

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
APPELLATE SIDE**

PRESENT:

**HON'BLE JUSTICE SUBRATA TALUKDAR  
AND  
HON'BLE JUSTICE KESANG DOMA BHUTIA**

**FMA 459 of 2021  
With  
IA No. CAN 1 of 2021**

**Kolkata Municipal Corporation & Anr.  
vs.  
Union of India & Ors.**

**(Via video conference)**

For the Appellants : Mr. Ashok Kumar Banerjee  
Mr. Rajdip Roy  
Mr. Anindya Sundar Chatterjee

For the Respondent No.3 : Mr. Jishnu Chowdhury  
Mr. Dilwar Khan

For the Respondent No.4 : Mr. Rishav Banerjee  
Mr. Pranay Agarwal  
Ms. Ankita Baid

Heard on : 15/11/2021

Judgment on : 04/02/2022

**Subrata Talukdar, J:**

This appeal arises out of the Judgement and Order dated 29<sup>th</sup> January 2021 of the Hon'ble Single Bench in the writ petition. The appellants are the Kolkata Municipal Corporation (KMC) and its Commissioner. The effective contesting respondents are the Respondent No. 3, Axis Bank Ltd (for short Axis Bank only) and the Respondent No.4, the Resolution Professional (for short RP) representing one M/s. Maximum Agency Private Ltd. (hereinafter referred to as the Corporate Debtor) presently under a Corporate Insolvency Resolution Process (for short CIRP) before the National Company Law Tribunal (for short NCLT), Kolkata Bench.

The short facts leading to this appeal are as follows:

That the Corporate Debtor, M/s. Maximum Agency Private Ltd., owed property taxes to the KMC. For satisfying its outstandings of property tax, KMC acted under its statute which is the KMC Act, 1980 in the year 2015 attaching the sole immovable property of the Corporate Debtor. However, no further steps were taken by KMC to act on the attachment by way of auctioning the said immovable property for the purpose of monetizing its outstandings of property tax. In such a situation, the Respondent No.3/ Axis Bank, being a secured creditor of the Corporate Debtor, instituted proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short the *IBC Code*). The

proceedings under Section 7 of the *IBC Code* were instituted in the year 2019 before the NCLT, Kolkata Bench including the sole immovable asset of the Corporate Debtor, now under order of attachment by the KMC.

It is a matter of record that KMC added itself in the proceedings before the NCLT, Kolkata Bench for recovery of its outstanding property tax dues *qua* the Corporate Debtor. However, the RP applied before the NCLT for valuation of the immovable property of the Corporate Debtor as part of the liquidation process involving the claims of all creditors in the IBC proceedings. KMC resisted such a move and, upon the NCLT directing the RP to take over the immovable asset of the Corporate Debtor, KMC challenged such order before the Hon'ble Single Bench in a writ petition. The Hon'ble Single Bench by its Judgement and Order dated 29<sup>th</sup> January, 2021 was pleased to dismiss the challenge of the KMC to the order dated 17<sup>th</sup> December, 2019 of the NCLT directing the hand over of physical possession of the said immovable property of the Corporate Debtor bearing the municipal holding number 127A, Sarat Bose Road, Kolkata-26 to the RP. Being aggrieved, the KMC has preferred this appeal before this Court.

Mr. Ashok Kr. Banerjee, Learned Senior Counsel appearing for the appellants, takes this Court straightaway to Paragraph-38 of the Judgement and Order impugned. Paragraph-38 reads as follows:

*“38. As such, a combined reading of the aforesaid propositions, as laid down in the various judgments, boil down to the ratio that, although a wrongful exercise of available jurisdiction would not be*

*sufficient to invoke the High Court's jurisdiction under Article 226 of the Constitution, the ground of absence of jurisdiction could trigger such invocation. Hence, in view of the nature of challenge involved in the present writ petition, the same is maintainable in law."*

It is submitted that the Hon'ble Single Bench was of the view, as reflected in Paragraph -38 (*supra*), that the NCLT lacked jurisdiction to pass the Order dated 17<sup>th</sup> December, 2019 directing the RP to take physical possession of the said immovable asset. It is argued that since NCLT, Kolkata Bench lacked jurisdiction, the writ petition was held to be maintainable by the Hon'ble Single Bench and to this aforesaid extent KMC had succeeded in establishing that any action to be taken by the RP *apropo* the said immovable asset can be the subject matter of challenge in a writ petition.

In support of his arguments, Learned Senior Counsel relies heavily upon the Judgement and Order of the Hon'ble Apex Court in *Civil Appeal (CA) No. 9170 of 2019, In Re: M/s. Embassy Property Developments Private Ltd. Versus State of Karnataka & Ors.* It is submitted that NCLT had no power to pass orders in IBC proceedings *qua* an immovable property which has been already proceeded with under an equally special statute, viz. the KMC Act, 1980. The KMC therefore acquires the first right to deal with the said immovable asset under its own special statute for realization of its dues. The IBC proceedings must therefore yield to the special statute, viz. the KMC Act.

Learned Senior Counsel submits that since the NCLT, Kolkata Bench does not possess the jurisdiction to adjudicate under the KMC Act, 1980, the Order impugned dated 17<sup>th</sup> December 2019 is in excess of jurisdiction, alternately, in exercise of a jurisdiction which does not exist. Both the above situations create the legal position that where jurisdiction has been exercised by an inferior Tribunal or an authority which does not exist or inheres in such Tribunal or authority, the relief can be applied for by invoking the writ jurisdiction of the Hon'ble Court.

Learned Senior Counsel for the appellants points out that such has been *underscored* by the Hon'ble Single Bench at Paragraph -38 (*supra*).

Replying to the both arguments of the appellants by relying on a catena of judicial authorities, Learned Counsel for the Respondents submit that the IBC proceedings are independent and have overriding effect. Having regard to the clear and wide language of Section 238 of the IBC, the NCLT and the NCLAT are vested with exclusive jurisdiction to deal with all issues pertaining to the insolvency process of a Corporate Debtor including the mode and manner of disposal of its assets. Reliance is placed on the reported authority of 2020) 14 SCC 198, *In Re: Anand Rao Korada Resolutional Professional versus Varsha Fabrics Private Ltd. and Ors.* at Paragraphs 9,10 and 11 thereof which read as follows:

“ 9. *Section 238* gives an overriding effect to the IBC over all other laws. The provisions of the IBC vest

*exclusive jurisdiction on the NCLT and the NCLAT to deal with all issues pertaining to the insolvency process of a corporate debtor, and the mode and manner of disposal of its assets. [Section 238](#) reads as follows :*

*“238. Provisions of this Code to override other laws. – The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

*10. Section 231 of the IBC bars the jurisdiction of civil courts in respect of any matter in which the Adjudicating Authority i.e. the NCLT or the NCLAT is empowered by the Code to pass any Order. [Section 231](#) is set out hereinbelow for ready reference :*

*“231. Bar of jurisdiction. – No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority or the Board 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 or the Board under this Code.”*

*11. In view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor – Respondent No. 4 herein, once the proceedings under the IBC had commenced, and an Order declaring moratorium was passed by the NCLT. The High Court passed the*

*impugned Interim Orders dated 14.08.2019 and 05.09.2019 after the CIRP had commenced in this case.”*

Also relying on the authority of *In Re: A Navinchandra Steels Private Ltd. Versus Srei Equipment Finance Ltd. and Others* reported in 2021) 4 SCC 435, particularly at *Paragraphs 24 and 26* thereof, the respondents submit that in the facts of this case, the KMC has been unable to make out any case that steps have already been taken under the order of attachment *qua* the said immovable asset of the Corporate Debtor and, such steps have reached an irreversible or irretrievable stage which would warrant that the NCLT should stay its hands. It is pointed out that nothing has been brought on record by the appellants disclosing that the KMC has proceeded under the order of attachment resulting in an irreversible and irretrievable situation whereby the RP must desist from exercising any authority over the same. It will be now relevant to quote *Paragraphs 24 and 26* of *In Re: A. Navinchandra Steels (supra)* which read as follows:

*“24. In Action Ispat , this Court was faced with a proceeding in which a winding up petition had been admitted by the High Court and then transferred to the NCLT to be tried as a proceeding under the IBC. After referring to the judgments in Jaipur Metals (supra), Forech (supra), and Kaledonia (supra), and after setting out various Sections dealing with winding up of companies under the Companies Act, 2013, this Court then held:*

*“14. What becomes clear upon a reading of the three judgments of this Court is the following:*

*14.1. So far as transfer of winding up proceedings is concerned, the Code began tentatively by leaving proceedings relating to winding up of companies to be transferred to NCLT at a stage as may be prescribed by the Central Government.*

*14.2. This was done by the Transfer Rules, 2016 [Companies (Transfer of Pending proceedings) Rules, 2016] which came into force with effect from 15.12.2016. Rules 5 and 6 referred to three types of proceedings. Only those proceedings which are at the stage of pre-service of notice of the winding up petition stand compulsorily transferred to the NCLT.*

*14.3. The result therefore was that post notice and pre admission of winding up petitions, parallel proceedings would continue under both statutes, leading to a most unsatisfactory state of affairs. This led to the introduction of the 5th proviso to [section 434\(1\)\(c\)](#) which, as has been correctly pointed out in [Kaledonia \[Kaledonia Jute & Fibres Pvt. Ltd. v. Axis Nirman & Industries Ltd., 2020 SCC OnLine SC 943\]](#), is not restricted to any particular stage of a winding up proceeding.*

*14.4. Therefore, what follows as a matter of law is that even post admission of a winding up petition, and after the appointment of a Company Liquidator to take over the assets of a company sought to be wound up, discretion is vested in the Company Court to transfer such petition to the NCLT. The question that arises*

*before us in this case is how is such discretion to be exercised?”*

*“25. Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding up petition even after it is admitted. Thus, in a winding up proceeding where the petition has not been served in terms of Rule 26 of the Companies (Court) Rules, 1959 at a pre-admission stage, given the beneficial result of the application of the Code, such winding up proceeding is compulsorily transferable to the NCLT to be resolved under the Code. Even post issue of notice and pre admission, the same result would ensue. However, post admission of a winding up petition and after the assets of the company sought to be wound up become in custodia legis and are taken over by the Company Liquidator, [section 290](#) of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and may even sell the company as a going concern. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding up proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that the Company Court must proceed with the winding up, instead of transferring the proceedings to*

*the NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case.*

*26. On facts also, in the present case, nothing can be said to have become irretrievable in the sense mentioned in paragraph 31 of Action Ispat. ”*

Having heard the parties and considering the materials placed, this Court finds no reason to agree with the stand taken by the appellants/ the KMC. Apropos the first proposition advanced on behalf of the appellants that the Hon’ble Single Bench had observed on the want or lack of jurisdiction of the NCLT, Kolkata Bench *apropo* its order impugned dated December 17, 2019, this Court finds that the observations of the Hon’ble Single Bench at *Paragraph -38 (supra)* of its Judgement and Order dated 29<sup>th</sup> January 2021 were only in the nature of a reiteration of the by now well-established legal proposition that the writ Court can only interfere when an inferior Tribunal or authority exercises a jurisdiction which it does not possess.

Second, this Court also comes to the finding that the reasons set forth by the Hon’ble Single Bench at Paragraphs 40 to 51 of the Judgement and Order dated 29<sup>th</sup> of January, 2021 *apropo* the second question posted by the Hon’ble Single Bench at Paragraph 32 of the said impugned judgement, has been answered in the negative against the writ petitioners/ the present appellants.

It would be useful for this discussion to quote Paragraph 32(*supra*) which reads as follows:

*“32. Whether the property-in-question, having been seized by the KMC in recovery of its statutory claims against the debtor, can be the subject matter of a Corporate Resolution Process under the Insolvency and Bankruptcy Code, 2016.”*

It is plainly understandable that while discussing the answer to its second question at Paragraph 32 (*supra*), the Hon’ble Single Bench was pleased to uphold the primacy of the IBC in a Corporate Resolution Process and hence underscored the jurisdiction of the NCLT to direct the RP to take over the said immovable asset of the Corporate Debtor.

This Court further finds that apropos the dictum laid down *In Re: Action Ispat and Power* reported in 2021) 2 SCC 641 as also noticed *In Re: A Navinchandra Steels Private Ltd.* reported in 2021) 4 SCC 435 (*supra*), the appellants have been unable to make out a case that an irreversible position has been carved out by operation of law which would bar the NCLT from taking the Resolution Process forward under the IBC.

Last, but not the least, this Court finds the legal position unassailable that the property dues of KMC carry a statutory flavour and therefore being in the nature of crown debts also do not take precedence over the dues of other classes of secured creditors. This Court finds the above stated legal position affirmed with bold simplicity in the pronouncement of the Hon’ble Apex Court *In Re: Commissioner of Income Tax versus Monet Ispat and Energy Ltd. (Petitions for Special Leave To Appeal (C)) number 6483 of 2018 dated 13<sup>th</sup> of August 2018* which reads as follows:

*“Given Section 238 of the Insolvency and Bankruptcy Code, 2016 it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.*

*We may also refer in this connection to Dena Bank Vs, Bhikhabhai Prabhudas Parekh and Co. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.*

*We are of the view that the High Court of Delhi is therefore, correct in law.*

*Accordingly, the Special Leave Petitions are dismissed. Pending applications, if any, stand disposed of.”*

In the backdrop of the above discussion, **FMA 459 of 2021** with **IA No. CAN 1 of 2021** stand dismissed.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

**I agree.**

**(Kesang Doma Bhutia, J.)**

**(Subrata Talukdar, J.)**