



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.25373 of 2018
and
WMP Nos.29520 & 29522 of 2018

Indowind Energy Limited,
Incorporated under the provisions of
the Companies Act, 1956 and having its
Registered Office at 4th Floor,
Kothari Buildings, 114, Mahatma Gandhi Salai,
Nungambakkam, Chennai - 600 034. ... Petitioner

Vs

1. Union of India,
Rep. by The Secretary,
Ministry of Corporate Affairs,
A Wing, Shastri Bhawan,
Rajendra Prasad Road,
New Delhi - 110 001.

2. National Company Law Tribunal
(Division Bench), Chennai,
Rep. by its Registrar,
Corporate Bhavan, 3rd Floor,
26, Rajaji Salai, Chennai - 600 001.

3. The Bank of New York Mellon,
a Company incorporated in New York,
under the laws of the State of New York,
having its registered office at One Wall Street,
New York, NY 10266, and having
its Principal offices at One Canada Square,
40th Floor, London, E14 5AL, United Kingdom,
through its attorney Mr.Aniesh Kumar ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, issuance of a writ of declaration, declaring the impugned Rule 2(a) & Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 and Rule 5 of the Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017 amending the earlier Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 notified by the Central Government exercising its powers



under Section 434(1) and 470(1) of the Companies Act, 2013 to the effect of directing the winding up petitions filed / pending under Section 433 / 434 of the Companies Act, 1956 before the Hon'ble High Court of Chennai to be treated as an applicant under Section 7, 8 or 9 of the Insolvency and Bankruptcy Code, 2016 to be adjudicated under the said provisions by the Ld. National Company Law Tribunal / National Company Law Appellate Tribunal as ultra vires the legislative competence of the parliament / repugnant to the existing provisions of the Section 433 / 434 of the Companies Act, 1956 as saved in terms of the saving provisions of Section 465 of the Companies Act, 2013 and ultra vires the provisions of Articles 14, 19(1)(g), 20, 21 and 323 B of the Constitution of India.

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

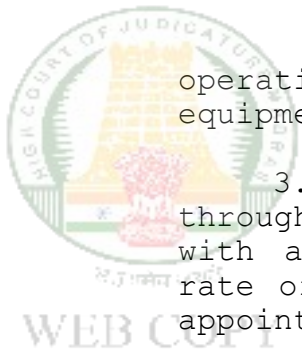
For Respondents: Mr. Mr.Arun Karthik Mohan &
Mr.Suhrith Parthasarathy for R3

O R D E R

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

The petitioner Indowind Energy Limited, Chennai, has filed the instant writ petition for a declaration, that Rule 2(a) & Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 and Rule 5 of the Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017 amending the earlier Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 notified by the Central Government exercising its powers under Section 434(1) and 470 (1) of the Companies Act, 2013 to the effect directing the winding up petitions filed / pending under Section 433 / 434 of the Companies Act, 1956 before the Hon'ble High Court of Chennai to be dealt with under Section 7, 8 or 9 of the Insolvency and Bankruptcy Code, 2016 and to be adjudicated under the said provisions by the Ld. National Company Law Tribunal / National Company Law Appellate Tribunal as ultra vires the legislative competence of the parliament / repugnant to the existing provisions of the Section 433 / 434 of the Companies Act, 1956 as saved in terms of the saving provisions of Section 465 of the Companies Act, 2013 and ultra vires the provisions of Articles 14, 19(1)(g), 20, 21 and 323 B of the Constitution of India.

2. The facts in brief are that the petitioner company was incorporated under the Companies Act, on 19.07.1995. The main objects of the company is to carry on business of Generating Energy from Wind using Wind Mills, Wind Turbines and other equipments to sell, distribute, supply and share the energy to the Governments, Companies, Industries, Electricity Boards and Individuals. The Company also provides services including installation, commission,



operation and maintenance of all kinds of power generation equipments, machineries and plants.

3. It is stated that the petitioner company raised funds through bonds to the tune of 30 Million USD on 21.12.2007 with a maturity date falling due on 22.12.2012 and coupon rate of 2.5% semi annually. The bank of New York (BNY) was appointed as the Trustee to manage the affairs of the bonds.

4. The petitioner states that it was making the payments regularly for the 3 semi annual periods and during the 3rd semi annual period, since there was severe recession all over the world, there was default. It is stated that the petitioner company and its bond holders resolved to restructure the terms of the bonds.

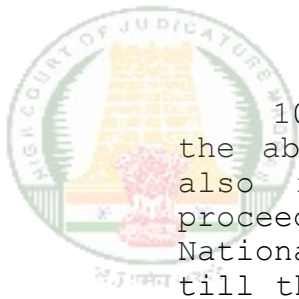
5. The petitioner states that as per the restructured terms, the coupon rate was made NIL and on maturity it was agreed that 50% shares and 50% cash would be given.

6. It is stated that in the year 2011, after agreeing to the restructured terms, the trustee Viz., Bank of New York, Mellon, the 3rd respondent issued a demand notice. The same was disputed by the petitioner company. It is stated that the 3rd respondent issued a winding up notice, which was disputed by the petitioner company and a winding up petition viz., CP No.172 of 2011 was filed in the High Court of Madras, invoking the provisions of the Companies Act.

7. It is also stated that out of the 30 Million USD bonds, the petitioner company has already redeemed 15 Million USD bonds and for the balance of 15 Million USD bonds, the petitioner company is ready to issue shares as per the restructured term. It is stated that the 3rd respondent is not accepting the same even though, it has originally submitted to the restructuring of the bonds.

8. It is stated that the petitioner company entered appearance in CP No.172 of 2011 and filed counter on 18.01.2012. Rejoinder has also been filed on 02.02.2012 to the counter filed by the petitioner and a Sur-joinder has also been filed on 18.02.2012 by the petitioner. The matter was being adjourned and was on the board of the Company Law Court.

9. It is stated that when the matter stood thus, Companies (Transfer of Pending Proceedings) Rules, 2016 was brought. The Company Petition was listed on 18.08.2017 on which date, the learned Company Court transferred the matter to the National Company Law Tribunal in terms of Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. It is pertinent to mention that on transfer, the company petition viz. CP.No.172 of 2017 has been renumbered as TCP No.483/(IB)/C-II/CB/2018.



10. The petitioner has therefore challenged the vires of the above Rules, in the writ petition. The petitioner had also filed WMP No.29520 of 2018, for stay of further proceedings in the TCP No.483/(IB)/2018, pending before the National Company Law Tribunal, Chennai, the 2nd respondent, till the final disposal of the instant writ petition and this Court by an order dated 26.09.2018 has granted an order of interim stay of all the proceedings in the tribunal.

11. At this juncture, it is necessary to extract Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, which 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."

12. 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"

13. 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."

14. It is also 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



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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."

15. 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."

16. It is the submission of the petitioner that the Bank of New York, Mellon is a trustee appointed by the petitioner, Indo Wind Energy Limited. Admittedly Bank of New York, Mellon is not the Bond holder and therefore, it is not the financial creditor. It is stated that the Bank of New York,



Mellon has declared itself as the financial creditor and has initiated proceedings. It is stated that by virtue of the transfer to the tribunal, the petitioner's entire right even to agitate the issue regarding the respondent being a financial creditor or for that matter that any amount due and payable, is completely lost. It is the submission of the petitioner that in the cases where even the locus-standi and jurisdiction is disputed, agitated and are seized for consideration by the High Court, they cannot be transferred to be proceeded under the IBC Code, automatically as per the choice of one party ignoring all the objections of the other party. According to the petitioner, this would result in prejudicing the rights of the respondent in the company petition."

17. The matter was heard in detail and the judgment was reserved.

18. At this juncture, it is pertinent to mention that there is direct conflict of opinion between the Madras High Court judgment in [Mr.Sanjay Goel Vs. M/s.EL Forge Limited in C.P.No.14 of 2015 etc. dated 11.01.2017] and Bombay High Court judgments in [West Hills Realty Pvt. Ltd., Vs. Neelkamal Realtors Tower Pvt. Ltd., reported in 2017 (200) CompCas 179 (Bom), and Mr. Ashok Commercial Enterprises vs. Parekh Aluminex Limited, reported in 2017 SCC Online Bom 421] Rajasthan High Court [Shreeji Shipping Vs. Hindustan Zinc Limited, in S.B.Company Petition No.9 / 2016 dated 22.03.2017] and Delhi High Court [Grundfos Pumps India Private Limited Vs. ITC Ltd., reported in 2018 SCC Online Del 6630].

19. The Hon'ble Supreme Court of India by judgment dated 22.01.2019 in Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd., reported in 2019 SCC Online SC 87, has set aside the judgment of the Madras High Court, by observing 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.



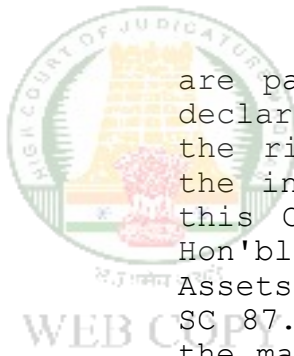
For this purpose, the Madras High Court strongly relied upon Form No. 6 appended to Rule 27 and the expression "was admitted" occurring in the Notice of Petition contained in the said Form.

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.

20. In view of the judgment of the Hon'ble Supreme Court in Forech India Ltd's case [cited supra], the Company Petition No.172 of 2011, which has been transferred to the National Company Law Tribunal, Chennai, the 2nd respondent, has to be brought back to the High Court, Madras, for the reason that all the further proceedings has been stayed by us, by an order dated 26.09.2018 in WMP No.29520 of 2018. When purpose of filing the writ petition has already been served, it would be mere academic exercise to decide the vires of the Section.

21. Writ petition is therefore disposed of, in the light of the decision of the Hon'ble Supreme Court in Forech India Ltd's case [cited supra] and the TCP No.483/(IB)/2018, pending on the file of the National Company Law Tribunal, Chennai, the 2nd respondent, is directed to be re-transferred to this Court and the original number may be granted.

22. 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."

23. No Costs. Consequently, the connected writ miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

ars
To

1. The Secretary,
Union of India,
Ministry of Corporate Affairs,
A Wing, Shastri Bhawan,
Rajendra Prasad Road,
New Delhi - 110 001.



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

+1cc to Mr.Mc Gan Law Firm, Advocate SR.No. 66815

+1cc to Mr.Arun Karthik Mohan , Advocate SR.No. 68817

in W.P.No.25373 of 2018

and

WMP Nos.29520 & 29522 of 2018

A.SK(14/10/2019)