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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.43320 of 2016

and

WMP Nos.37190 to 37193 of 2016

C.V.Shailandhran

... Petitioner

Vs

1. Union of India,
Rep. by its Ministry of Corporate Affairs,
Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi - 110 001.

2. Union of India,
Rep. by its Ministry of Law and Justice,
Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi - 110 001.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, issuance of a writ of declaration, declaring that Companies (Transfer of Pending Proceedings) Rules, 2016 and consequently that the Companies (Removal of Difficulties) Fourth Order 2016 are ultra vires Sections 434 and 465 of the Companies Act, 2013 and unconstitutional as it is violative of Articles 14, 19 and 21 of the Constitution of India.

For Petitioner : Mr.Arvind Pandian, Standing Counsel,
for Harishankar Mani

For Respondents: Mr. G.Rajagopalan
ASGI, assisted by Mr.Venkataswamy Babu
SGCGSC for R1 & R2

O R D E R

(Order of this Court was made by SUBRAMONIUM PRASAD, J.)

The petitioner, a practicing Advocate, has filed this instant writ petition, for a declaration that the Companies (Transfer of Pending Proceedings) Rules, 2016 and consequently that the Companies (Removal of Difficulties) Fourth Order 2016, are ultra vires to Section 434 and 465 of the Companies Act, 2013 and also that they are violative of Articles 14, 19 and 21 of the Constitution of India.



2. It is the contention of the petitioner that the Companies (Transfer of Pending Proceedings) Rules, 2016 should be applied prospectively, since it affects the rights of the petitioner which accrued to the parties prior to the amendment of the Companies Act.

3. The petitioner states that it is settled law that the rights of the parties in relation to legal proceedings are crystallised on the date of commencement of such proceedings and the rights so conferred cannot be taken away by a subsequent repeal of the provisions under which such proceedings have commenced, unless there is a specific statutory mandate to that effect.

4. The petitioner further states that in the present case, there is no statutory mandate, either in the Companies Act, 2013 nor in the Insolvency & Bankruptcy Code, 2016 [hereinafter referred to as Code] to enable conversion of matters filed under the Companies Act, much prior to the enforcement of the Code, to be converted into petitions under the Code, so as to divest parties of substantive rights in relation to the petition itself.

5. It is submitted that the Companies Act, 2013 deals with transfer of proceedings to the tribunal. The impugned rules have been made, under the powers conferred under Section 433 of the Companies Act, 2013. Section 433 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 to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer".

6. The petitioner states that a bare reading of the aforesaid provision clearly establishes that transfer of proceedings to the tribunal as provided for in section 434 only contemplates a change in forum which will hear applications and petitions previously heard by Courts and the said section did not contemplate that a different law may be made applicable than the one under which, the transferred proceedings were conducted prior to the transfer.

7. The petitioner states that the transferred proceedings merely contemplates a change (transfer) in forum and not a change in law, which the rules seek to provide for. The right to enforce a right through a particular proceeding, being a substantive right conferred by a statute in force at the time of commencement of the proceedings cannot be taken away subsequent by a repeal of those proceedings or by subordinate legislation in the form of rules. Any such action, can only be undertaken by the Parliament, by providing a clear and unambiguous legislative mandate, divesting the petitioners in pending



proceedings of their vested rights.

8. The petitioner relies on the judgment of the Hon'ble Supreme Court in Garikapati Veeraya Vs. N. Subbiah Choudhry, reported in AIR 1957 SC 540, wherein it is held that a vested right of appeal, can be only taken away, when the enactment specifically says so.

9. The petitioner has submitted that mere reading of Section 434 of the Companies Act, 2013 would, clearly establishes the intention of the legislature to continue the proceedings in accordance with the Act under which such proceedings were commenced and it, in no manner, contemplates divesting / curtailing of any vested rights, by imposing additional burdens, the failure to comply with which, may render the proceedings abated. This is further fortified by the provisions of Section 465 of the Companies Act, 2013 as well as Section 6 of the General Clauses Act, 1857, both of which, clearly state that the provisions of the Companies Act or any amendment thereof, would not affect "any established jurisdiction".

10. The petitioner further states that the impugned Removal of Difficulties Order has been passed in exercise of the power conferred upon the Central Government under Section 470 of the Companies Act, 2013. The power of the Central Government to amend a statute, by inserting a proviso to the statutory text is unauthorised as the same is in no manner contemplated in Section 470 of the Companies Act, 2013. To the contrary, the said section contemplates that any order made under that Section, should only be for the purpose of removal of doubts and as such, should not be inconsistent with any of the provisions already prevalent in the Act. This clearly indicates the status of the orders passed under the said section that the same should not be treated as subordinate legislation and not as statutory text per se. The impugned Removal of Difficulties Order, even if possessed with statutory force, has been made ultra vires section 470 of the Act, as the provisions of the impugned order are contrary to the clear legislative mandate in Section 434 and Section 465 of the Companies Act, 2013, which clearly contemplates that the law under which proceedings were commenced would continue to apply to such proceedings even after their transfer to the NCLT. Therefore, petitioner states that for the abovesaid reason alone, the impugned Order is ultra vires the Companies Act, 2013, under the aegis of which, the same has been passed.

11. It is the contention of the petitioner that the grounds taken in an application under Section 433(e) of the Companies Act, 2013 are substantially different from the those, that should be taken under the Insolvency and Bankruptcy Code, 2016

12. While notice was issued, the respondents have filed the



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counter. In the counter it has been stated as follows:

9. Taking into account the amendment of section 434(1)(c), and also the Rule making powers under section 239(1) of the Code, with a view to cause the least inconvenience to stakeholders, the Companies (Transfer of Pending Proceedings) Rules, 2016 (the Transfer Rules), as notified, in Rule 5, provides for transfer to NCLT of only those winding up cases filed before the High Court under Companies Act, 1956 where the petition for winding up has not been served on the respondents under Rule 26 of the Companies (Court) Rules, 1959.

10. Rule 26 of the Companies (Court) Rules, 1959 is as quoted below:-

"26. Service of petition - Every petition shall be served on the respondent, if any, named in the petition and on such other persons as the Act or these rules may require or as the Judge or the Registrar may direct. Unless otherwise ordered, a copy of the petition shall be served along with the notice of the petition."

11. The Rule 5 provides that winding up petitions under clause (e) of section 433 which are pending before the High Court, and which have not been served on the respondent(s) (by the petitioner) as required under Rule 26, shall be transferred to NCLT and considered for admission under Section 7,8 or 9 of Code, as applicable. Petitions pending admission where notice has been served on the respondent(s) (by the petitioner) shall continue to remain in the High Court pending their admission and be dealt with as per provisions of Companies Act, 1956.

12. The Rule 5 also takes into account the legislative intent that on suppression/repeal by Code of the provisions related to 'inability to pay debt' a ground under the Act, winding up proceedings on this ground cannot be transferred as is on this ground to NCLT.

13. Further, with a view to provide clarity that the pending winding up proceedings which continue with the High Courts are required to be dealt with in accordance with provisions of Companies Act, 1956 and the Companies (Court) Rules, 1959, the Companies (Removal of Difficulties) Fourth Order, 2016 (the



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Order) was notified under section 470 of the Act.

14. Commencement of section 434(1)(c) also necessitated transfer of other cases presently pending with the High Courts (compromises and arrangements, reduction of capital, variation of rights, and some other residual sections) under Companies Act, 1956 and, therefore, commencement of the corresponding provisions of the Companies Act, 2013. As these matters involve time consuming procedures before the adjudicating authority, unlike matters relating to voluntary winding up which are filed with the High Court only at the final stage for passing of order for dissolution of the company, delayed implementation of these provisions would not have made a difference, and in case of new petitions, would have caused more inconvenience. Rule 3 of the Transfer Rules provide, therefore, for transfer of such cases from the date of notification.

13. The submission of the petitioner in short, is that all petitions which are pending for winding up under Section 433 (e) of the Companies Act, should be retained in the High Court and only fresh matters should be filed in the National Company Law Tribunal.

14. Heard Mr. Harishankar Mani, learned counsel for the petitioner and Mr. Venkataswamy Babu, learned Senior Panel Counsel for the respondents.

15. After the judgment were reserved, the Hon'ble Supreme Court in *Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.*, reported in 2019 SCC Online SC 87, observed as under.

"15. Shri Sen pointed out to us that there was a divergence of views in the interpretation of the aforesaid rules. The Bombay High Court in *Ashok Commercial Enterprises v. Parekh Aluminex Limited*, (2017) 4 Bom. CR 653, stated that the notice referred to in Rule 26 was a pre-admission notice and hence, held that all winding up petitions where pre-admission notices were issued and served on the respondent will be retained in the High Court. On the other hand, the Madras High Court in *M.K. & Sons Engineering v. Eason Reyrolle Ltd.* in CP/364/2016 has held that the notice under Rule 26 is referable to a post-admission position of the winding up petition and accordingly held that only those petitions where a winding up order is already made can be retained in the High Court. For this



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purpose, the Madras High Court strongly relied upon Form No. 6 appended to Rule 27 and the expression "was admitted" occurring in the Notice of Petition contained in the said Form.

16. We are of the view that Rules 26 and 27 clearly refer to a pre-admission scenario as is clear from a plain reading of Rules 26 and 27, which make it clear that the notice contained in Form No. 6 has to be served in not less than 14 days before the date of hearing. Hence, the expression "was admitted" in Form No. 6 only means that notice has been issued in the winding up petition which is then "fixed for hearing before the Company Judge" on a certain day. Thus, the Madras High Court view is plainly incorrect whereas the Bombay High Court view is correct in law.

16. In view of the judgment of the Hon'ble Supreme Court in Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd., reported in 2019 SCC Online SC 87, it is not necessary to adjudicate on the vires of the amended Rule, because the judgment of the Hon'ble Supreme Court, answers the case of the petitioner.

17. In view of the law laid down by the Hon'ble Supreme Court of India, Rule 5 has to be read in a way that Rule 26 & 27 of the Companies (Court) Rules, 1959 refers only to pre admission scenario and all winding up petitions, in which pre admission notices were issued and served on the respondents, will be retained with the High Court. Writ petition is therefore, disposed of, in terms of the judgment of the Hon'ble Supreme Court in Forech India Limited's case [cited supra]. No Costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

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To

1. Ministry of Corporate Affairs,
Union of India,
Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi - 110 001.

2. Ministry of Law and Justice,
Union of India,
Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi - 110 001.

3. The Sub Assistant Registrar,
Original Side, High Court,
Madras.

4. The Registrar,
National Company Law Tribunal,
(Divisional Bench), Chennai,
Corporate Bhavan,
3rd Floor, 26 Rajaji Salai,
Chennai 600 001.

+lcc to Mr.Venkataswamy Babu, Advocate, S.R.No. 66807

W.P.No.43320 of 2016
and
WMP Nos.37190 to 37193 of 2016

SR(CO)
GN(15/10/2019)