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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL LODGING NO. 68 OF 2018
 IN
 COMPANY APPLICATION NO. 572 OF 2017
 IN
 COMPANY PETITION NO. 434 OF 2015
 WITH
 NOTICE OF MOTION NO. 218 OF 2018
 (For Intervention)
 WITH
 NOTICE OF MOTION LODGING NO. 110 OF 2018

Jotun India Private Limited	)	
A company incorporated under the	)	
provisions of the Companies Act, 1956	)	
502, 5 th floor, Boston House, Suren Road	)	
Andheri (East), Mumbai 400 093, India.	)	.. Appellant
		(Org. Respondent)

Versus

PSL Limited	)	
A Company incorporated under the	)	
Provisions of the Companies Act, 1956	)	
having its registered office at Kachigam,	)	
Daman, Union Territory of Daman and	)	
Diu – 396210	)	.. Respondent
		(Org. Applicant)

Mr. Zal Andhyarujina a/w Ms. Akansha Agarwal, Ms. Silpa Nair, Ms. Lizun Wangdi, Mr. Akshay Aurora I/by Trilegal for appellant.

Mr. Janak Dwarkadas, Sr. Advocate with Ms. Ankita Singhanian, Mr. Amir Arsiwala, Mr. Omprakash Jha, Ragha Shekhar I/by The Law Point for the respondent.

Mr. Nikhil Rajani with Ms. Jyoti Sanap I/by V. Deshpande & Co. for the applicants/intervener in NMA/218/2018.

CORAM : NARESH H. PATIL &
G. S. KULKARNI, JJ.

RESERVED ON : MAY 03, 2018

PRONOUNCED ON : JULY 26, 2018

JUDGMENT [Per Naresh H. Patil, J.] :

1. **Admit.** Heard finally by consent of the parties.
2. This appeal is directed against the order dated 5/1/2018 passed by the learned Single Judge (Coram: K. R. Shriram,J.) in Company Application No. 572 of 2017 in Company Petition No. 434 of 2015.
3. The appellant is original respondent in Company Application No. 572 of 2017 and original petitioner in Company Petition No. 434 of 2015, which came to be filed on 10/3/2015 under Sections 433 and 434 of

the Companies Act, 1956 (for short **the Act of 1956**). The respondent herein is original applicant in Company Application No. 572 of 2017 and original respondent in Company Petition No. 434 of 2015.

4. The appellant claimed an outstanding amount of Rs.7.25 crores with interest in respect of unpaid invoices for the goods supplied by the appellant in favour of the respondent. The respondent – Corporate Debtor made a reference to Board of Industrial and Financial Reconstruction (for short **BIFR**). On 1/12/2016 the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (for short **the Repeal Act, 2003**) was notified and the Sick Industrial Companies (Special Provisions) Act, 1985 (for short the **SICA**) came to be repealed. Simultaneously, the Insolvency and Bankruptcy Code, 2016 (for short the IBC, 2016) was brought into force on 28/5/2016. Under the provisions of Section 4(b) of the Repeal Act, 2003 (as amended by the **IBC, 2016**), a company, whose reference was pending before the BIFR as on 1/12/2016, was entitled to file an application under Section 10 of the IBC, 2016 within a period of 180 days from the notification of the Repeal Act, 2003 i.e. on or before 31/5/2017. Such an application could be filed before the National Company Law Tribunal (**NCLT**) under Section 10 of the IBC, 2016. The proceedings before the

NCLT were to be commenced in respect of the corporate insolvency resolution process and for an order of moratorium.

5. On 9/3/2017, the Company Petition No. 434 of 2017 was admitted by the learned Company Judge. On 29/5/2017, the respondent – Corporate Debtor filed an application before the NCLT, Ahmedabad under Section 10 of the IBC, 2016 being C.P. (IB) No. 37/10/NCLT/AHM/2017 (IBC Application) within a period of 180 days as prescribed by the Repeal Act, 2003. In the said application, pendency of the Company Petition has been disclosed. On 18/7/2017, the IBC Application was taken up for hearing by the NCLT, Ahmedabad. The secured creditors, who were noticed, were also heard. After hearing the parties, the matter was reserved for orders by the NCLT. The matter was to be listed on 20/7/2017 as it was closed for orders. On 18/7/2017, the appellant-creditor filed Company Application (L) No. 333 of 2017 requesting for an appointment of a provisional liquidator. The learned Company Judge, by an order dated 19/7/2017 restrained NCLT, Ahmedabad from continuing with IBC Application. The Company Application was placed on 26/7/2017.

6. On 20/7/2017, Appeal (L) No. 280 of 2017 was filed by the respondent-corporate debtor challenging the said order dated 19/7/2017. ,

It is submitted that the Division Bench of this Court (Coram: Shantanu S. Kemkar & M. S. Sonak, JJ.) by an order dated 1/8/2017 clarified that the question of jurisdiction was kept open for determination and in that view of the matter, the respondent-corporate debtor withdrew the said appeal. The stay granted by the learned Single Judge is still continued due to which the NCLT, Ahmedabad could not pass further orders.

7. On 15/9/2017, Company Application No. 572 of 2017 came to be filed by the respondent – corporate debtor before the Company Judge seeking vacation of order dated 19/7/2017. By an order dated 5/1/2018, the learned Single Judge vacated the order dated 19/7/2017 by holding that there is no bar on the NCLT, Ahmedabad from proceeding with IBC Application of the respondent-corporate debtor. On 7/2/2018, present appeal came to be filed by the appellant challenging the order dated 5/1/2018.

8. Before we proceed to address the issues raised by the learned counsel appearing for the contesting parties, we may refer to certain provisions of the enactments which are relevant for the purpose of determination of the issues raised before us.

RELEVANT PROVISIONS OF STATUTES:

9. Chapter III of the SICA refers to references, inquiries and schemes. Section 18 refers to preparation and sanction of schemes. Section 20 refers to winding up of sick industrial company. The important provision for the purposes of the present case would be Section 22 relating to suspension of legal proceedings, contracts, etc. Section 22 (1) of the SICA reads as under :-

“22. Suspension of legal proceedings, contracts, etc. -

(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof (and no suit for the recovery of money or for the enforcement of

any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.”

Section 4 of the Repeal Act, 2003 refers to consequential provisions on the dissolution of the Appellate Authority and the Board.

Section 4(b) of the Repeal Act, 2003 reads as under :-

“4. Consequential provisions. - On the dissolution of the Appellate Authority and the Board, -

(a)

(b) on such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016

within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016;

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause.

Chapter II of the IBC, 2016 refers to corporate insolvency resolution process. Sections 10, 12, 14 and 22 of the IBC, 2016 read as under:-

“10. Initiation of corporate insolvency resolution process by corporate applicant.- (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to -

(a) its books of account and such other

documents relating to such period as may be specified; and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order -

(a) admit the application, if it is complete; or

(b) reject the application, if it is incomplete:

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

12. Time-limit for completion of insolvency resolution process.- (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one

hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

14. Moratorium. - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or

disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the

moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

22. Appointment of resolution professional. - (1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than seventy-five percent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

(3) Where the committee of creditors resolves under sub-section (2) -

(a) to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or

(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.

(4) The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall

make such appointment after confirmation by the Board.

(5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.”

Chapter III of the IBC, 2016 refers to liquidation process.

Sections 63, 64 and 231 read as under :

“63. Civil Court not to have jurisdiction.- No Civil Court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil Court not to have jurisdiction.

64. Expeditious disposal of applications.- (1) Where an application is not disposed of or an order is not passed within the period specified in this Code, the National Company Law Tribunal or the National Company Law Appellate Tribunal, as the case may be, shall record the reasons for not doing so within the period so specified; and the President of the National Company Law Tribunal

or the Chairperson of the National Company Law Appellate Tribunal, as the case may be, may, after taking into account the reasons so recorded, extend the period specified in the Act but not exceeding ten days.

(2) No injunction shall be granted by any Court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.

(Emphasis supplied)

231. Bar of jurisdiction.- No civil Court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.”

The Notifications issued by the Ministry of Finance (Department of Financial Services), New Delhi, dated 25/11/2016 reads as under :

“ **NOTIFICATION**

S.O. 3568(E). - In exercise of powers conferred by sub-section (2) of section 1 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004), the Central Government hereby appoints the 1st day of December, 2016, as the date on which the provisions of the said Act shall come into force.

[F.No.3/2/2011-IF-II]

R.N. DUBEY, Economic Adviser”

“
NOTIFICATION

S.O. 3569(E). - In exercise of powers conferred by clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004), the Central Government hereby notifies the 1st day of December, 2016, as the date for the purpose of clause (b) of section 4 of the said Act.

[F.No.3/2/2011-IF-II]
R.N. DUBEY, Economic Adviser”

SUBMISSIONS:

10. Mr. Zal Andhyarujina, the learned counsel appearing for the appellant submitted that under the Act of 1956, the provisions pertaining to liquidation / winding up of companies are provided in Chapter VII and Sections 425 to 560 of the said Act. The present Company Petition was filed under Section 433(e) of the Act of 1956. On 12/9/2013, the Companies Act, 2013 (for short **the Act of 2013**) was enacted seeking to revise and replace the Act of 1956. The corresponding winding up provisions were enacted, but not notified to come into effect, under Chapter XX and Sections 270 to 365 of the Act of 2013. It is submitted that although the IBC 2016 was enacted on 28/5/2016, different sections of the IBC 2016 were to come into force on different dates as and when

notified by the Central Government. On 15/11/2015, Section 255 and Schedule XI of the IBC, 2016 came into force and substituted Sections 270 to 272, 280, 326, 327, 329, 334, 336, 337, 342, 343, 347, 348, 357 and 434 of the Act of 2013 and omitted Sections 289, 304, 323 and 325 of the said Act. Certain provisions were brought into effect on 25/12/2016. In the light of the enactments of the IBC, 2016, the Legislature provided to give effect to the provisions of the Act of 2013 pertaining to transfer of proceedings. The learned counsel submitted that on 15/12/2016, the Central Government brought into force Section 434(1)(c) of the Act of 2013 along with the Companies (Transfer of Pending Proceedings) Rules, 2016 which, inter alia, created a different class of company petitions filed before the High Court under Section 433(e) of the Act of 1956 i.e. post notice. Such petitions are referred to as the **“saved petitions”**, which is the subject matter of the present appeal.

11. The appellant further submits that Section 434 of the Act of 2013 deals with the transfer of the proceedings, pending under the Act of 1956 before any District Court or High Court to the Tribunal upon its constitution. Section 255 read with Schedule XI of the IBC 2016 amended Section 434 of the Act of 2013 in the following manner:

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

**The Eleventh Schedule
Amendments to the Companies Act, 2013**

34. For Section 434, the following section shall be substituted, namely -

434. Transfer of certain pending proceedings -

(1) On such date as may be notified by the Central Government in this behalf, -

(a)

(b)

(c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

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

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all

matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.”

12. On 7/12/2016, the Central Government notified the Companies (Transfer of Pending Proceedings) Rules 2016 (for short **the Transfer Rules 2016**), by which it was clarified that all petitions filed under Section 433(e) of the Act of 1956 in the High Court which had not been served upon the respondent shall be transferred to the NCLT. On 29/6/2017, the Central Government notified the Companies (Transfer of Pending Proceedings) Second Amendment Rules 2017, which further amended the Transfer Rules 2016. Rule 5 of the said Rules reads 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 of a company under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under Rule 26 of the Companies (Court) Rules 1959 shall be transferred to the Bench of the Tribunal established under sub-section 4 of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code.

Provided that the petitioner shall submit all information,

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

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

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

13. The learned counsel for the appellant submitted that the powers of the Company Court i.e. the High Court are express in nature and in view of the provisions of these enactments stated above, the Company Court had jurisdiction to grant injunction against other proceeding, including proceeding before the NCLT. Section 442 of the Act of 1956 is a discretionary power of the High Court, wherein proceedings could be

restrained against a company. Section 442 of the Act of 1956 reads as under :-

“442. Power of Court to stay or restrain proceedings against Company.

At any time after the presentation of a winding up petition and before a winding up order has been made, the company, or any creditor or contributory, may –

(a) where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, apply to the Court in which the suit or proceeding is pending for a stay of proceedings therein; and

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

In the submission of the learned counsel for the appellant, Section 442 of the Act of 1956 has not been deleted. The learned counsel submits that under Section 443(1)(c) of the Act of 1956, the Company Court has power to issue any interim order. Relevant provisions of Section 443 of the Act of 1956 reads as under :-

“443. Powers of Tribunal on hearing petition.-(1) On hearing a winding up petition, the Tribunal may -

- (a) dismiss it, with or without costs; or
- (b) adjourn the hearing conditionally or unconditionally; or
- (c) make any interim order that it thinks fit; or
- (d) make an order for winding up the company with or without costs, or any other order that it thinks fit:

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

- (2)
- (3)

The learned counsel submitted that whether the proceedings are “by or against the company” as contemplated under Section 446(2) or “against the Company” under Section 442, it is a distinction without a difference. Winding up proceedings are representative in nature. The Company Court has power under Section 446 to injunct other proceedings, to be exercised when a winding up order has been made or provisional liquidator has been appointed. The Company Court retains its jurisdiction under the Companies Act in respect of saved petitions and it has discretion to exercise all powers under the Companies Act, 1956.

14. In the submission of the learned counsel for the appellant, the IBC, 2016 does not have primacy over the Act of 1956 and Sections 14, 63, 64 and 238 of the IBC 2016 do not apply to “saved petitions”. The features of the IBC, 2016 are distinct from the SICA. The counsel has enumerated following distinguishing features :

- (a) Under Section 15 of SICA, the Board of the Company is mandated to make a reference to BIFR if an industrial company becomes a sick industrial company; whereas, Section 10 of Code does not lay down any criteria.
- (b) Under Section 20 of SICA, upon failure of the rehabilitation of the Company, the Company is referred for winding up before the High court; whereas under the Code, upon failure of the resolution process, the liquidation takes place before the Adjudicating Authority/NCLT itself.
- (c) Under Section 22 of SICA, the stay on other proceedings operate immediately on filing of the reference before the BIFR under Section 15; whereas under the Code, the moratorium takes effect only upon admission of the application under Section 13 and 14 of the Code and therefore, requires the Adjudicating Authority to exercise its discretion.
- (d) Section 22 of SICA cannot be considered *pari materia* to Section 14 of the Code. Section 22 makes express reference to the Companies Act 1956 and winding up proceedings; whereas,

Section 14 of the Code does not expressly stay winding up proceedings or proceedings under the Companies Act, 1956.

(e) Upon notification of the SICA Repeal Act, the stay granted under Section 22 of SICA abated with immediate effect and was not continued to protect the Company for the period of 180 days.

In the submissions of the learned counsel, the learned Single Judge failed to consider the settled law on the point and the case law cited before him.

15. The learned counsel for the appellant, in support of his submission, placed reliance on the judgment delivered by the learned Single Judge of this court in the case of **M/s. Ashok Commercial Enterprises vs. Parekh Aluminex Limited**¹. Para 62 of the said judgment reads as under :-

“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

¹ [Company Petition No. 136 of 2014 decided on 11/4/2017]

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.

The learned counsel also placed reliance on the order passed by the learned Single Judge of this court in the Case of **West Hills Realty Private Ltd. vs. Neelkamal Realtors Tower Pvt. Ltd.**².

16. The learned Senior Counsel Mr. Janak Dwarkadas, appearing for the respondent, submitted that as long as post notice winding up petition was pending, whether the same was admitted or not, the Company Court would certainly be entitled to dispose of the same without any impediment, including passing a final order of winding up of the company in question. The pendency of a post notice winding up petition by itself would not in any manner trigger the applicability of the IBC, 2016.

According to the learned counsel, the IBC, 2016 would get triggered if,

2 [Company Petition No. 331 of 2016 dated 23/12/2016]

- (a) a pre-notice winding up petition was filed and transferred to the NCLT pursuant to the transfer notification dated 7th December, 2016;
- (b) a fresh application was to be filed by an operational or financial creditor under the Code;
- (c) the Company itself were to file an application under Section 10 of the Code;
- (d) pursuant to repeal of SICA, and by virtue of Section 252 read with the 8th Schedule of the Code, a reference or appeal which was pending before the BIFR or AAIFR stood abated and in the period of 180 days, the same was filed before the NCLT under the provisions of the Code.

17. It is submitted that it is only in any one of the aforesaid instances, the IBC gets triggered and the bar under Section 64(2) of the IBC, 2016 gets attracted. Inherent powers of the court cannot be exercised contrary to and inconsistent with express statutory provisions. It is submitted that a post notice winding up petition must be regarded to be in the same position as any other petitioning creditor who had filed a winding up petition against a company to which the provisions of Section 22 of SICA became applicable by operation of law, regardless of the stage at which the winding up may be. In the written submission, the respondent

further submitted that, the fact that there was as yet no declaration made by NCLT under the IBC, 2016, cannot be taken as a ground / justification for exercising the power to grant an injunction restraining the Company from invoking the provisions of Section 10 of the IBC, 2016, as the same would be in the teeth of Section 64(2) of the IBC, 2016. If the submission of the appellant is accepted, it would mean that in respect of a Company where notice of a winding up petition has been served or a winding up admitted such a company itself would be completely outside the purview of and exempt from the applicability of the provisions of the IBC, 2016 for all times to come. It is further submitted that such an interpretation would be contrary to every cannon of interpretation and would in fact fall foul of the notification dated 7th December, 2016 by which the pre-notice winding up petitions were not only transferred to the NCLT, but were required to be disposed of in accordance with the provisions of the Code as also the provisions of Section 252 read with 8th Schedule of the Code, which expressly permits a period of 180 days within which references which were pending before BIFR/AAIFR could be applied to be referred to the NCLT under the provisions of the Code. The interpretation sought to be canvassed by the appellant creditor would render Section 252 and the 8th Schedule of the Code otiose.

18. The learned Senior Counsel referred to Section 252 of the IBC, 2016 and the amended Repeal Act, 2003 in the manner specified in VIIIth Schedule of the IBC 2016. The **Eighth Schedule** of the IBC, 2016 provides as under :-

“ In section 4, for sub-clause (b), the following sub-clause shall be substituted, namely -

“(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code 2016 by a company whose appeal or reference or inquiry stands abated under this clause.”

19. The effect of this substituted Section 4(b) is to confer an express power upon the company to make a reference to the NCLT under the IBC, 2016 within 180 days of the commencement of the Code i.e. 1/12/2016, which reference will be dealt with in accordance with provisions of the IBC, 2016. There is no express or implied saving of any substantive provisions of the Act of 1956 to warrant the interpretation placed by the appellant, according to the learned counsel.

20. On the effect of Repeal, it is submitted that Section 255 read with **XI Schedule** of the IBC, 2016 has amended the Companies Act, 2013. In the XI Schedule, Clause 34 (c) provides as under :-

“34. For section 434, the following section shall be substituted, namely:-

“434. (1) On such date as may be notified by the Central Government in this behalf, -

(a)

(b)

(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise arrangements and reconstruction and winding up

of companies pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer.

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

21. The learned Senior Counsel appearing for the respondent, in support of his submissions, placed reliance on the following judgments:

- (a) Allahabad Bank vs. Canara Bank and anr.³.
- (b) M/s. Innoventive Industries Ltd. vs. ICICI Bank and anr.⁴
- (c) B. Gopal Das and ors. vs. Kota Straw Board (P) Ltd.⁵
- (d) Kailash Prasad Mishra and ors. vs. Medwin Laboratory P. Ltd. and ors.⁶

22. We have extensively heard the learned counsel appearing for the parties. We have perused the record, impugned order and the judgments cited before us.

3 [(2000) 4 SCC 406]

4 [2017 SCC OnLine SC 1025].

5 [1972 (1) WLN 35].

6 [1985 SCC OnLine MP 194].

23. We may refer to the statement of objects and reasons of the IBC, 2016 which reads as under :-

“STATEMENT OF OBJECTS AND REASONS

There is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provide for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920 and is dealt with by the Courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.

2. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons,

partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

3. The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India (Board) for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and

disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code.

4. The Code seeks to provide for amendments in the Indian Partnership Act, 1932, the Central Excise Act, 1944, Customs Act, 1962, Income Tax Act, 1961, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Finance Act, 1994, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Payment and Settlement Systems Act, 2007, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013.

5. The Code seeks to achieve the above objectives.”

24. The Apex Court in the case of M/s Innoventive Industries Ltd. vs. ICICI Bank and anr. (Supra) had incorporated the statement made by the Hon’ble Finance Minister while piloting IBC 2016 in para 15 which reads as under:-

“SHRI ARGUN JAITLEY: One of the differences between your Chapter 11 and this is that in Chapter 11, the debtor continues to be in possession. Here the creditors will be in

possession. Now, the SICA is being phased out, and I will tell you one of the reasons why SICA didn't function. Under SICA, the predominant experience has been this, and that is why a decision was taken way back in 2002 to repeal SICA when the original Company Law amendments were passed. Now since they were challenged before the Supreme Court, it didn't come into operation. Now, the object behind SICA was revival of sick companies. But not too many revivals took place. But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and, therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed -- as the Joint Committee has decided -- in accordance with the waterfall mechanism which they have created."

The Apex Court quoted the relevant portions of the Bankruptcy Law Reforms Committee in para 16, which read as under:

“As Chairman of the Committee on bankruptcy law reforms, I have had the privilege of overseeing the design and drafting of a new legal framework for resolving matters of insolvency and bankruptcy. This is a matter of critical importance: India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India. Such dynamism not only needs reforms, but reforms done urgently.”

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“The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say.

This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into

place: to a limited extent, banks are able to repossess fixed assets which were pledged with them.

While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder has been one (though not the only) reason why the corporate bond market has not worked. This, in turn, has far reaching ramifications such as the difficulties of infrastructure financing.

Under these conditions, the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis.

When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure. Further, secured credit dominates, as creditors rights are partially present only in this case. Lenders have an emphasis on secured credit. In this case, credit analysis is relatively easy: It only requires taking a view on the market value of the collateral. As a consequence, credit analysis as a sophisticated analysis of the business prospects of a firm has shriveled.

Both these phenomena are unsatisfactory. In many settings, debt is an efficient tool for corporate finance; there needs to be much more debt in the financing of Indian firms. E.g. long-dated corporate bonds are essential for most infrastructure projects. The lack of lending without collateral, and the lack of lending based on the prospects of the firm, has emphasised debt financing of asset-heavy industries. However, some of the most important industries for India's rapid growth are those which are more labour intensive. These industries have been starved of credit.”

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“The key economic question in the bankruptcy process- When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision:

a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.”

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“Speed is of essence

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay.”

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“The role that insolvency and bankruptcy plays in debt financing - Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of

- Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or

- Business failure – which is a breakdown in the business model of the enterprise, and it is unable to generate sufficient revenues to meet payments.

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency.”

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“Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this.”

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“Objectives

The Committee set the following as objectives desired from implementing a new Code to resolve insolvency and bankruptcy:

1. Low time to resolution.
2. Low loss in recovery.
3. Higher levels of debt financing across a wide variety of debt instruments.

The performance of the new Code in implementation will be based on measures of the above outcomes.”

In paras 27, 31 and 33, the Apex Court observed in respect of scheme of the IBC, 2016 as under:-

27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is

defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount. For the meaning of “debt”, we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a “claim” and for the meaning of “claim”, we have to go back to Section 3(6) which defines “claim” to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.

31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of

creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to

pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

25. In the case of Allahabad Bank vs. Canara Bank and anr. (Supra), in paras 13, 33, 34 and 50, the Apex Court observed as under :-

“13. From the aforesaid contentions, the following points arise for consideration:

(1) Whether in respect of proceedings under the RDB Act at the stage of adjudication for the money due to the Banks or financial institutions and at the stage of execution for recovery of monies under the RDB Act, the Tribunal and the Recovery Officers are conferred exclusive jurisdiction in their respective spheres?

(2) Whether for initiation of various proceedings by the Banks and financial institutions under the RDB Act, leave of the Company Court is necessary under Section 537 before a winding up order is passed against the Company or before provisional liquidator is appointed under section 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in exercise of powers under section 442?

(3) Whether after a winding up order is passed under Section 446 (1) of the Companies Act or a provisional liquidator is

appointed, whether the Company Court can stay proceedings under the RDB Act, transfer them to itself and also decide questions of liability, execution, and priority under section 446 (2) and (3) read with sections 529, 529A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?

(4) Whether, in case it is decided that the distribution of monies is to be done only by the Tribunal, the provisions of section 73 CPC and sub- sections (1) and (2) of section 529, section 530 of the Companies Court (sic Act) also apply - apart from section 529A - to the proceedings before the Tribunal under the RDB Act?

(5) Whether in view of provisions in section 19(2) and 19(19) as introduced by Ordinance 1/2000, the Tribunal can permit the appellant Bank alone to appropriate the entire sale proceeds realised by the appellant except to the limited extent restricted by section 529A? Can the secured creditors like the Canara Bank claim under section 19(19) any part of the realisations made by the Recovery Officer and is there any difference between cases where the secured creditor opts to stand outside the winding up and where he goes before the Company Court?

(6) What is the relief to be granted on the facts of the case since the Recovery Officer has now sold some properties of the company and the monies are lying partly in the Tribunal or partly in this Court?

33. It is true that it has been held in several judgments of this

Court that there is a special purpose behind the provisions in Sections 442, 446 and 537 of the Companies Act, 1956. it has been, in fact, so stated by the Federal court in Governor General in Council v. Shiromani Sugar Mills Ltd. under the Old Companies Act, 1913. Similarly, this Court in Sudarsan Chits (I) Ltd. v. O. Sukumaran Pillai observed that – not satisfied with Sections 442 and 537 and also with Section 446(1) (which was similar to Section 171 of the Old Companies Act, 1913), - Parliament enacted the Companies (Amendment) Act, 1960 and brought in the present sub-sections (2) and (3) into Section 446. This Court pointed out that instead of allowing claims to be proceeded with against these companies in various civil courts, Parliament declared that wherever winding-up proceedings were pending or when an order of winding up was passed, it was necessary to save the company “from this prolix and expensive litigation and to accelerate the disposal of winding-up proceedings”, and “a cheap and summary remedy” was devised by conferring jurisdiction on the Company Court to entertain suits and proceedings in respect of claims for and against the company. That being the object behind enacting Section 446(2), it was held (at SCC p. 661, para 8) that the Companies Act “must receive such construction at the hands of the court as would advance the object and at any rate not thwart it” (emphasis supplied). In other words, the principle of purposive interpretation was, as contended by the respondent's counsel, applied while construing these provisions of the

Companies Act. This principle was applied by some High Courts to hold that provisions of the Companies Act can be invoked against the Tribunal.

34. While it is true that the principle of purposive interpretation has been applied by the Supreme Court in favour jurisdiction and powers of the Company Court in Sudarsan Chits (I) Ltd. case, and other cases the said principle, in our view, cannot be invoked in the present case against the Debts Recovery Tribunal in view of the superior purpose of the RDB Act and the special provisions contained therein. In our opinion, the very same principle mentioned above equally applies to the Tribunal / Recovery Officer under the RDB Act, 1993 because the purpose of the said Act is something more important than the purpose of Sections 442, 446 and 537 of the Companies Act. It was intended that there should be a speedy and summary remedy for recovery of thousands of crores which were due to the banks and to financial institutions, so that the delays occurring in winding-up proceedings could be avoided.

50. For the aforesaid reasons, we hold that at the stage of adjudication under section 17 and execution of the certificate under section 25 etc. the provisions of the RDB Act, 1993 confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to Banks and financial institutions and there can be no interference by the Company

Court under section 442 read with section 537 or under Section 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of priorities among the Banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with section 19(19) read with section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor-company and also after a winding up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favour of the appellant and against the respondents.

26. For appreciating the issues raised before us, it is necessary to give regards to the Preamble and the Statement of Objects and Reasons of the IBC, 2016.

The vital issue raised before this court is **as to whether the Company Court could injunct the NCLT in saved petitions wherein notice of winding up was issued?** Amongst various issues and the consequences which were demonstrated by the learned counsel appearing

for the appellant, the foremost is that in case the NCLT is allowed to go ahead with the proceedings filed before it, then the purpose of winding up proceedings would get frustrated. There is a definite purpose behind the legislature creating two classes of petitions, one saved petitions and other petitions pending before the NCLT, according to the learned counsel for the appellant. Therefore, in the category of saved petitions, the outcome shall be winding up of the company in accordance with the Companies Act. Allowing NCLT to proceed, would delay winding up proceeding and would further frustrate the cause of filing of company petition which may cause loss, hardship and prejudice to the appellant herein. Considering the various provisions of the Repeal Act 2003, IBC, 2016, Scheduled attached to the IBC, 2016, Central Government Rules issued from time to time and the notifications and more precisely the statement of objects and reasons of the IBC, 2016, we are not convinced to accept the proposition propounded by the learned counsel appearing for the appellant. IBC, 2016 is framed with a purpose to make sincere efforts for revival of the company. The scheme under the IBC, 2016 is to revive the Company within the stipulated time frame of 180 days and in case the efforts fail then the outcome is to take necessary steps under the provisions of IBC, 2016 for initiation of liquidation process in accordance with Chapter III of the IBC,

2016. Under the scheme of IBC, 2016, in case a resolution plan fails, ultimate outcome is liquidation of the company. These provisions will have to be considered keeping in view the purpose of enactment of the IBC, 2016. We must reiterate the observations of the Bankruptcy Law Reforms Committee wherein it was observed that, “Control of a company is not devine right. When a firm defaults on its debt, control of the company should shift to the creditors”. The Committee further stated that the objectives desired from implementing the new Code to resolve insolvency and bankruptcy is, (a) low time to resolution, (b) low loss in recovery and (c) higher levels of debt financing across a wide variety of debt instruments. The Committee had further observed that for many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. The recovery rates obtained in India are among the lowest in the world when default takes place, broadly speaking, lenders seems to recover 20% of the value of debt, on an NPV basis. The Committee further observed that lending in India is concentrated in a few large companies that have a low probability of failure. The Committee observed in respect of speed being essence as under :-

“Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation”.

The Apex Court in the case of M/s. Innoventive Industries Ltd. vs. ICIC Bank & Anr. (Supra) observed in para 11 as under:

“11.According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone. Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.”

27. The issue raised is that these principles stated above may be made efficaciously applicable to petitions which are not saved but as regards saved petitions are concerned, provisions of the Act and the Rules therein alone shall govern. We are not convinced to accept the said proposition.

28. The learned Single Judge had a comparative analysis of SICA and IBC, 2016. The learned Single Judge observed in para 85 of the impugned order as under :-

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

29. A comparative analysis of provisions of SICA clearly indicates that under the provisions of Section 22 of SICA once the proceeding was initiated, the other proceedings pending before the different forums were suspended. In fact, there was an injunction operating in case the jurisdiction under SICA was invoked by a concerned party. The learned

counsel for the appellant made efforts to persuade us that the provisions of SICA and IBC, 2016 are not pari-materia legislations to make it applicable to the saved petitions under the Companies Act. In our considered view, it would not be appropriate to observe that by enacting IBC, 2016 the legislator intended to create two classes of winding up petitions, one pending before the Company Court (saved petitions) and another transferred to the forum i.e. NCLT which would be governed by the provisions of IBC, 2016. Such a distinction would go contrary to the object and purpose of enacting IBC, 2016 by the Parliament. Due regard must be given to the legislator's intent and the Rules and Notifications issued from time to time in this behalf. It would not even be appropriate to accept a proposition that Company Judge would have jurisdiction to stay the proceedings before the NCLT in connection with the revival or resolution proceedings while exercising jurisdiction under the saved petitions. In case the forum under the IBC, 2016 fails to revive the company or to successfully complete the resolution plan, then whether the Company Court and the NCLT would go ahead simultaneously in liquidating the company and complete the winding up proceedings. This situation needs to be harmonized and balanced.

CASE LAW :

30. We may refer to observations made by the Apex Court in respect of provisions of SICA in the case of Madura Coats Limited vs. Modi Rubber Limited and anr.⁷, in paras 27 and 28, which read as under :

“27. From the above it is quite clear that different situations can arise in the process of winding up a company under the Companies Act but whatever be the situation, whenever a reference is made to BIFR under Sections 15 and 16 of SICA, the provisions of SICA would come into play and they would prevail over the provisions of the Companies Act and proceedings under the Companies Act must give way to proceedings under SICA.

28. In this state of the law, insofar as the present appeal is concerned, we do not find any error in the view taken by the High Court in concluding that the winding-up proceedings before the Company Court cannot continue after a reference has been registered by BIFR and an enquiry initiated under Section 16 of SICA. The present appeal is squarely covered by the primacy given to the provisions of SICA over the Companies Act as delineated in Real Value, Rishabh Agro and Tata Motors. Consequently, the High Court was right in concluding that the provisions of Section 22 of SICA would come into play and that the Company Court could not proceed further in the matter pending a final decision in the reference under SICA.

⁷ [(2016) 7 SCC 603]

While considering the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Apex Court in the case of Marida Chemicals Ltd. & ors. vs. Union of India and ors.⁸, in para 50, observed as under:-

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

8 [(2004) 4 SCC 311]

in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applied to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

The Apex Court, while dealing with the provisions of SEBI Act, in the case of Sahara India Real Estate Corporation Ltd. and ors. vs. Securities and Exchange Board of India and anr.⁹, in paras 64, 65 & 67, observed as under :-

64. Both in England and India, it is well established, that the range of functions that may be performed by a company incorporated under the Companies Act is extremely wide. Public companies and private companies, functioning under the Companies Act, 2006 in England and the Companies Act, 1956 in India, have considerable social and economic importance, but public companies are more highly regulated than Private companies. Private companies are not authorised to offer any securities to the public. The FSMA in England generally deals with issue of securities to the public, including Listing Rules, the Prospectus Rules, and continuing obligation contained in the Disclosure and Transparency Rules, etc. the Companies Act, 1956 in India was enacted with the object to protect the interests of a large number of shareholders, safeguard the interests of the

9 [(2013) 1 SCC 1]

creditors to attain the ultimate ends of social and economic policy of the Government. Provisions have also been incorporated making provisions for prospectus, allotment and other matters relating to issue of shares and debentures, etc.

65. Parliament has also enacted the SEBI Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. SEBI was established in the year 1988 to promote orderly and healthy growth of the securities, market and for investors' protection. The SEBI Act, Rules and Regulations also oblige the public companies to provide high degree of protection to the investors' rights and interests through adequate, accurate and authentic information and disclosure of information on a continuous basis.

67. The powers and functions of SEBI are dealt with in Chapter IV of the SEBI Act. Section 11 states that, subject to the provisions of the Act, it shall be the duty of SEBI to protect the interests of investors in securities and to promote the development of and to regulate the securities market. SEBI is also duty-bound to prohibit fraudulent and unfair trade practices relating to securities markets, prohibiting insider trading in securities , etc. Section 11-A authorises SEBI to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities which read as follows :-

“11-A Board to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities.- (1) Without prejudice to the provisions of the Companies Act, 1956 (1 of 1956), the Board may, for the protection of investors -

(a) specify, by regulations -

(i) the matters relating to issue of capital, transfer of securities and other matters incidental thereto; and

(ii) the manner in which such matters shall be disclosed by the companies;

(b) by general or special orders-

(i) prohibit any company from issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities;

(ii) specify the conditions subject to which the prospectus, such offer document or advertisement, if not prohibited, may be issued.

(2) Without prejudice to the provisions of Section 21 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Board may specify the requirements for listing and transfer of securities and other matters incidental thereto.”

31. In the case of Neelkamal Realtors Suburban Pvt. Ltd. And anr. vs. Union of India¹⁰, the Division Bench of this court, to which one of us was Member (Naresh H. Patil,J.), in para 49, referred to the relevant observations made in the case of Seaford Court Estates Ltd. v. Asher [1948] AC 291, King's Bench Division, which read as under:

“.....Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precession. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized”

Purposive and Harmonious Interpretation:

32. There could be a situation where there are two special statutes operating in the field or a special statute and statute generally governing the field, which may be referred to as general law. Even if it is considered that in respect of subject matter there are two special statutes operating, one Companies Act and other IBC, 2016, we need to have a purposive approach

10 [2018 (1) ABR 558]

and harmonious interpretation to the provisions of law. A harmonious and balanced approach is required to be adopted for the purpose of interpreting the IBC, 2016 and the jurisdictional limitations and areas operating in respect of saved petitions before the Company Court.

33. The purpose of the IBC, 2016 and the NCLT hearing petitions is primarily to revive the company by having a resolution method. Whereas in the winding up petition pending before the Company Court, ultimate approach and object is to wound up the company. Even under the IBC, if efforts to revive the company fails, then the liquidation proceedings get initiated under Chapter III of the IBC, 2016. Taking into consideration the statutory scheme of the IBC, 2016, we are of the view that NCLT constitutes a separate and distinct forum and it cannot be attributed to be a subordinate forum to the Company Court as constituted under the Companies Act.

34. Section 63 of the IBC, 2016 enjoins a Civil Court or authority to entertain any suit or proceedings in respect of any matter on which NCLT has jurisdiction under the Code. Section 231 refers to bar of jurisdiction. It states that no Civil Court shall have jurisdiction in respect of any matter in

which the Adjudicating Authority is empowered under the Code to pass orders and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any orders passed by such Adjudicating Authority under the Code. These provisions are manifestly clear to indicate that a special statute has conferred jurisdiction on the NCLT. One of the basic purpose of the IBC, 2016 is to make a sincere effort to revive the company. Whereas in the winding up petition pending before the Company Court the initiation and ultimate culmination of the proceeding is to wound up the company.

35. The general legal principles of interpretation of statute state that the general law should yield to the special law. In the context of the present statute i.e. IBC 2016, we are of the view that the Companies Act 1956 could be treated as general law and IBC, 2016 to be a special statute to the extent of the provisions relating to revival or resolution of the company as per provision under Chapter II of the IBC. Even if the Companies Act and the IBC 2016 are considered as special statutes operating in their respective field, we are of the view that the IBC 2016 being later enactment and in view of the statement and objects and the purpose for which it was enacted, the provisions relating to revival/resolution of the company incorporated under Chapter II will have to be

given primacy over the provisions of the winding up proceeding pending before the Company Courts which are referred as saved petitions.

36. We may refer to following judgments in support of this interpretational aspect of the two statutes operating in the similar fields:-

(a) In the case of Allahabad Bank vs. Canara Bank and anr. (Supra), the Apex Court in para 40, observed as under :-

“40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, section 34. A similar situation arose in Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non-obstante clauses but that the

"1985 Act being a subsequent enactment, the non-obstante clause therein would ordinarily prevail over the non-obstante

clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one". (SCC p. 157, para 9)

Therefore, in view of section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts.

(b) In the case of Raghunath Rai Bareja and anr. vs. Punjab National Bank and ors. [(2007) 2 SCC 230], the Apex Court in paras 21 and 27 observed as under:-

“21. In the aforesaid decision this Court also upheld the view of some of the High Courts that the Company Act is a general statute, and hence the RDB Act which is a special Act, overrides the general statute. In any event, in view of Section 34 of the RDB Act, the said Act will prevail to the extent of inconsistency over the Companies Act.

27. In this connection, it may be mentioned that Section 446(3) of the Companies Act was omitted by the Companies (Second Amendment) Act, 2002 and evidently the High Court has overlooked this amendment. As a result in our opinion the High Court has no power to transfer the execution petition to the Debts Recovery Tribunal. At any event as held in Allahabad Bank v. Canara Bank, Section 446 has no application once the RDB Act applies because

Section 34 expressly gives overriding effect to the provisions of the RDB Act. Also, the RDB Act is a special law and hence will prevail over the general law in the Companies Act as held in *Allahabad Bank v. Canara Bank*.”

(c) In the case of *ICICI Bank Ltd. vs. SIDCO Leathers Ltd. And ors. [(2006) 10 SCC 452]*, the Apex Court in paras 46 and 47 observed as under:

“46. The provisions of the Companies Act may be a special statute but if the special statute does not contain any specific provision dealing with the contractual and other statutory rights between different kinds of the secured creditors, the specific provisions contained in the general statute shall prevail.

47. In *Maru Ram v. Union of India* this Court distinguished between a specific provision and a special law holding that a specific provision dealing with a particular situation would override even a special law, which is inconsistent therewith.”

(d) In the case of *Gaziabad Zila Sahakari Bank Ltd. vs. Addl. Labour Commissioner and ors. [(2007) 11 SCC 756]*, the Apex Court in para 63 observed as under :

“63. Also if we refer to the general principles of Statutory Interpretation as discussed by G.P.Singh, in his treatise on 'Principles of Statutory Interpretation', we can observe that, a prior general Act may be affected by a subsequent particular or special Act if the

subject-matter of the particular Act prior to its enforcement was being governed by the general provisions of the earlier Act. In such a case the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases. The distinction may be important at times for determining the applicability of those provisions of the General Clauses Act, 1897, (Interpretation Act, 1889 of U.K. now Interpretation Act, 1978) which apply only in case of repeals.

(e) In the case of Commercial Tax Officer, Rajasthan vs. Binani Cements Limited and anr. [(2014) 8 SCC 319], the Apex Court observed in paras 31, 34 and 36 as under :

“31.

Thereby implying that though there exists an overlap between the general and special provision, the general provision would also be sustained and the two would co-exist.

34. It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the Latin maxim of *generalia specialibus non derogant*, i.e., general law yields to special law should they operate in the same field on same subject. (Vepa P. Sarathi, Interpretation of Statutes, 5th Ed.,

Eastern Book Company; N. S. Bindra's Interpretation of Statutes, 8th Ed., The Law Book Company; Craies on Statute Law, S.G.G.Edkar, 7th Ed., Sweet & Maxwell; Justice G.P. Singh, Principles of Statutory Interpretation, 13th Ed., LexisNexis; Craies on Legislation, Daniel Greenberg, 9th Ed., Thomson Sweet & Maxwell, Maxwell on Interpretation of Statutes, 12th Ed., Lexis Nexis)

36. The maxim *generalia specialibus non derogant* is dealt with in Volume 44 (1) of the 4th ed. of Halsbury's Laws of England at Para 1300 as follows:

“The principle descends clearly from decisions of the House of Lords in *Seward v. Vera Cruz* and the Privy Council in *Barker v Edger*, and has been affirmed and put into effect on many occasions.... If Parliament has considered all the circumstances of, and made special provision for, a particular case, the presumption is that a subsequent enactment of a purely general character would not have been intended to interfere with that provision; and therefore, if such an enactment, although inconsistent in substance, is capable of reasonable and sensible application without extending to the case in question, it is *prima facie* to be construed as not so extending. The special provision stands as an exceptional proviso upon the general. If, however, it appears from a consideration of the general enactment in the light of admissible circumstances that Parliament's true intention was to establish thereby a rule of universal application, then the special provision must give way to the general.”

37. We have also perused the report of the Insolvency Law Committee published by the Ministry of Corporate Affairs, Government of India, which was placed before us.

38. In view of the afore-stated reasoning and the case laws cited, we are of the considered opinion that the Company Court while dealing with the winding up petitions (saved petitions) shall have no jurisdiction to stay the proceedings before the NCLT in respect of revival or resolution issue. We may further state that in case the forum under the IBC, 2016 i.e. NCLT fails to revive or successfully implement the resolution plan, then the Company Judge seized with the winding up petitions (saved petitions) would deal with the petition in accordance with law. We are of the view that allowing both the forums i.e. Company Court and the NCLT to go ahead with the liquidation proceedings/winding up proceedings simultaneously would not serve any purpose. There is likelihood of creation of confusion and complexity. To harmonize this likely situation, we observe that the Company Judge, in saved petitions, would exercise jurisdiction in case revival efforts by NCLT fails.

39. We find that the learned Single Judge approached the issue in its proper perspective and harmoniously considered various provisions of the relevant enactments keeping in view the object behind the special statutes. We do not find any error or perversity in the view adopted by the learned Single Judge.

40. The appeal is accordingly dismissed.

41. Notice of Motion Lodging No. 110 of 2018 as well as Notice of Motion No. 218 of 2018 do not survive and are disposed of.

(G. S. KULKARNI,J.)

(NARESH H. PATIL,J.)

42. After pronouncement of the Judgment, the learned counsel appearing for the appellant prays for continuation of ad-interim relief granted earlier for a period of four weeks. The learned counsel appearing for the respondent opposed the said prayer. In the facts, prayer is rejected.

(G. S. KULKARNI,J.)

(NARESH H. PATIL,J.)