

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

OSA Nos.287 of 2017 and 477, 478 & 479 of 2018
CMP No.18177 of 2017 in OSA No.287 of 2017
CMP Nos.225885 & 22886 of 2018 in OSA No.477 of 2018
CMP No.22889 of 2018 in OSA No.478 of 2018
CMP No.22902 of 2018 in OSA No.479 of 2018

OSA No.287 of 2017

Spicejet Limited,
having its Registered Office at
No.319, Udyog Vihar,
Phase IV, Gurgaon - 122 016
Haryana, India

and erstwhile Registered Office at
Kamraj Domestic Terminal,
Chennai Airport,
Chennai - 600 027.

... Appellant/Respondent

Vs

Credit Suisse AG
A Stock Corporation registered
under the laws of Switzerland,
carrying its business at:
Uetlibergstrasse 231 (C2)
8045, Zurich, Switzerland.

... Respondent/Petitioner

Original Side Appeal filed under Section 483 of Companies Act, 1956 read with Clause 15 of Letters Patent against the order dated 07.09.2017 passed by the learned Single Judge in CP No.363 of 2015.

a) This Petition filed under the matter of the Companies Act 1956 to windup of the Respondent under the provisions of the Companies Act 1956;

b) To appoint the Official Liquidator High Court Madras as the Liquidator of the Respondent with all powers under section 448 of the Companies Act 1956 to take charge of the Assets, Properties, stock in trade and books of accounts of the Company (OSA 287/2017)

For Petitioner : Mr.Ramakrishnan Veeraraghavan
Barrister & Sr.Advocate
for Mr.Ashok Menon & Association

For Respondents: Mr.Rahul Balaji
for M/s.R.Parthasarathy

OSA No.477 of 2018

M/s. Nissan Motor India Pvt. Ltd.,
Plot No.1, SIPCOT Industrial Park,
Mattur (Post), Oragadam,
Sriperumbudur Taluk,
Kancheepuram District,
Tamil Nadu - 602 105. ... Appellant/Third Party

Vs

1. Mr.Sanjay Goel,
Partner,
M/s.Goel Steel Company,
89A, MTH Road,
Ambattur Industrial Estate,
Chennai - 600 058.

2. M/s.EL Forge Limited,
having its Registered Office at
No.21C, ABK Colony,
Eldams Road, Alwarpet,
Chennai - 600 018,
Tamil Nadu, India.

3. M/s. SRL Advisors LLP,
Rep. by its Designated Partner
Shaily Lal,
Flat No.5 & 6, 2nd Floor,
Ajit Arcade, Kailash Colony,
Lala Lajpat Rai Marg,
New Delhi - 110 048.

4. National Company Law Tribunal (Chennai Bench),
Corporate Bhavan, 3rd Floor,
26, Rajaji Salai,
Chennai - 600 001. ... Respondents/Petitioner/Respondent &
Proposed Respondents

[Cause title accepted vide Court order dated 16.07.2018 (MMSJ
&NAVJ)]

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent against the order dated 11.01.2017 passed by the learned Single Judge in CP No.14 of 2015.

a) This Petition filed under the matter of the Companies Act 1956 to be transferred to the NCCT (OSA 477/2018)

For Petitioner : Mr.P.S.Raman, Sr.Counsel

For Respondent : Mr.Robin, R.David, Advocate &
Mr. Dhiraj Philip Advocate for
M/s.Paul & Paul J. Hudson Samuel for R3

OSA No.478 of 2018

Indowind Energy Limited,
having its Registered Office at
4th Floor, Kothari Buildings, 114,
Mahatma Gandhi Salai,
Nungambakkam, Chennai - 600 034.

... Appellant

Vs

The Bank of New York Mellon,
having its Registered Office at
One Wall Street, New York, NY 10268
and having its Principal Offices at
One Canada Square,
40th Floor, London, E14 5AL, United Kingdom,
through its attorney Mr.Navneet Singh.

... Respondent

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent against the order dated 18.08.2017 passed by the learned Single Judge in CP No.172 of 2011.

3.This Petition filed under the Companies Act

(a) To wind up of the respondents under the provisions of the Companies Act 1956, and (OSA.478/2018)

For Petitioner: Mr.N.Muralikumaran for
M/s.Mcgan Law Firm

OSA No.479 of 2018

M/s. Renault Nissan Automotive India Pvt. Ltd.
Plot No.1, SIPCOT Industrial Park,
Mattur (Post), Oragadam,
Sriperumbudur Taluk,

Kancheepuram District,
Tamil Nadu - 602 105.

... Appellant/Third Party

Vs

1. Mr.Sanjay Goel,
Partner,
M/s.Goel Steel Company,
89A, MTH Road,
Ambattur Industrial Estate,
Chennai - 600 058.

2. M/s.EL Forge Limited,
having its Registered Office at
No.21C, ABK Colony,
Eldams Road, Alwarpet,
Chennai - 600 018,
Tamil Nadu, India.

3. M/s. SRL Advisors LLP,
Rep. by its Designated Partner
Shaily Lal,
Flat No.5 & 6, 2nd Floor,
Ajit Arcade, Kailash Colony,
Lala Lajpat Rai Marg,
New Delhi - 110 048.

4. National Company Law Tribunal (Chennai Bench),
Corporate Bhavan, 3rd Floor,
26, Rajaji Salai,
Chennai - 600 001. ... Respondents/Petitioner & Respondents &
Proposed Respondents

For Petitioner : Mr.P.S.Raman, Sr.Counsel

For Respondent : Mr.Robin, R.David, Advocate &
Mr. Dhiraj Philip Advocate for
M/s.Paul & Paul J. Hudson Samuel for R3

Original Side Appeal filed under Order XXXVI Rule 1 of Original
Side Rules read with Clause 15 of Letters Patent against the
order dated 11.01.2017 passed by the learned Single Judge in CP
No.14 of 2015.

This Petition filed under the Companies Act

a) The Respondent viz. M/s.EI Forge Limited having its
registered office at No.21C ARK Colony Eldams Road Alwarpet
Chennai-600 018 Tamil Nadu India be wound up by an order and
direction of this Court under the provisions of the Companies
Act 1956;

b) For the appointment of the Official Liquidator High Court Madras to take charge of the assets of the respondent company namely M/s.EI Forge Limited; (OSA 479/2018)

C O M M O N J U D G M E N T

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

Judgments and orders passed by learned Single Judge of this Court in CP No.14 of 2015 dated 11.01.2017, CP No.172 of 2011 dated 18.08.2017 and CP No.363 of 2015 dated 07.09.2017, has been challenged in OSA Nos.477 & 479 of 2018, 478 of 2018 and 287 of 2017, respectively.

2. The question which arises for consideration is the scope and ambit of Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, Companies (Removal of Difficulties) Fourth Order, 2016, and Rule 5 of the Companies (Transfer of Pending Proceedings) Second Amendment, Rules, 2017. The Companies Act, 1956, was amended by the Central Act, 18 of 2013. Section 434 of the amended Act reads as under:

"434.Transfer of certain pending proceedings:-

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

(a) all matters,, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act.;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court, within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order: Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period allow it to be filed within a further period not exceeding sixty days;

(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.

(d) any appeal preferred to the Appellate

Authority for Industrial and Financial Reconstruction or any reference made or inquiry pending to or before the Board of Industrial and Financial Reconstruction or any proceeding of whatever nature pending before the Appellate Authority for Industrial and Financial Reconstruction or the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) immediately before the commencement of this Act shall stand abated: Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make a reference to the Tribunal under this Act within one hundred and eighty days from the commencement of this Act in accordance with the provisions of this Act: Provided further that no fees shall be payable for making such reference under this Act by a company whose appeal or reference or inquiry stands abated under this clause.

(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."

3. Section 434 (1) (c) is the only relevant clause for the purpose of these Original Side Appeals. A perusal of the said Clause shows that all proceedings under the Companies Act, 1956 (prior to amendment) including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending 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.

4. Section 434 (2) gave the power to the Central Government to make rules, consistent with the provisions of the amended Act to ensure timely transfer of all matters, proceedings or cases, before the Company Law Board or the District Court and High Court to the tribunal.

5. On 07.12.2015, the Central Government brought out the Companies (Transfer of Pending Proceedings) Rules, 2016 and 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 under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under Rule 26 of the Companies (Court)

Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-Section (4) of Section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the code:

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

6. Simultaneously, on the same date, by the Companies (Removal of Difficulties) Fourth Order, 2016, it was made clear in sub-Clause 2 of the said Order as follows:-

"(2) In the Companies Act, 2013, in Section 434, in sub-section (1), in clause (c), after the proviso, the following provisos shall be inserted, namely:-

"Provided further that -

xxx xxx xxx

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959""

7. By a Notification dated 29.06.2017, titled the Companies (Transfer of Pending Proceedings) Second Amendment, Rules, 2017, Rule 5 was substituted as follows:-

"(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 upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 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."

8. The issue, which falls for consideration is as to which of the petitions, leading to winding up of companies under Section 433(e) of the old Act i.e. winding up petitions filed on the ground of inability to pay debts, should be retained in the High Court and which petitions should be transferred to the tribunal.

9. At this juncture, it is relevant to extract Rules 26 & 27 of the Companies (Court) Rules, 1959, which reads as under.

"Rule 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.

Rule 27. Notice of petition and time of service - Notice of every petition required to be served upon any person shall be in Form No. 6, and shall, unless otherwise ordered by Court or provided by these rules, be served not less than 14 days before the date of hearing.

Provided always that such notice when by the Act or under these Rules is required to be served on the

Central Government, the same shall, unless otherwise ordered by the Court, be served not less than 28 clear days before the date of hearing."

10. Form No. 6 appended to Rule 27 reads as under:

"FORM No. 6

(See Rule 27)

[Heading as in Form No. 1]

Company Petition No..... of 19

NOTICE OF PETITION

Take notice that a petition under Sec..... of the Companies Act, 1956, for presented by on the day of 19..... was admitted on the day of 19..... and that the said petition is fixed for hearing before the Company Judge on the day of 19..... If you desire to support or oppose the petition at the hearing, you should give me notice thereof in writing so as to reach me not later than..... days before the date fixed for the hearing of the petition, and appear at the hearing in person or by your advocate. If you wish to oppose the petition, the grounds of opposition or a copy of your affidavit should be furnished with your notice. A copy of the petition will be furnished to you if you require it on payment of the prescribed charges for the same/is enclosed herewith.

Dated..... (Sd/-)..... Name.....

(Advocate for petitioner)

Address:

[This notice should be served on or before the day of 19.....]

NOTE: Where the notice is to a respondent named in the petition, a copy of the petition should be served on him alongwith the notice."

11. The learned Single Judge after considering all the aspects of the case, vide order dated 11.01.2017, made in CP No.14 of 2011, observed as under.

"21. In the light of the above referred two decisions, this Court is of the view that the procedure of pre-admission notice have been recognized as a principle to be followed and adopted by the Court and it has been a discretionary power exercised by the Court. If such is the position

pertaining to a pre-admission notice, we are required to see whether such notice was in the mind of the framers of the Transfer Rules when they refer to Rule 26. Obviously, this cannot be the intention because the statute, namely, the Companies Act nor any of the Rules contemplate issuance of pre-admission notice rather it is a procedure which was evolved by the Courts and this aspect has been brought out by the High Court of Bombay in the case of West Hills Realty Pvt. Ltd. (supra) by referring to the decision in the case of Modern Dekor Painting Contracts Pvt. Ltd. (supra).

22. Having come to such a conclusion, the correct interpretation to be given to Rule 5 of the Transfer Rules is in respect of the petitions where winding up petitions under Section 433(e), in which the petition has not been served on the respondent as required under Rule 26 of the Company Court Rules would mean that the service of notice upon admission of the Company Petition and while following the procedure under Rule 96 if Rule 26 had been complied with, those petitions shall not be transferred and in other cases, it shall be transferred. Further, if a Company Petition has been admitted and notice has not been served in terms of Rule 26 of the Company Court Rules, even those petitions have to be transferred to National Company Law Tribunal (NCLT).

23. The learned counsels appearing for the petitioners placed heavy reliance in the decision of the High Court of Bombay in the case of West Hills Realty Pvt. Ltd. (supra). In the said decision, the question which arose for consideration is what amounts to a notice under Rule 26 of the Company Court Rules for the transfer of pending winding up petitions under Section 433(e) of the Act to the NCLT within the meaning of the relevant transfer provision. The Court after elaborately referring to the statutory provisions of the Company Court Rules, the Forms and the contentions raised by the learned counsels, in paragraph 12 pointed out that the argument that Rule 26 contemplates only a post-admission notice, if to be accepted will lead to a peculiar situation. Further, it was pointed out that those petitions which are admitted and where notice of admission was not served to the respondent pursuant to the order of admission, will stand transferred to NCLT and will have to be taken up for admission once again, this would be clearly anomalous. After making such an observation, the Court directed that all the petitions where notice

has been served on the respondent in pursuance of the acceptance order are to be treated as served as required under Rule 26 of the Company Court Rules, 1959 and accordingly they shall not be transferred to NCLT.

24.As rightly pointed out by the learned Additional Solicitor General, in the case of West Hills Realty Pvt. Ltd. (supra), the Court had not laid down the definite legal principle that Rule 26 also encompasses cases where pre-admission notice has been issued.

25.With great respect to the observations contained therein, the Court was more concerned about the anomaly which may occur in the event of such cases being transferred. In my respectful view, that aspect may not be a right consideration to examine as to what is the purport and import of Rule 5 of the Transfer Rules. The Rule has to be interpreted to give true meaning and to give effect to Section 434 (c). Thus, Rule 26 referable therein should definitely mean the notice on admission and not a pre-admission notice as no such procedure is contemplated under the statute. Therefore, such procedure having not been statutorily recognized and not saved by the Transfer Rules, all company petitions which have not been admitted and notice has not been served on the respondent under Rule 26 have to be necessarily transferred.

26.Accordingly, it is held that all company petitions filed for winding up under Section 433(e) of the Companies Act, 1956 in which pre-admission notices have been served, unserved or in the process of service are to be transferred to NCLT. All company petitions which have been admitted and notice has not been served on the respondent as required under Rule 26 of the company Court Rules, 1959 shall also be transferred to NCLT. The above direction be complied with by the Registry expeditiously."

12. The High Court of Bombay in West Hills Realty Pvt. Ltd., Vs. Neelkamal Realtors Tower Pvt. Ltd., reported in 2017 (200) CompCas 179 (Bom), took a contrary view and it was observed as under.

"12. In fact, if anything, the argument that Rule 26 contemplates a postadmission notice and only in the event such notice is actually served on the respondent that the petition shall stand transferred to NCLT, will lead to a peculiar situation. It will mean that those petitions, which are admitted and where notice of the petition is not served on the

respondent pursuant to the order of admission, will stand transferred to NCLT and will be taken up for admission once again by requiring the petitioners in those petitions to furnish information for admission of the petitions under section 7, 8 or 9 of the Code, as the case may be. That would be clearly anomalous.

13. In the premises, it follows that every winding up petition under clause (e) of section 433 which is pending before the High Court and which is not served by the petitioner on the respondent company shall stand transferred to NCLT under Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. If such pending petition is served by the petitioner on the respondent, the petition will continue to be dealt with by this Court and the applicable provisions will be the provisions of 1956 Act.

A perusal of the order of the learned Single Judge, would show that he had differed from the said judgment of the Bombay High Court in West Hills Realty Case.

13. It is also pertinent to mention that the Bombay High Court in Mr. Ashok Commercial Enterprises vs. Parekh Aluminex Limited, reported in 2017 SCC Online Bom 421, also took a contrary view from the Madras High Court. The learned Single Judge of the Bombay High Court, observed as under.

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

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

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

49. Sometime in the year 2016, the Parliament enacted the Insolvency and Bankruptcy Code, 2016. It received the assent of the President on 28th May 2016, by which Code, the Parliament sought to consolidate and amend the laws relating to reorganization and insolvency resolution of the corporate persons. Under the said Code, NCLT has been designated as the adjudicating authority for corporate persons for resolution of insolvency, liquidation and bankruptcy. By Notification dated 7th December 2016, the Central Government brought into force various other provisions of the Companies Act, 2013 including provisions relating to winding up contained in that Act with effect from 15th December 2016.

50. The Central Government issued another Notification on 7th December 2016 by exercising powers conferred under Section 434(1) and (2) and notified Rules called "Companies (Transfer of Pending Proceedings) Rules, 2016", which provides for transfer of various proceedings pending before the High Court to the NCLT Rule 5 of the said Rules

provides for Transfer of Pending Proceedings of winding up on the ground of inability to pay debts. It is prescribed that all such pending Petitions which are pending before a High Court where the Petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the National Company Law Tribunal established under Section 419(4) of the Companies Act, 2013 exercising territorial jurisdiction and such Petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be and shall be dealt with in accordance with Part II of the Code.

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

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

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

54. In paragraph 13 of the said order, it is held that every winding up Petition under clause(e) of Section 433 which is pending before a High Court

and which is not served by the petitioner on the respondent Company shall stand transferred to NCLT under Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. If such pending Petition is served by the petitioner on the respondent before 15th December 2016, the Petition will continue to be dealt with by this Court and the applicable provisions will be the provisions of 1956 Act.

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

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

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

provisions relating to winding up of the Company are concerned.

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

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

60. Schedule XI to the Insolvency and Bankruptcy Code, 2016 provides for the amendments to various provisions of the Companies Act, 2013 and also Companies Act, 1956. Section 434 of the Companies Act, 2013 is substituted by a new Section which provides for transfer of certain Pending Proceedings. Section 434(c) provides that all proceedings under the Companies Act, 1956 including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of Companies, pending immediately before such date before any District Court or High Court, shall stand transferred, provided that only such proceedings relating to the winding up of the Companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

61. Under Section 434(2), the Central Government is conferred with the powers to make Rules consistent with the provisions of the said Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the Courts to the Tribunal under that section. It is thus, clear beyond reasonable doubt that the Central Government is empowered to prescribe the proceedings described in Section 434(c) which shall stand transferred to the

Tribunal and the stage before their transfer. By exercising such powers conferred upon the Central Government under Section 434(1) and (2) of the Companies Act, 2013, the Central Government has issued the said Notification dated 7th December 2016 notifying the said Companies (Court) Rules, 1959. Rule 5 of the said Rules clearly provides for Transfer of Pending Proceedings of the winding up on the ground of inability to pay debts, if the Petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959.

62. In my view, it is clear that all winding up proceedings shall not stand transferred to the NCLT. It is clear that if the service of the notice of the Company Petition under Rule 26 of the Companies (Court) Rules, 1959 is not complied before the 15th December 2016 such Petitions shall stand transferred to NCLT whereas all other Company Petitions would continue to be heard and adjudicated upon only by the High Court. The Legislative intent is thus clear that two sets of winding up proceedings would be heard by two different forum i.e. one by NCLT and another by the High Court depending upon the date of service of Petition before or after 15th December 2016. In my view, there is thus, no embargo on this Court to hear this Petition along with other companion Petitions, in view of the admitted position that the notice under Rule 26 of the Companies (Court) Rules, 1959 has been served on the respondent prior to 15th December 2016.

14. A perusal of the above mentioned paragraphs would show that the Bombay High Court was of the view that notice referred to in Rule 26 of the Company (Court) Rules, is a pre admission notice and therefore, the Bombay High Court took a view that all winding up petitions, where pre admission notice was issued and served on the respondents, will be retained by the High Court. On the other hand the view taken by this Court is that the notice, under Rule 26 is referable to a post admission position and the learned Single Judge was of the view that only those petitions where, a winding up petition is already made, need be retained in this Court and all other petitions must be sent back.

15. The Delhi High Court in Grundfos Pumps India Private Limited Vs. ITC Ltd., reported in 2018 SCC Online Del 6630 has accepted the judgment of the Bombay High Court and has noted the difference of opinion between the view of Bombay High Court and

Madras High Court, by observing as hereunder.

8. I may note that Madras High Court in Mr. Sanjay Goel v. EL Forge Ltd. being CP Nos. 14/2015, 239/2015, 242/2015, 94/2016 and 364/2016 dated 11.1.2017, however, did not agree with the view of the Bombay High Court and held as follows:

"24. As rightly pointed out by the learned Additional Solicitor General, in the case of West Hills Realty Pvt. Ltd. (supra), the Court had not laid down the definite principle that Rule 26 also encompasses cases where pre-admission notice has been issued.

25. With great respect to the observations contained therein, the court was more concerned about the anomaly which may occur in the event of such cases being transferred. In my respectful view, that aspect may not be a right consideration to examine as to what is the support and import of Rule 5 of the Transfer Rules. The Rule has to be interpreted to give true meaning and to give effect to Section 434(c). Thus, Rule 26 referable therein should definitely mean the notice on admission and not pre-admission notice as no such procedure is contemplated under the statute. Therefore, such procedure having not been statutorily recognized and not saved by the Transfer Rules, all company petitions which have not been admitted and notice has not been served on the respondent under Rule 26 have to be necessarily transferred."

16. Further, in the said judgment, the Delhi High Court has accepted the view of the Bombay High Court by holding as under.

"9. In my opinion, the judgment of the Bombay High Court in West Hills Realty Private Ltd. v. Neelkamal Realtors Tower Pvt. Ltd., gives the correct position. As rightly noted by the Bombay High Court, Rule 26 of the Companies (Court) Rules, 1959 deals with Service of petition whereas Rule 27 deals with Notice of petition. There is nothing in Rule 26 to show that the service of the petition is to be effected only when the petition is admitted. In fact, admission of a winding up petition is dealt with the Rule 96 of the Companies (Court) Rules 1959. The said Rule 96 reads as follows:-

"96. Admission of petition and directions as to advertisement -

Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the

petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition."

17. The Rajasthan High Court in Shreeji Shipping Vs. Hindustan Zinc Limited, in S.B.Company Petition No.9 / 2016 by judgment dated 22.03.2017 has also accepted the view of the Bombay High Court in West Hills Realty case [cited supra] by observing as under.

14. There is yet another aspect of the matter. As per Rule 17 of the Rules, the forms set forth in the Appendix 1 where applicable shall be used with such variations as circumstances may require and therefore, it would not be appropriate to interpret the Rule 26 of the Rules in the manner suggested by the respondent Company that notice contemplated therein is only the notice post admission to be issued in the Form No.6 prescribed under Rule 27 of the Rules of 1959. In this view of the matter, this court is of the opinion that where the Judge exercising his discretion under Rule 96 of the Rules of 1959, directs issuance of the pre-admission notice, it is open to issue the notice in Form No.6 under Rule 27 of the Rules, with the variation as required.

15. For the aforementioned reasons, this court is in complete agreement with the view taken by the Bombay High Court in West Hills Realty Private Ltd.'s case (supra) that every winding-up petition under clause (e) of Section 433 which is pending before the High Court and which is not served by the petitioner on the respondent Company, shall stand transferred to the NCLT under Rule 5 of the Rules of 2016 but where the pending petition is already served by the petitioner on the respondent, the petition will continue to be dealt with by the High Court and the applicable provisions will be the provisions of the Act of 1956."

18. After the judgment was reserved in this Court, the Hon'ble Supreme Court, has decided this issue in Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd., reported in 2019 SCC Online SC 87. The Hon'ble Supreme Court, noticed the divergent opinion between the Bombay High Court and impugned judgment and has 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 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.

19. The Supreme Court has therefore, held that the view of the learned Single Judge is plainly incorrect and the view of the Bombay High Court is correct in law.

20. In view of the above, nothing survives for us to decide. Article 141 of the Constitution of India states that judgment of the Hon'ble Supreme Court is binding on all Courts within the territory of India. The judgments of the learned Single Judge

in CP No.14 of 2015 dated 11.01.2017, CP No.172 of 2011 dated 18.08.2017 and CP No.363 of 2015 dated 07.09.2017, are therefore, set aside, in view of the judgment of the Hon'ble Supreme Court of India in Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd., reported in 2019 SCC Online SC 87. The Original Side Appeals viz., OSA Nos.477 & 479 of 2018, 478 of 2018 and 287 of 2017 are allowed.

21. After the judgment impugned herein was passed, all the cases relating to petitions for winding up of companies under sub-clause (e) of Section 433, on the ground of inability to pay debts were transferred to National Company Law Tribunal (NCLT). In those cases where orders for stay were not obtained from this Court, the NCLT has proceeded under the Insolvency and Bankruptcy Code, 2016. To transfer those cases, where NCLT has proceeded in the absence of any stay order from this Court wherein Insolvency Resolutions Professionals have been appointed, Corporate Insolvency Resolution process have begun, Resolution plans have been submitted, Resolution plans have been approved, or Liquidation process have begun or are under challenge before the National Company Law Appellate Tribunal (NCLAT), back to this Court would cause prejudice to the parties. We therefore make it clear that such of those cases where no stay orders have been obtained and the proceedings have been carried on in the NCLT need not be transferred back to this Court. We are passing this order fully aware that judgment is always declaratory and applies retrospectively, but keeping in mind the rights of the parties which would have crystallized in the interregnum i.e., between the dates of orders passed by this Court and the judgment dated 22.01.2019 passed by the Hon'ble Supreme Court in Forech India Ltd Vs. Edelweiss Assets Reconstruction Co.Ltd., reported in (2019) SCC Online SC 87. We have passed the above directions, keeping in view the maxim "Actus Curiae Neminem Gravabit" (No person shall be prejudiced by an act of Court). It is well settled that it is a duty of all the Courts to take care that no act of the Court in the course of the whole of the proceedings does any injury to the parties in the Court. The Hon'ble Supreme Court in Rajkumar Dey Vs. Tarapada Dey, (1987) 4 SCC 98 has stated,

"6. We have to bear in mind two maxims of equity which are well settled, namely, actus curiae neminem gravabit – An act of the Court shall prejudice no man. In Broom's Legal Maxims, 10th Edn., 1939 at page 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is lex non cogit ad impossibilia (Broom's Legal Maxims – page 162) – The law does not compel a man to do that which he cannot

possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

22. No Costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

Ars

TO

- 1.The Sub Assistant Registrar,
Original Side, High Court,
Madras.
- 2.The Registrar,
National Company Law Tribunal,
(Chennai Bench), Chennai,
Corporate Bhawan,
3rd Floor,
26, Rajaji Salai, Chennai 600 001.

+1cc to Mr.Arun Karthick Mohan, Advocate, S.R.No. 66818
+1cc to Mr.MCgan Law Firm, Advocate, S.R.No. 66814
+2cc to Mr.Ashok Menon, Advocate, S.R.No. 66952
+1cc to Mr.M.Velmurugan, Advocate, S.R.No. 67675

OSA Nos.287 of 2017 and 477, 478 & 479 of 2018
CMP No.18177 of 2017 in OSA No.287 of 2017
CMP Nos.225885 & 22886 of 2018 in OSA No.477 of 2018
CMP No.22889 of 2018 in OSA No.478 of 2018
CMP No.22902 of 2018 in OSA No.479 of 2018

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