIN No. L2703MH1994PLC080732) Respondent**

Mr.J.P.Sen, Senior Advocate, a/w. Mr.Sandeep Parikh, Mr.Amit Pradhan, Mr.Abhishek Sawant, i/b. M/s.Subhash Pradhan & Co. for the Petitioner in CP/136/2014.

Mr.Zal Andhyarujina a/w. Mr.Simil Purohit, Mr.Punit Damodar, Ms.Nikita Vardhan, i/b. Kanga & Co. for the Respondent Company.

Ms.Ankita Singhania, a/w. Mr.Amir Ali Shaikh, i/b. I.V.Merchant & Co. for the Intervener/Applicant in CAL/887/2015.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 7th MARCH, 2017

PRONOUNCED ON : 11th APRIL, 2017

JUDGMENT :

By this petition filed under the provisions of section 433 (e) read with section 434(1)(a) and section 439 of the Companies Act, 1956, the petitioner seeks winding up of the respondent company on the ground that the respondent is unable to pay its debts.

2. This petition was placed on board for admission from time to time in last more than two years along with several other petitions for similar reliefs against the respondent. Learned counsel for the petitioner and the respondent however have addressed this court in this company petition and the same is thus considered by this court first.

3. Mr.Andhyarujina, learned counsel for the respondent has raised a

preliminary objection about this court hearing this company petition along with other companion petitions at this stage on the ground that the winding up petition filed by ICICI Bank against the respondent is transferred to National Company Law Tribunal in view of the amendment to the provisions of Insolvency and Bankruptcy Code, 2016 (for short the said Code) and in view of the notification dated 7th December, 2016 issued by the Central Government in exercise of the powers conferred under sub-sections 1 and 2 of section 434 transferring various proceedings pending before the High Court to the National Company Law Tribunal. (For short “NCLT”)

4. Learned counsel for the respondent invited my attention to the definition of 'corporate debtor' under section 3(8), 'creditor' under section 3(10), 'debt' under section 3(11), 'insolvency professional agency' under section 3(20) and 'secured creditor' under section 3(30). He also placed reliance on the definition of 'adjudicating authority' under section 5(1) which means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. He placed reliance on sections 6, 7, 8, 9, 12, 14, 16, 17 to 24, 31 and 32 of the Code. It is submitted that under the said provisions, the insolvency resolution process has to be completed within the period of 180 days from the date of making an application to initiate such process and if the same is not completed within the period of 180 days, the NCLT is empowered to order extension by not more than 90 days and such extension cannot be granted more than once.

5. Learned counsel submits that under sections 13 and 14 of the Code, NCLT is empowered to declare a moratorium for prohibiting various acts including filing and taking of various action against the corporate debtor which order shall have effect from the date of such order till completion of the corporate insolvency

resolution process. He submits that under section 16 of the Code the NCLT has to appoint interim resolution professional within 14 days from the date of insolvency commencement date. Under sections 17 to 20 various duties of the interim resolution professional qua corporate debtor are provided. He submits that interim resolution professional is thereafter bound to constitute the committee after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor. He submits that under Section 22 the committee of creditors has to take various steps.

6. The said interim resolution professional has to conduct corporate resolution process under section 23. The members of the Committee of the creditors have to conduct meeting under section 24 of the Code. Under Section 30 of the Code, applicant is permitted to submit a resolution plan to the resolution professional prepared on the basis of the information memorandum. Chapter III provides for liquidation process. Section 31 provides for approval of resolution plan by the adjudicating authority i.e. NCLT. Section 32 provides for an appeal against the order of approving the resolution plan by NCLT.

7. Mr. Andhyarujina, learned counsel placed reliance on section 238 of the Code and submits that in view of *non-obstante* provision under section 238, the provisions of Insolvency and Bankruptcy Code, 2016 will prevail even if there is any inconsistency between the provisions of the Code and Companies Act, 1956. He placed reliance on section 243 of the Code and would submit that by the said provisions only certain enactment are repealed. He also placed reliance on XIth schedule of the Code thereby amending certain provisions of the Companies Act, 2013 and more particularly the provisions relating to the winding up of the company by the NCLT.

8. Learned counsel for the respondent invited my attention to the order dated 23rd December, 2016 in Company Petition No.331 of 2016 and in companion Petition No.332 of 2016 and an order dated 17th January, 2017 passed by Shri S.C.Gupte, J. clarifying the said order dated 23rd December, 2016. It is submitted by the learned counsel that none of the provisions referred to aforesaid of the Code were pointed out before this court or were considered in the said orders dated 23rd December, 2016 and 17th January, 2017 passed by this court while holding that every winding up petition under Clause (e) of section 433 which is pending before the High Court and is not served by the petitioner on the respondent company shall be transferred to NCLT under Rule 5 of the Company (Transfer of the Pending Proceedings) Rules, 2016 and further clarifying that it is not necessary that the service must be effected only in pursuance of the acceptance order. Any service effected on his own by the petitioner on the respondent is equivalent to service under section 26 and the petition in that case is not liable to be transferred to NCLT. It is submitted by the learned counsel that there is a clear legislative conflict between the provisions of the Companies Act, 2013 and Insolvency and Bankruptcy Code, 2013.

9. It is submitted that in view of overriding effect of the *non-obstante* clause under Insolvency and Bankruptcy Code, the said Code would prevail over the provisions of Companies Act, 2013. He submits that *dehors* the said *non-obstante* clause in section 238 of the Code, since the said Code is a Code of particular application and since the framers of legislature had knowledge of existing Companies Act, 1956 and Companies Act, 2013, the provisions of Code will have overriding effect over the Companies Act, 1956 and of 2013 which are general statutes. He submits that the legislative intent is clear that the conflict has

to be resolved in favour of the Code and not Companies Act. Learned counsel placed reliance on section 35 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) Act and would submit that the said Act also has similar provisions having overriding effect. Learned counsel placed reliance on the judgment of Supreme Court in case of ***Madras Petrochem Limited and another vs. Board for Industrial and Financial Reconstruction and others, (2016) 4 SCC 1*** and in particular paragraphs 1, 28 to 33, 36 to 40 and 44. He submits that the Supreme Court has interpreted sections 35 and 37 of the SARFAESI Act along with the provisions of the Recovery of Debts due to banks and Financial Institution Act, 1993. He submits that it is not the case of the respondent that the provisions of Companies Act, 2013 are repealed by the Insolvency and Bankruptcy Code, 2016. He submits that there is no legislative intent that the Companies Act, 2013 would override any other law. He relied upon section 465 of the Companies Act, 2013 and would submit that there is no *non-obstante* clause in the said Act. It is submitted that Companies Act, 2013 is general law dealing with the companies whereas it is the legislative intent to bring all the company proceedings and insolvency proceedings under one roof before NCLT under the provisions of Insolvency and Bankruptcy Code.

10. Learned counsel for the respondent placed reliance on the judgment of this court in case of ***JM Financial Asset Reconstruction Company Pvt. Ltd. vs. State of Maharashtra, 2016 SCC Online Bom 9099*** and in particular paragraphs 33, 35, 36 and 42. He placed reliance on the preamble of the Insolvency and Bankruptcy Code, 2016 and submits that the purpose of winding up is a public purpose. He also placed reliance on sections 439, 439A, 440, 441, 441A, 446, 448, 454 and 455 of the Companies Act, 1956 and would submit that there is direct conflict between these provisions of the Companies Act, 1956 with the provisions

of Insolvency and Bankruptcy Code, 2016.

11. Mr.Andhyarujina, learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***Tata Motors Ltd. vs. Pharmaceutical Products of India Ltd., & Anr., AIR 2008 SC 2805*** and in particular paragraphs 19 and 20 and would submit that those principles laid down by the Supreme Court would apply to the *non-obstante* clause under Insolvency and Bankruptcy Code, 2016. He submits that the company petition filed by ICICI Limited has stood transferred to NCLT in view of the notification issued by the Government whereas the other petitions are pending before this court. There may be conflicting orders passed by the two courts dealing with winding up against the same respondent. It is submitted that the respondent does not dispute that it is defaulter insofar as the said petition filed by ICICI Bank is concerned. He submits that since the said pending petition is likely to be heard by the NCLT in near future and since there are several provisions for declaration of moratorium and for appointment of resolution professional and committee of creditors for the purpose of revival of the corporate debtor under the Code, any adverse order passed by this court in these petitions for winding up if any, would frustrate the good chances of revival of the respondent in the said petition pending before NCLT which is being heard under the provisions of Insolvency and Bankruptcy Code, 2016.

12. Ms.Singhania, learned counsel for the intervenor who has filed Company Application (L) No.887 of 2015 claims to represent the workers/employees and opposes this company petition on various grounds. It is the case of the intervenor that he represents 350 workers of the respondent company and supports the respondent company. She submits that these 350 workers are skilled and are employed for the purpose of producing the products of

the respondent. She submits that respondent company is the biggest supplier of AFCs to Indian Railways, Flight Kitchens, Airlines and Five Star Hotels. The respondent supplies 90% of the requirements of Indian Railways since 1995, 100% of Indian Airlines requirements since 1996, 100% of Air India requirements since 1999, 80% of requirements of Jet Airways since 1996, 70% of Railway contractors requirements since 1996 etc. She submits that the respondent has received a certificate of compliance for good manufacturing practices for various companies.

13. It is submitted that the respondent company was at 20% of its installed capacity in or around June 2016. A large number of machines of the respondent are fully automatic and some are semi-automatic. She submits that as on today, there are about 125 workers on the pay roll of the respondent, out of which 20 workers are qualified engineers/skilled workers, 15 are operators of the plant/machines, 35 work in the marketing team, 35 work in the Mumbai Office and rest of them are assisting in operation of the plant at Factory in Silvassa. She submits that the workers are fully dependent on the respondent company and if any order of winding up is passed against the respondent company, it would affect not only the respondent, its contributories, the creditors but also a large number of employees. She submits that interest of the workers has to be considered by this court before passing any order of admission of the company petition. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of *National Textile Workers' Union and others vs. P.R.Ramakrishnan and others*, (1983) 1 SCC 228 and in particular paragraphs 6 to 8.

14. Learned counsel also placed reliance on the following judgments :-

(1) *Kotak Mahindra Bank Ltd. vs. J.B.Diamonds Ltd.*,

(2011) 163 Comp.Cas 152(Bom.) (Paragraphs 30, 33, 34, 37 and 38)

(2) B.Viswanathan vs. Seshasayee Paper and Boards Ltd., 1992, Vol.73, Company Cases Madras, 136 (at page 140)

(3) Narendra Glass Works (P) Ltd. vs. M.P.Beer Products Pvt. Ltd., (1989)Vol. 65 Company Cases 396 (at page 403)

(4) In re Greenwood & Co., 1990 Queen's Bench Division, 306 (at page 307)

(5) In re Great Western (Forest of Dean) Coal Consumers' Company, Vol.XXI Chancery Division, 769 (at pages 772 to 774)

(6) Ms.Ranjana Kumar and others vs. Indian Dyestuff Industries Ltd., (2001) Vol.107, Company Cases 579 Bombay (at pages 582 and 583)

15. The intervenor has also filed additional affidavit dated 6th March, 2007 in these proceedings. It is submitted that the winding up order would not be a beneficial to the petitioner or any other secured creditors and since the petition filed by the ICICI against the respondent is pending before NCLT, this court shall not pass any order of even admission of the petition against the respondent which would severally prejudice the interest of the employees.

16. Mr.Sen, learned senior counsel for the petitioner in response to the preliminary objection raised by Mr.Andhyarujina, learned counsel for the respondent submits that under Schedule XI of the Insolvency and Bankruptcy Code, 2016, various amendments are made to the Companies Act, 2013. He submits that Section 434 of the Companies Act, 1956 is also amended. Under the

said amended provision, Central Government is empowered to issue notification for transfer of certain pending proceedings before the Company Law Board. He placed reliance on proviso to the said amended provisions and submits that all proceedings under the Companies Act, 1956 including for winding up of the companies pending immediately before such date before any District Court or High Court shall stand transferred to the tribunal provided that only such proceedings relating to winding up companies shall be transferred to the tribunal that are at a stage as may be prescribed by the Central Government.

17. It is submitted that pursuant to the said amended provision, the Ministry of Corporate Affairs issued a notification dated 7th December 2016. By the said notification, Rules called as “the Companies (Transfer of Pending Proceedings) Rules, 2016” are notified. Rule 5 provides for transfer of pending proceedings of winding up on the ground of inability to pay debts. Rule 5 is extracted as under :-

“5. Transfer of pending proceedings of winding up on the ground of inability to pay debts –

(1) all petitions relating to winding up under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court and where the petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code.

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

the date of this notification, failing which the petition shall abate.

(2) All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.”

18. It is submitted by the learned senior counsel that Section 238 of the Insolvency and Bankruptcy Code, 2016 indicates the legislative intent as to which winding up proceedings will continue to be heard by the Company Court and which are required to be transferred to the National Company Law Tribunal (NCLT). He submits that clause 5 of the said notification dated 7th December 2016 clearly defines the category of the matters which shall stand transferred to the NCLT and which shall remain to be heard by the Company Court. He submits that the legislative intent is thus clear.

19. Learned senior counsel placed reliance on the order passed by Shri Justice S.C.Gupte on 23rd December 2016 in Company Petition No.331 of 2016 in the case of **West Hills Realty Private Limited Vs. Neelkamal Realtors Tower Pvt. Ltd.** and clarificatory order dated 17th January 2017. He submits that this Court has already interpreted the provisions of the Insolvency and Bankruptcy Code, 2016 and also Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 and has clearly held as to which winding up proceedings shall be heard by the Company Court and which proceedings shall stand transferred to the NCLT. He submits that admittedly in this case, the service of the notice was served upon the respondent much prior to the 15th December 2016 and thus these proceedings can be heard only by this Court and not by the

NCLT. He submits that thus the provisions of the Companies Act, 1956 would apply to this petition and not the provisions of the Insolvency and Bankruptcy Code, 2016.

20. Learned senior counsel invited my attention to Section 14 read with Section 5(12) of the Insolvency and Bankruptcy Code, 2016 and would submit that Moratorium can be declared by the NCLT only if conditions prescribed under the provisions of the said Code are satisfied. He submits that under Section 7 of the said Code, a financial creditor may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority only if the conditions prescribed therein are satisfied by the corporate debtor.

21. It is submitted that admittedly till date, the company petition filed by the ICICI Limited against the respondent which is transferred to the NCLT is not admitted and corporate insolvency resolution process has not been initiated. He submits that the insolvency commencement date as defined under Section 5(12) of the Code has not occurred. The NCLT has not declared any Moratorium prohibiting institution or continuation of pending suit or any other proceedings against the corporate debtor.

22. In so far as the reliance is placed under Section 238 of the Code by Mr. Andhyarunjina, learned counsel for the respondent is concerned, it is submitted by the learned senior counsel for the petitioner that there is no quarrel with the proposition of law canvassed by the learned counsel for the respondent in so far as the said provision is concerned. He further submits that in this case, however, Section 238 of the Code has no application. He submits that the said

provision would be attracted only if there is any conflict between the provisions of the Code and the provisions of the Companies Act, 1956 or the Companies Act, 2013. He submits that as on today, there is no order passed by the NCLT declaring Moratorium under Section 14 of the Code. There is no conflict between the Code and Companies Act, 1956 or Companies Act, 2013.

23. It is submitted that the analogy of the SICA sought by the respondent does not apply. It is submitted that under the provisions of the SICA, even if a reference was registered by the then BIFR, Section 22 of the SICA was attracted which is not the case in case of the Insolvency and Bankruptcy Code, 2016.

24. It is submitted that a party who files a company petition for winding up before the NCLT may even withdraw the said petition subsequently. It is submitted that if large number of the petitions which are pending against the petitioner in this Court which are pending for substantial period of time are stayed and/or adjourned to enable the NCLT to hear a petition filed by the ICICI, it would encourage the respondent to abuse the process of law. He submits that one of the creditors may file collusive petition before the NCLT and may not proceed with such proceedings for admission of number of years. He submits that if the present proceedings are stayed and/or adjourned, the notification issued by the Ministry of Corporate Affairs on 7th December 2016 would be redundant. He submits that under the said notification dated 7th December 2016, class of winding up petitions is created and thus such notification should be given an appropriate meaning and effect.

25. It is submitted by the learned senior counsel that there is no legal bar

in hearing this company petition during the pendency of another petition against the respondent before the NCLT under the provisions of the Insolvency and Bankruptcy Code, 2016. It is submitted that only question that arises in these circumstances is as to whether the respondent has made out a case for exercise of discretion of this Court to adjourn large number of winding up proceedings pending against the same respondent in this Court and to wait for outcome of one of the company petitions filed by the ICICI Bank Limited against the respondent before the NCLT which is not even admitted till date.

26. By a separate order passed by this Court on 27th February 2017, the application for adjournment made by the respondent on various grounds summarized aforesaid came to be rejected. This Court thereafter directed the parties to the proceedings to proceed with the hearing of the admission of those petitions. This Court, however, heard the Company Petition No.136 of 2014 on merits and adjourned the other company petitions.

27. Mr.Sen, learned senior counsel for the petitioner invited my attention to the affidavit filed by M/s.Kotak Mahindra Bank Ltd. and would submit that there are no chances of revival of the respondent company. He submits that various minutes of meetings of CDR group of lenders clearly indicates that the CDR has failed. All the lenders have already exited and have decided to file recovery proceedings against the respondent. The account of the respondent is declared as fraudulent by the secured creditors. None of the person is willing to be on board of directors of the respondent.

28. Learned senior counsel for the petitioner invited my attention to various averments made in the petition. He submits that the petitioner had granted

short Term Loan aggregating to the total amount of Rs.67 crores during the period between January 2012 to July 2012 to the respondent. During the period between September 2012 to October 2012, the respondent acknowledged each of the amounts lent by the petitioner to the respondent aggregating to the total debt amount of Rs.67 crores and had executed bill of exchange and issued 12 cheques for the purpose of making repayment of the total debt of the amount of Rs.67 crores to the petitioner. He submits that in the month of February 2013, the petitioner had filed a summary suit being Suit No.203 of 2013 in this Court against the respondent for recovery of the dues of Rs.67 crores along with interest. On 4th April 2013, a cheque for Rs.1,25,00,000/- issued by the respondent towards repayment was dishonoured upon presentation of the said cheque by the petitioner with its bankers for the reason of “insufficient funds in the account.” The petitioner thereafter issued a Statutory Demand Notice on 15th June 2013. The respondent vide its advocate's letter dated 16th July 2013 replied to the said statutory notice and falsely denied the claims.

29. It is submitted by the learned senior counsel that in the said summary suit, the petitioner had filed Summons for Judgment (21 of 2013). By an order dated 24th February 2014 passed by this Court, this Court granted conditional leave to the respondent to defend the said suit i.e. on deposit of Rs.67 crores in this Court within a period of eight weeks from the date of the said order.

30. The respondent herein thereafter preferred an Appeal bearing Appeal (L) No.252 of 2014. Division Bench of this Court did not interfere with the order passed by the learned senior Judge and dismissed the said appeal by an order dated 20th November 2014. Though the Division Bench of this Court granted extension of time to deposit the said amount, the respondent did not deposit the said

amount. Supreme Court by an order dated 23rd February 2015 dismissed the petition for Special Leave to Appeal (C) No.648 of 2015. Supreme Court dismissed the Review Petition being R.P. (C) No.1412 of 2015 in SLP (C) No.648 of 2015 by an order dated 15th July 2015. This Court by an order dated 30th July 2015 decreed the said summary suit No.203 of 2013 in view of the respondent not complying with the order of conditional leave granted by this Court.

31. It is submitted by the learned senior counsel that the decree passed by this Court in the said summary suit against the respondent has attained finality. The respondent is thus liable to pay the said amount to the petitioner.

32. It is submitted by the learned senior counsel that the respondent has made every attempt to delay the hearing of the present proceedings along with other group of petitions. He submits that there is no jurisdictional embargo.

33. In so far as the submission made by Ms.Singhania, learned counsel for the workers is concerned, it is submitted by the learned senior counsel for the petitioner that there are no averments made by the applicant in the Company Application that about 350 workers are supporting the applicant. No proof of such alleged support is annexed. He submits that even if the workers' support is relevant for deciding the winding up proceedings against the respondent company, such support is not decisive. He also invited my attention to the order passed by the this Court on 22nd January 2016 recording the statement made by the respondent that the respondent was a sick company.

34. It is submitted that the plea of the workers may be decisive at the time of hearing of the company petition finally. He placed reliance on the judgment of

Delhi High Court in case of *Citibank N.A. vs. Moser Baer India Ltd., (2015) 188 Company Cases 416*. It is submitted by the learned senior counsel that before all the assets of the respondent are frittered away, this court shall appoint an Official Liquidator as a Provisional Liquidator in respect of all the assets, books of accounts and control of the respondent.

35. During the pendency of hearing of this petition, M/s.Kotak Mahindra Bank Limited has withdrawn the company petition filed by it against the respondent. In so far as the Indian Overseas Bank Ltd. is concerned, learned counsel for the Indian Overseas Bank Ltd. states that the said bank is neither opposing the petition nor supporting the petition. He, however, states that the said bank has already filed the proceedings against the respondent before the Debt Recovery Tribunal and the said proceedings are being pursued by the said bank against the respondent rigorously.

36. Mr. Sen, learned senior counsel for the petitioner also invited my attention to some of the averments made by the said Indian Overseas Bank Ltd. which was the lead bank and was part of the said CDR scheme. He submits that even the said affidavit clearly indicates that the CDR scheme had miserably failed. In the said affidavit, it is clearly stated that the account of the respondent has been declared as fraudulent and red flagged account. He submits that ICICI Bank Limited has filed winding up proceedings against the respondent which proceedings are transferred to the NCLT for winding up of the respondent and not for revival.

37. It is submitted by the learned senior counsel that the respondent has not made out a case for exercising discretion by this court in favour of the

respondent. He submits that CDR scheme has admittedly failed. No settlement of dispute has taken place till date. The proceedings filed by the respondent under the provisions of SICA were unsuccessful. Though several opportunities were given to the respondent for its revival, the respondent could not revive. There are no possibilities of revival of the respondent. He distinguished the judgment of this court in case of ***IDFC Bank Limited vs. M/s.Ruchi Soya Industries Limited in Company Petition No.570 of 2016 and companion matters delivered on 14th February,2017*** on the ground that 98% of the secured creditors of the respondent company in that matter were opposing the company petition. He submits that in this case, none of the creditors are supporting the case of the respondent. All the secured creditors have already filed appropriate proceedings for recovery of their dues.

38. Mr.Andhyarujina, learned counsel for the respondent in response to the submissions made by the learned senior counsel for the petitioner on merits of the petition submits that the meeting of the joint lenders forum is now scheduled. He does not dispute that a decree came to be passed in favour of the petitioner and against the respondent which decree has attained finality. Learned counsel invited my attention to paragraphs 3, 4, 8, 10 and 11 of the affidavit in reply filed by the Indian Overseas Bank supporting the case of the respondent. He also placed reliance on the additional affidavit filed by the Indian Overseas Bank dated 15th December,2015. He does not dispute that the CDR scheme has failed. He submits that Kotak Mahindra Bank has now already withdrawn the company petition against the respondent.

39. It is submitted that all the assets of the respondent are already mortgaged. The respondent is carrying on production only to the extent of 30% of

the total capacity of the respondent. He placed reliance on the judgment of Punjab and Haryana High Court in case of ***Canara Bank and others vs. Arihant Industries Ltd., 2002 Vol.110 Company Cases 70*** (Punjab and Haryana). He submits that the company court has ample discretionary power to consider the interest of the company, its creditors and also the employees who would be seriously affected. He placed reliance on the judgment of Gujarat High Court in case of ***Rishi Enterprises, In re., 1992 Volume 73 Company Cases 271*** and in particular relevant paragraphs on pages 272 to 274. He strongly placed reliance on the judgment of this court in case of ***IDFC Bank Limited*** (supra).

40. Learned counsel placed reliance on the judgment of Gujarat High Court in case of ***Tata Iron and Steel Co. vs. Micro Forge (India) Ltd., 2000 SCC OnLine Guj.394*** and in particular paragraph 19 laying down the guidelines to be considered by the company court while hearing the company petition for winding up of a company. He also placed reliance on the judgment of Madras High Court in case of ***Dallah Albaraka (Ireland) Ltd. vs. Pentasoft Technologies Ltd., (2010) 157 Comp. Cas 413 (Mad)***. It is submitted that the petitioner herein has already filed execution application against the respondent and also against its directors. He submits that this court thus in these circumstances shall not entertain this winding up petition which is an equitable mode of execution. He submits that the respondent being a running a company, the petitioner has not made out any case for appointment of the Official Liquidator as a Provisional Liquidator of the assets of the company.

41. It is submitted that if the Official Liquidator is appointed as a provisional liquidator of the respondent, it would seriously prejudice the interest of the respondent and its employees and would affect the interest of the creditors. He

submits that the order of winding up would not benefit the creditors. He placed reliance on the judgment of this court in case of ***Darshan Anilkumar Patel vs. Gitaneel Hotels Pvt. Ltd. and others, (1993) 2 Bom.C.R. 440*** and in particular paragraph 20 thereof. He submits that the respondent has to recover a large number of amount from various creditors and there are good chances of its revival. He submits that this court has already granted injunction against the respondent and its directors in the execution application filed by the petitioner. He submits that the respondent is making profit which fact is placed on record. He submits that the petitioner itself has admitted in the execution application that the respondent is making profit. He submits that the statement made by the respondent before the company court that the net assets of the respondent are in negative is of no significance.

42. Mr.Sen, learned senior counsel for the petitioner in rejoinder submits that admittedly, the CDR scheme has already failed. He submits that in the minutes of the meeting of the CDR, it is clearly recorded that the account of the respondent is declared as fraudulent account. He submits that this company petition had been filed against the respondent in the year 2014. The respondent had several opportunities for revival if any in last three years but the respondent has failed to revive. He submits that there are no reasonable prospect of revival of the respondent. He submits that the judgment of this court in case of ***IDFC Bank Limited*** (supra) is clearly distinguishable in the facts of this case. In that matter, the rectification and restructuring steps were under consideration whereas in this case admittedly the attempt of revival of CDR has failed. He submits that the Indian Overseas Bank which was the lead banker participating in Joint Lenders Forum meeting has now stated that it was neither supporting nor opposing the case of the respondent but is admittedly pursuing the recovery proceedings filed by it

against the respondent before the Debt Recovery Tribunal.

43. It is submitted that in any event the petitioner being an unsecured creditor is not a party to the said joint lender forum and thus even if any decision is taken by Joint Lenders Forum at some stage in future, the said decision would not be binding on the unsecured creditors like the petitioner. It is submitted that only the possible protection which cannot be granted to the petitioner who is an unsecured creditor can be by appointing the Official Liquidator as a Provisional Liquidator. He submits that filing of execution application by the petitioner against the respondent and its directors is no bar from prosecuting this company petition for winding up. He submits that this court has to consider as to whether the respondent is in a position to discharge its liability and is unable to pay its debt while considering the winding up petition.

44. Insofar as the submission of the learned counsel for the respondent that this court shall exercise its discretionary power in favour of the respondent is concerned, it is submitted by the learned senior counsel for the petitioner that there are several inconsistencies about the number of workers as on today deployed by the respondent. He submits that similarly there are inconsistencies in the affidavit filed by the workers. He submits that even according to the affidavit filed by the intervenor who claims to represent some workers, those workers' dues are not discharged by the respondent atleast from July 2016 onwards. He submits that the respondent has not filed any audited account with the Registrar of Companies for last more than three years and thus it is not possible to ascertain whether the respondent company is making any profit or not as canvassed by the learned counsel for the respondent.

45. It is submitted that the decree passed by this court in favour of the petitioner and against the respondent has attained finality. The defence raised by the respondent is not bonafide and is moonshine. The value of the net asset of the respondent is already eroded as is apparent from the statement made by the respondent which was recorded by this court. He submits that the liabilities of the respondent are much more than the assets. He distinguished the judgment of this court in case of ***Darshan Anilkumar Patel*** (supra). He submits that a large number of petitions are pending against the respondent *inter alia* praying for winding up which itself indicates that the respondent is heavily indebted.

Reasons and conclusions :-

46. I shall first decide whether an oral application made by the respondent to adjourn the hearing of this Petition till the Company Petition filed by the I.C.I.C.I. Bank against the respondent before NCLT shall be granted or not and this petition shall be made subject to the outcome of the petition filed by ICICI Bank Ltd. against the respondent which is pending before NCLT. It is not in dispute that this Petition along with other Company Petitions are pending for about three years in this Court for admission. The Companies Act, 1956 which is in force since 1 April 1956 provides for subject of winding up of the companies and other subjects. Section 433(c) of the Companies Act, 1956 provides for winding up of a Company, if the Company is unable to pay its debts. In the year 2013, the Parliament passed Companies Act, 2013 which seeks to repeal 1956 Act. The said 2013 Act received the assent of the President on 29th August 2013, which Act consolidates and amends the law relating to companies over the last 100 years in this country.

47. Sections 408 and 410 of the Companies Act, 2013 confer powers on the Central Government to constitute National Company Law Tribunal and National Company Law Appellate Tribunal respectively to exercise and discharge the powers and functions as may be conferred on them by the said Companies Act, 2013. The Central Government exercised those powers conferred under Section 408 and 410 of the Companies Act, 2013 and issued separate Notifications through the Ministry of Corporate Affairs on 1st June 2016 and constituted the National Company Law Tribunal and National Company Law Appellate Tribunal respectively. The Central Government also issued a Notification on 1st June 2016 by exercising powers conferred under Section 434(1)(a) of the Companies Act, 2013 to the effect that all the matters or proceedings or case pending before the Board of Companies law administration as on the date shall stand transferred to National Company Law Tribunal to be disposed of in accordance with the provisions of the Companies Act, 2013 or Companies Act, 1956 as the case may be.

48. The Central Government issued another Notification on 1st June 2016 specifying that as on the date of the said Notification, various provisions of the Companies Act, 2013 listed out in the said Notification shall come into force.

49. Sometime in the year 2016, the Parliament enacted the Insolvency and Bankruptcy Code, 2016. It received the assent of the President on 28th May 2016, by which Code, the Parliament sought to consolidate and amend the laws relating to reorganization and insolvency resolution of the corporate persons. Under the said Code, NCLT has been designated as the adjudicating authority for corporate persons for resolution of insolvency, liquidation and bankruptcy. By Notification dated 7th December 2016, the Central Government brought into force various other

provisions of the Companies Act, 2013 including provisions relating to winding up contained in that Act with effect from 15th December 2016.

50. The Central Government issued another Notification on 7th December 2016 by exercising powers conferred under Section 434(1) and (2) and notified Rules called “Companies (Transfer of Pending Proceedings) Rules, 2016”, which provides for transfer of various proceedings pending before the High Court to the NCLT. Rule 5 of the said Rules provides for Transfer of Pending Proceedings of winding up on the ground of inability to pay debts. It is prescribed that all such pending Petitions which are pending before a High Court 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 National Company Law Tribunal established under Section 419(4) of the Companies Act, 2013 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 shall be dealt with in accordance with Part II of the Code.

51. This Court by an order dated 23rd December 2016 construed the provisions of the Companies (Transfer of Pending Proceedings) Rules, 2016 and various Notifications issued by the Central Government referred to aforesaid and also considered the objects and purpose of enacting Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016. This Court in the said order also has interpreted Rules 26 to 29, Form No. 6 and Rules 96 and 98 of the Companies (Court) Rules, 1959, which provides for service of Petition and Notice upon the Company.

52. This Court held that whilst it is true that the Petitions that are to be

transferred to NCLT must be at a pre-admission stage, proviso does not imply that every Petition at the pre-admission stage ought to be transferred to NCLT. It is held that all winding up Petitions admitted by the High Court would have necessarily complied with the requirement of service under Rule 26, whereas Petitions pending admission might or might not have complied with the requirement of such service.

53. It is held that those Petitions which are pending admission or which have been served on the respondent as required under Rule, 26 shall continue to remain in the High Court pending their admission, whilst the Petitions pending admission, which have not been served on the respondent as required under Rule 26 shall be transferred to, and considered for admission under Section 7, 8 or 9 of the Code by NCLT. It is held that Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 appears to be mandate of the transfer Notification.

54. In paragraph 13 of the said order, it is held that every winding up Petition under clause (e) of Section 433 which is pending before a High Court and which is not served by the petitioner on the respondent Company shall stand transferred to NCLT under Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. If such pending Petition is served by the petitioner on the respondent before 15th December 2016, the Petition will continue to be dealt with by this Court and the applicable provisions will be the provisions of 1956 Act.

55. By an order dated 17th January 2017, this Court clarified the said order dated 23rd December 2016 that *sine qua non* for transfer of a winding up Petition to NCLT under the Companies (Transfer of Pending Proceedings) Rules, 2016, is

non-service of a pending Petition. It is clarified that as per the service of the Petition, it is not necessary that the service must be effected only in pursuance of an acceptance of order. Any service effected on his own by the petitioner on the respondent is equivalent to service under Rule 26. The Petition in that case is not liable to be transferred to NCLT. It is not in dispute that the said order dated 23rd December 2016 and clarificatory order dated 17th January 2017 passed by this Court in Company Petition No. 331 of 2016 and in companion Petition hold the field and are not set aside.

56. It is not in dispute that in this Petition and the other Companion Petition which were on board for admission, the service of the notice under Rule 26 of the Companies (Court) Rules, 1959 had been effected by the petitioner on the respondent Company prior to 15th December 2016. It is thus, clear that in view of the Notification dated 7th December 2016 by which the Companies (Transfer of Pending Proceedings) Rules, 2016 are notified duly construed by this Court in the said order dated 23rd December 2016 and clarificatory order dated 17th January 2017, this Petition will have to be heard by this Court and the provisions of the Companies Act, 1956 would be attracted to this Petition. This proceeding thus cannot be transferred to NCLT under the said Notification dated 7th December 2016.

57. The question now arises for consideration to this Court is, whether there is any inconsistency or conflict between the provisions of the Companies Act, 2013, Companies Act, 1956 with the provisions of Insolvency and Bankruptcy Code, 2016 insofar as provisions relating to winding up of the Company are concerned.

58. Insofar as the Company Petition filed by I.C.I.C.I. Bank against the respondent is concerned, the said Petition is transferred to NCLT, Mumbai, in view of the said Bank not having effected the service of notice under Rule 26 of the Companies (Court) Rules, 1959 upon the respondent. All other Company Petitions which are filed against the respondent which are pending before this Court have to be tried only by this Court.

59. Mr. Andhyarujina, the learned Counsel appearing for the respondent placed reliance on various provisions of Code referred aforesaid, to buttress his argument that in view of overriding the effect of the *non obstante* clause under Section 238 of the Code and since the said Code is a Code of particular application and having knowledge of former legislations i.e. Companies Act, 1956 and the Companies Act, 2013 provisions of the Code will have overriding effect over the Companies Act, 1956 and Companies Act, 2013 which are general statute.

60. Schedule XI to the Insolvency and Bankruptcy Code, 2016 provides for the amendments to various provisions of the Companies Act, 2013 and also Companies Act, 1956. Section 434 of the Companies Act, 2013 is substituted by a new Section which provides for transfer of certain Pending Proceedings. Section 434(c) provides that 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, provided that only such proceedings relating to the winding up of the Companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

61. Under Section 434(2), the Central Government is conferred with the

powers to make Rules consistent with the provisions of the said Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the Courts to the Tribunal under that section. It is thus, clear beyond reasonable doubt that the Central Government is empowered to prescribe the proceedings described in Section 434(c) which shall stand transferred to the Tribunal and the stage before their transfer. By exercising such powers conferred upon the Central Government under Section 434(1) and (2) of the Companies Act, 2013, the Central Government has issued the said Notification dated 7th December 2016 notifying the said Companies (Court) Rules, 1959. Rule 5 of the said Rules clearly provides for Transfer of Pending Proceedings of the winding up on the ground of inability to pay debts, if the Petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959.

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.

64. In my view, the judgment of the Supreme Court in case of ***Madras Petrochem Limited and another vs. Board for Industrial and Financial Reconstruction and others*** (supra) and in case of ***Tata Motors Ltd. vs. Pharmaceutical Products of India Ltd.*** (supra) and Judgment of this Court in case of ***JM Financial Asset Reconstruction Company Pvt. Ltd. vs. State of Maharashtra*** (supra) would be of no assistance to the respondent. There is no dispute about the propositions of law laid down in the aforesaid Judgment of the Supreme Court and this Court, but the same would not apply to the facts of this case, in view of this Court holding that there is no conflict between the provisions of Insolvency and Bankruptcy Code, 2016 and the provisions of the Companies Act, 1956 and the Companies Act, 2013.

65. The next question that arises for consideration of this Court is whether in these circumstances, the respondent has made out a case for exercising

discretionary jurisdiction of this Court to keep this Petition in abeyance till an order of declaration of moratorium is made by the NCLT under Section 13 read with other provisions of the Code in the said isolated Petition filed by I.C.I.C.I. Bank against the respondent and shall await the outcome of the said Petition.

66. In support of the submission of the respondent that if any order is passed by this Court in this Company Petition along with other companion Petition admitting the Company Petition and passing any order of appointment of the Official Liquidator as provisional liquidator would seriously affect the outcome of the proceedings filed by the I.C.I.C.I. Bank against the respondent before NCLT is concerned, Mr. Andhyarujina, the learned Counsel appearing for the respondent placed reliance on the various provisions of the Code and more particularly, Section 3(8), 3(10), 3(11), 3(20), 3(30), Section 5 to 9, 12, 14, 16 to 24, 31, 32, 238 and 243.

67. During the pendency of this petition along with companion petitions, M/s.Kotak Mahindra Bank Limited withdrew Company Petition No.504 of 2016 filed by it against the respondent unconditionally. A perusal of the affidavit 22nd January, 2016 filed by M/s.Kotak Mahindra Bank Limited in this petition however indicates that the said bank had filed the said affidavit for the purpose of supporting the company petition. In the said affidavit, M/s.Kotak Mahindra Bank Limited brought on record that the respondent was referred to corporate date restructuring cell as it was facing financial difficulty. It was stated that the CDR could not fructify and the promoters failed to comply with the terms and conditions of the scheme and also to bring any promoter's contribution as directed by CDR due to which the said revival scheme failed.

68. It was further stated that in view of the default committed by the respondent in repayment of the credit facilities, the account of the respondent had been declared as non-performing asset with the M/s.Kotak Mahindra Bank Limited on or before 3rd May, 2015. M/s.Kotak Mahindra Bank Limited accordingly recalled the entire facilities advanced to the respondent pursuant to the defaults and failure of the CDR scheme and also invoked the guarantee by issuing a recall notice dated 23rd December, 2015. According to M/s.Kotak Mahindra Bank Limited, they were entitled to recover more than Rs.110 crores from the respondent. It was also brought on record that since the respondent had failed to comply with the demand made in the recall notice issued by M/s.Kotak Mahindra Bank Limited, the said bank has already filed Original Application in the Debt Recovery Tribunal (DRT) against the respondent and its guarantors. It is brought on record that in the CDR scheme, the respondent had admitted its liabilities to the various banks in an aggregate sum of Rs.2912,90,39,247/- as on 30th November, 2015 to its secured creditors.

69. A perusal of the record indicates that though the Indian Overseas Bank Limited through its counsel made a statement before this Court that the said bank was neither supporting the respondent nor opposing the company petition filed by the petitioner against the respondent, it is admitted that the said bank has been pursuing the recovery proceedings filed by it against the respondent before the Debt Recovery Tribunal. A perusal of the affidavit dated 28th September, 2015 filed by the Indian Overseas Bank Limited indicates that though the said bank in the said affidavit tried to support the case of the respondent at that point of time, has placed on record that for want of sufficient funds in TRA account, no CDR bank could adjust any amount till now and no amount has been credited either to the interest amount or to the principal amount. It is placed on record that the

Indian Overseas Bank Limited has already filed 52 Original Applications before the Debt Recovery Tribunal, Bombay against the respondent for recovery of over Rs.1123,19,62,542/-.

70. A perusal of the record further indicates that the account of the respondent has been declared as fraudulent by the secured creditors in the CDR meetings and all the lenders have already exited and have decided to file the recovery proceedings against the respondent. Most of such secured creditors have already filed the proceedings against the respondent for winding up. Several petitions are pending against the respondent.

71. This Court repeatedly gave various opportunities to the respondent to demonstrate before this Court that inspite of failure of CDR, the respondent has possibility of its revival even at this stage inspite of the respondent having been heavily indebted and with limited assets in hand, the respondent however, could not produce any proposal before this Court to demonstrate the same. The respondent though had applied before the BIFR for revival, could not succeed. All the creditors except M/s.Kotak Mahindra Bank Limited are pressing for their recovery in various proceedings filed before this Court and / before other forum.

72. The only argument advanced by the learned counsel for the respondent to postpone the hearing of this company petition along with other companion proceedings, was invoking provisions of Insolvency & Bankruptcy Code, 2016. Admittedly the NCLT has not passed any order of declaration of moratorium and has not made any public announcement under section 13 of the Insolvency & Bankruptcy Code, 2016 for the purpose referred to in section 14. The company petition filed by the ICICI Bank Limited against the respondent is

not even admitted. It is not in dispute that the respondent is not disputing that the respondent is a defaulter in that matter as stated by Mr.Andhyarujina, learned counsel for the respondent before this Court. The said company petition filed by ICICI Bank Limited against the respondent is not for seeking a declaration of moratorium for the purpose referred to in section 14 and for the appointment of any interim resolution professional but is filed for winding up of the respondent. It is thus clear that the said ICICI Bank Limited is also not supporting the case of the respondent but may pursue the said petition and to take the same to its logical conclusion.

73. In these circumstances, when large number of petitions are filed against the respondent which are pending for about three years for winding up of the respondent, and in view of several attempts made by the respondent for delaying the out come of these petitions on one or other frivolous grounds, I am not inclined to accept the submission of Mr.Andhyarujina, learned counsel for the respondent to postpone the hearing of this petition along with other companion petitions and to await for the out come of the said isolated petition filed by the ICICI Bank Limited which is not even admitted till date. This petition along with other companion petitions, which are pending for about three years cannot be adjourned *since die* and be made subject to the out come of the said company petition filed by the ICICI Bank Limited. In my view, the application for postponement of hearing of this petition along with other petitions based on the said company petition filed by the ICICI Bank Limited is one more attempt of the respondent to delay the out come of various company petitions pending for winding up against the respondent. I have accordingly rejected the application of the learned counsel for the respondent for postponement of this petition along with other companion matters and have heard the learned counsel for the parties on

merits.

74. Insofar as the merits of the petition is concerned, learned counsel for the respondent could not dispute that the decree passed by this Court against the respondent has attained finality in view of the appeal filed by the respondent against the order passed by the learned single Judge of this Court and Special Leave Petition filed before the Supreme Court having been dismissed. There is no *bonafide* defence raised by the respondent to the company petition. The liability of the respondent in this case is not disputed. In view of the respondent having been heavily indebted and in view of large number of creditors, including unsecured creditors, in my view, the petitioner has made out a case not only for admission of this company petition but also for appointment of the Official Liquidator as a Provisional Liquidator. In my view there are not even remotest possibility of revival of the respondent company. Before the remaining assets of the respondent are frittered away, appointment of the Official Liquidator as Provisional Liquidator is absolutely warranted.

75. Insofar as so called support to the respondent made by some of the workers, who are represented by Ms.Singhanian, learned counsel appearing for the intervenor is concerned, in my view though the Company Court has to consider the say of the workers of the respondent company even at the stage of admission of the company petition, the opposition of the company petition by the workers is not decisive for the purpose of entertaining the winding up petition at the admission stage. A perusal of the two affidavits filed by the intervenor shows inconsistencies. Be that as it may, even according to the said affidavits filed by the intervenor, it is clear that even according to the workers, the respondent has not paid their dues since July, 2016 till date. In these circumstances, various judgments

relied upon by Ms.Singhania, learned counsel for the intervenor and Mr.Andhyarujina, learned counsel for the respondent on the discretionary powers of the Company Court while entertaining the winding up petition would be of no assistance to the intervenor as well as to the respondent.

76. Admittedly, the petitioner is one of the unsecured creditor. This Court in an unreported judgment delivered on 19th March, 2010 in case of ***Sublime Agro Limited vs. Indage Vinters Limited*** in Company Petition No.960 of 2009 has held that CDR scheme is admittedly a voluntary scheme and not binding on the unsecured creditors of the company. Even if any JLF meeting is proposed according to the learned counsel for the respondent at this stage, decision of any restructuring or rectification would not be binding on the unsecured creditors. Be that as it may, no documents are produced by the respondent in support its submission that the Joint Lenders Forum are taking any steps for rectification and restructuring of the respondent.

77. This Court has taken a view in case of ***Sublime Agro Limited*** (supra) that the provisions pertaining to winding up proceedings under the Companies Court are more particularly meant for protecting the interest of the unsecured creditors of the company who are most affected lot when a company becomes commercially insolvent. The secured creditors of the company can always pursue their claim by keeping themselves out of the winding up proceedings. The Court cannot push back the claims of the unsecured creditors and allow the company to keep on creating further liabilities so that ultimately what is recovered from the company upon being wound up is taken away by the secured creditors and the creditors whose claims are to be given priority in law leaving the unsecured creditors high and dry. I am therefore of the view that large number of unsecured

creditors cannot be made to wait on the ground that in future NCLT may declare moratorium on the application of the ICICI Bank Limited under section 13 of the Insolvency and Bankruptcy Code, 2016 for the purpose of section 14. No cognizance of such petition filed by ICICI Bank Limited against the respondent which is pending before the NCLT thus can be taken by this Court as sought to be canvassed by the learned counsel for the respondent.

78. The Delhi High court in case of ***Citibank N.A. vs. Moser Baer India Ltd., (2015) 188 Company Case 416 (Delhi)*** has considered a situation where under the CDR scheme the amount infused by the consortium of banks was very limited and the moratorium was likely to expire in near future. The Delhi High Court observed that what would happen thereafter is a matter of speculation. The Delhi High Court in that situation admitted the company petition and impleaded the workers. The judgment of the Delhi High Court in the case of ***Citibank N.A.*** (supra) would squarely apply to the facts of this case. I am in respectful agreement with the views expressed by the Delhi High Court. In this case also the out come of the petition filed by ICICI Bank Limited is totally uncertain and speculative.

79. In the facts and circumstances of this case, I am not inclined to exercise any discretion in favour of the respondent and the intervenor for the reasons recorded aforesaid. The respondent is heavily indebted and is unable to pay its debts.

80. I therefore, pass the following order :

- a). The Company Petition No.136 of 2014 is admitted and shall be advertised in two local newspapers, namely (i) Free Press Journal (in English) and Navshakti (in Marathi) as also

in the Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette, and any resultant inadequacy of notice shall not invalidate such advertisement or notice and shall not constitute non-compliance with this direction or with the Companies (Court) Rules, 1959.

b). The company petition is made returnable on **19th June, 2017**. The petitioner shall deposit Rs.10,000/- towards publication charges with the Prothonotary & Senior Master, under intimation to the Company Registrar, within three weeks from the date of admission, failing which the petition shall stand dismissed for the non-prosecution without further reference to the Court. After the advertisements are issued, the balance, if any, shall be refunded to the petitioner.

c). The service of the petition under Rule 28 of the Companies (Court), Rules, 1959 shall be deemed to have been waived.

d). The Company Application (Lodging) No.887 of 2015, filed by the intervenor is allowed.

e). The Company Application No.932 of 2015 is made absolute in terms of prayer clauses (a) and (b).

f). The parties, including the Official Liquidator to act on the authenticated copy of this order.

(R.D.DHANUKA, J.)

81. At this stage Mr.Andhyarujina, learned counsel appearing for the respondent applies for stay of advertisement of the petition and also of the interim relief granted by this Court in Company Application No.932 of 2015. The application for stay is vehemently opposed by the learned counsel for the petitioner.

82. The petition shall not be advertised for a period of two weeks from today. The Official Liquidator also shall not implement the order passed by this Court in terms of prayer clauses (a) and (b) of the Company Application No.932 of 2015 for a period of two weeks from today.

83. If any appeal is filed by the respondent, the papers and proceedings shall be served upon the petitioner's advocate in advance.

(R.D.DHANUKA, J.)