

IN THE HIGH COURT AT CALCUTTA
ORIGINAL JURISDICTION
ORIGINAL SIDE

BEFORE:

The Hon'ble Mr. Justice Ravi Krishan Kapur

CA/12/2022

In CP/387/2014

RE : JESSOP & CO. LIMITED (in liquidation) & Ors.

Vs.

The Official Liquidator, High Court at Calcutta

For the Secured Creditor : Mr. Ratnanko Banerji, Senior Advocate
Ms. Pooja Chakraborti, Advocate
Ms. Radhika Misra, Advocate
Mr. Kiran Sharma, Advocate

For the Contributory : Mr. Krishna Raj Thaker, Advocate
Mr. Rupak Ghosh, Advocate
Mr. Chayan Gupta, Advocate
Mr. Soumyajyoti Nandy, Advocate
Mr. Niladri Banerjee, Advocate
Mr. Ashutosh Singh, Advocate

For the Official Liquidator : Mr. Subhadip Biswas, Advocate

Heard on : 06.05.2022, 10.05.2022, 13.05.2022

Judgment on : 04.07.2022

Ravi Krishan Kapur, J.:

1. This application has been filed by a secured creditor (Edelweiss Asset Reconstruction Company Ltd.) of Jessop & Company Ltd, the company (in liquidation) seeking transfer of CP No. 387 of 2014 alongwith all connected applications to the National Company Law Tribunal, Kolkatta Bench (NCLT). The application has been filed under the 5th proviso of the newly amended Section 434 (1) (c) of the Companies Act,

2013 (the Act). The section in its new avatar contemplates a party applying to the Court, to seek transfer of proceedings relating to winding-up of a company to the NCLT.

2. It is submitted on behalf of the applicant that by a Deed of Assignment dated 28th March, 2014, the applicant had become a secured creditor of the company (in liquidation). The current dues of the applicant are approximately Rs. 424 crores. The order of winding-up was passed on 6th March, 2017. Thereafter, one of the contributories of the company (in liquidation) had filed an application, inter alia, for framing a scheme of repayment. By an order dated 18th May, 2017, the contributory was permitted to take physical possession of the assets of the company (in liquidation) and the Official Liquidator was directed to be in symbolic possession. The order also provided that the expenses incurred for providing security guards in respect of the assets of the company (in liquidation) shall be borne by the contributory. By an order dated 17th August, 2017, the contributory was also directed to bring a scheme for payment of the dues of the creditors of the company (in liquidation). However, admittedly till date, no scheme has been framed. Significantly, the applicant had also filed an application being CA 172 of 2019 seeking appropriate directions for the Official Liquidator to handover the possession of the mortgaged properties of the company (in liquidation) to the applicant.
3. It is contended on behalf of the applicant that, in view of the amended Section 434 (1) (c) of the Act and the 5th proviso, the applicant is entitled to apply to this Court for transfer of the winding-up

proceedings to the NCLT. The applicant is a “party” defined under Section 434 (1) (c) of the Act. It is also contended that a secured creditor may stand outside the winding-up proceeding and still realise its security dehors the winding-up proceedings. In this connection, reliance is placed on *M.K. Ranganathan Vs. State of Madras* (AIR 1955 Supreme Court 604), *Food Controller Vs. Cork* (1923 AC 647). Moreover, the Official Liquidator has also not taken any steps whatsoever to sell any of the assets of the company (in liquidation) for more than five years. There has also been no money paid to any of the creditors. In this connection, reliance is placed on the decisions in *Action Ispat & Power (P) Ltd. Vs. Shyam Metalics & Energy Ltd.* (2021) 2 SCC 641, *A. Navinchandra Steels (P) Ltd. Vs. SREI Equipment Finance Ltd.* (2021) 4 SCC 435, *Sicom Limited vs. Hanung Toys and Textiles Ltd.* (2019) 264 DLT 400 and *Alfavision Overseas Ltd. Vs. Kanak Tairdeal (India) Pvt. Ltd.* (2019) SCC Online MP 5012. It is further submitted that there are no other circumstances which warrant this Court retaining the winding-up proceedings. On the contrary, it would only enure to the benefit of all parties involved that the proceedings be transferred to NCLT and be brought to their logical conclusion.

4. On behalf of one of the contributories, namely Indo Wagon Engineering Ltd., it is submitted that the petitioner is not a party to the winding-up proceedings and hence is not entitled to seek transfer of proceedings to the NCLT. It is further alleged that in the absence of any application pending under the Insolvency Code before the NCLT, there is no question of transferring of these proceedings to the NCLT. It is further

submitted that there is no power vested in the NCLT to consider an application for framing of a scheme for repayment of the creditors of the company (in liquidation). It is also submitted that irreversible steps have taken place in the form of payments having been made to security agencies and the pendency of an application under Section 466 of the Act filed by the contributory and the pending application for framing of a scheme in respect of the company (in liquidation). All these steps are irreversible in nature and would severely prejudice the rights of the contributory. Reliance is also placed on the judgment reported in *Union of India Vs. Amrit Lal Manchanda and Anr (2004) 3 SCC 75* to contend that, the peculiar facts of a case would make a world of difference between the conclusions in two cases. Thus, the decision reported in *Action Ispat (Supra)* and *A. Navinchandra Steels (P) Ltd. (Supra)* are distinguishable. Pursuant to directions by this Court, a Status Report has also been filed by the Official Liquidator which confirms that none of the assets of the company (in liquidation) have been sold.

5. By an amendment dated 7th August, 2018 the 5th proviso to Section 434 (1) (c) of the Act was added which provided as follows:-

*“434. Transfer of certain pending proceedings. – (1)
On such date as may be notified by the Central
Government in this behalf –*

(a)-(b)

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(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:

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Provided further that any party or parties to any proceedings relating to the winding up of companies pending before any court immediately before the commencement of the Insolvency and bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as on application for initiation of corporate insolvency resolution process under the Insolvency and bankruptcy Code, 2016 (31 of 2016)”

6. In *Action Ispat & Power (P) Ltd. vs. Shyam Metalics & Energy Ltd.*

(2021) 2 SCC 641, the Hon’ble Supreme Court held as follows:-

“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 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 sale 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 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. (emphasis supplied).

Significantly, in the facts of the aforesaid decision, the concurrent finding of the Company Judge and the Division Bench was that despite the fact that in the liquidation proceedings, the Official Liquidator had taken possession and control of the registered office and the factory premises, records and books no irreversible steps towards winding up of the company had otherwise taken place. The ratio in *Action Ispat & Power (P) Ltd. (supra)* has subsequently been followed in *A. Navinchandra Steels (P) Ltd. vs. SREI Equipment Finance Ltd. (2021) 4 SCC 435*.

7. In *Maheswary Ispat Ltd. And Alaknanda Sponge Private Limited vs. Official Liquidator, High Court, Calcutta (Unreported decision of the High Court at Calcutta dated 17.5.2022 in C P 560 of 2011)* this Court has held as follows:-

“Ordinarily, there is a strong presumption that Civil Courts have jurisdiction to decide all questions of civil nature. The exclusion of jurisdiction of Civil Courts must either be explicitly expressed or clearly implied. In my view, the section does not contemplate proceedings being automatically transferred to the Tribunal. There is an element of discretion which the Company Court retains in respect of pending proceedings whether to exercise the power to transfer or not depending on the facts and circumstances of each case. The only test as laid down by the Supreme Court is whether any irreversible situation has arisen warranting the Court to stay its hands and not transfer the proceeding to the NCLT. However, the clear legislative intent is to oust the jurisdiction of the Court and transfer all proceedings to the Tribunal (except in limited cases) with the ultimate object to resuscitate the corporate debtors who are in the red and in some cases to prevent

parallel proceedings.”

8. In the newly introduced Insolvency regime and after the aforesaid amendments to the Act, there is a radical change in the approach whilst dealing with companies in liquidation. It is true that there is no automatic transfer of all proceedings pending for winding-up of a company to the NCLT. In fact, there is an element of discretion which the Company Court retains in respect of pending winding-up proceedings even post amendment. However, such discretion has to be exercised in the facts and circumstances of each case. (*Sicom Limited vs Hanung joys and Textiles Ltd. (2019) 26 DLJ 400*) *Alfavision Overseas Ltd. vs Kanak Fairdeal (India) Pvt. Ltd., 2019 SCC online MP 5012*).
9. The sole test laid down in the decision of *Action Ispat (Supra)* as followed in *A. Navinchandra Steels (P) Ltd. (Supra)* is whether an irreversible situation has arisen warranting the Court to stay its hands and not transfer the proceeding to the NCLT. In my view, there are no facts whatsoever which justify the conclusion of an irreversible situation having arisen in the facts of the case. The company was directed to be wound-up on the 6th March, 2017. Thereafter, one of the contributories, namely Indo Wagon Engineering Ltd. had obtained diverse orders from Court whereby they continued to be in possession of the assets of the company (in liquidation). Admittedly, till date there is no scheme for repayment of the outstanding dues of the creditors which has been framed. No other steps have taken place by the Official Liquidator in aid of winding-up of the company. The aggregate dues of

the applicant are in excess of Rs. 400 crores. Notwithstanding orders of this Court, the security agencies have also not been paid by the contributory. The Official Liquidator is not in possession of any of the assets company (in liquidation) far less having made any attempt to sell them. The stalemate or impasse which has been created by the contributory and the inaction of the Official Liquidator only strengthens the case of the applicant in seeking transfer of the proceedings to the NCLT on the ground that no irreversible situation has arisen justifying this Court to retain jurisdiction.

10. Section 434 (1)(c) provides that “*any party*” to “*any proceeding*” “relating to the winding up of a company” may file an application for transfer to the NCLT. A proceeding for winding-up is a proceeding *in rem* which enures to the benefit of all creditors, such a proceeding may be initiated by one or more creditors but is treated as a joint petition. It is well settled that a secured creditor may choose to stand outside the winding-up proceeding and enforce its security dehors the winding-up proceeding (*Palmer’s Company Precedents, Volume I Page No. 415, M.K. Rangathan vs State of Madras (AIR 1955 SC 604 at Para 15-16, Food Controller vs Cork [1923] AC 647*). Thus, the fact that the petitioner has chosen to stand outside the winding-up proceeding does not mean that the petitioner is not a party within the meaning of Section 434 (1) (c) of the Act or is disentitled from making this application.

11. I also do not find any merit in the objection raised by the contributory that a petition under Section 7 and Section 9 of the Insolvency and Bankruptcy Code 2016 (the Code) should be pending before the NCLT,

prior to directing transfer of the winding-up proceedings to the NCLT. Neither is this legislative intent nor is this pre-condition borne out from the language of the newly amended section. Accordingly, I do not find any merit in this submission and the same is rejected. I also do not find any force in the submission that a scheme for repayment of the creditors of the company (in liquidation) cannot be considered by the NCLT. Section 230 (1) of the Companies Act contemplates that a Scheme of Compromise and Arrangement may be submitted under the provisions of the Code. Moreover, Rule 2B of the IBBI (Liquidation process Regulation) 2016 read with 230 of the Companies Act, 2013 now governs the process for submitting a scheme for compromise or arrangement. Under Section 29A of the Insolvency and Bankruptcy Code, the promoters are disqualified from framing of a scheme of the company. Accordingly, this submission on behalf of the contributory is also rejected. I also do not find any merit in the submission that the fact that some moneys have been paid by the contributory would create an irreversible situation which justifies these proceedings being transferred to the NCLT. None of these grounds make it impossible to set the clock back compelling the Company Court to proceed with the winding-up of the company instead of transferring the proceeding to the NCLT. All such issues can always be decided by the NCLT during the course of winding-up. Hence, there is no impossible situation arisen which justifies this Court retaining this winding-up proceeding. It is to be remembered that, the jurisdictional change brought about in the amended Section 434 (1) (c) makes it clear that it is now obligatory

for the Court (in the absence of any irreversible or exceptional circumstances) to transfer the proceedings to the NCLT. This is the clear legislative intent. In fact, to continue with the winding-up proceedings in the absence of an irreversible situation would in my view, tantamount to committing a jurisdictional error. The decision relied on by the contributory, *Union of India vs. Amrit Lal Manchanda and Anr. (2004) 3 SCC 75* is distinguishable and inapplicable to the facts of this case.

12. In view of the aforesaid, I direct that this Company Petition being CP No. 387 of 2014 and all applications filed therein stand transferred forthwith to the National Company Law Tribunal Kolkata.
13. CA No. 12 of 2022 stands allowed.
14. The Department shall treat CP No. 387 of 2014 and all applications filed therein are disposed of insofar as the records of this Court are concerned.

(Ravi Krishan Kapur, J.)