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O.S.A.No.160 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.02.2022

DATE OF DECISION : 21.06.2022

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

AND

THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.No.160 of 2019

M/s.Sharon Solutions Limited,
Having its registered office at
Ground Floor, Jeeva House,
No.520, M.K.N. Road,
Alandur, Chennai – 16 .

.. Appellant

Versus

1.Edelweiss Asset Reconstruction Company Limited,
Registered Office at Edelweiss House,
15th Floor, Off C.S.T. Road, Kalina,
Mumbai – 400 098.
Acting in its capacity as Trustee of
EARC Trust – SC 38.

... 1st Respondent / third party

2.The Official Liquidator,
High Court of Judicature, Madras,
2nd Floor, Corporate Bhavan,
No.29, Rajaji Salai,
Chennai – 1.

.. 2nd Respondent

Prayer: Original Side Appeal has been filed under Order XXXVI Rule 9 of Original Side Rules read with Clause 15 of the Letters Patent Act and Section 483 of Companies Act against the order passed by the learned Single Judge in C.A.No.575 of 2018 in C.P.No.14 of



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2014, dated 15.02.2019.

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For Appellant

: Mr.Sathish Parasaran, Senior Counsel

for M/s.Subhang Nair and Pavitra Venkateswaran

For R1

: Mr.S.Ravi for Mrs. Indumathi Ravi

R2 --- Official Liquidator

JUDGMENT

T.RAJA, J.

M/s.Sharon Solutions Limited, Alandur, Chennai, has filed this appeal challenging the impugned fair and decreetal order passed by the learned Single Judge in C.A.No.575 of 2018 in C.P.No.14 of 2014, dated 15.02.2019, in and by which, the application filed by the Edelweiss Asset Reconstruction Company Limited/third party/first respondent herein seeking to permit them to initiate a Corporate Insolvency Resolution Process (CIRP) before the National Company Law Tribunal (NCLT), Chennai, under Section 7 of the Insolvency and Bankruptcy Code against M/s.Sharon Solutions Limited was allowed holding that there is no need for the applicant to seek leave of the Court to approach the NCLT which is automatic and therefore, the High Court cannot usurp the power of the NCLT from proceeding with the matter.

2. Mr.Sathish Parasaran, learned Senior counsel appearing for the appellant Company would submit that when the order of admittance of winding up under the provisions of the Companies Act, 1956, is in existence, the appellant Company cannot now be subjected to fresh proceeding under a separate statute. The finding given by the learned



Single Judge that simultaneous proceedings can go on, that is, one before the NCLT and another before the Company Court, would create inconsistency and multiplicity of proceedings. Moreover, that is not the intention of statute and therefore, such an order ought not to have been passed by the learned Single Judge.

3. It is further argued that the present application filed by the first respondent in C.A.No.575 of 2018 in C.P.No.14 of 2014 seeking to permit them to initiate Corporate Insolvency Resolution Process before the NCLT is in the nature of an application filed under Section 446 of the Companies Act and this apart, when the Official Liquidator has been appointed as Provisional Liquidator, no other proceeding can be commenced except by leave of the Court. Therefore, having subjected to themselves to the provisions of the Companies Act, 1956, the first respondent cannot seek for initiation of fresh proceedings under the provisions of Insolvency and Bankruptcy Code before the NCLT, which is nothing but two parallel adjudications, that is, one before the Company Court and another before the NCLT, thus, such an approach of the first respondent is erroneous and does not convey the intention of the legislature. Hence, the impugned fair and decreetal order passed by the learned Single Judge permitting the first respondent to initiate fresh proceeding before the NCLT, Chennai, pending the similar proceeding before the Company Court, is not sustainable in law and therefore, the same is liable to be set aside.



4. Mr.S.Ravi, learned counsel for the first respondent would submit that the appellant Company had availed several loan facilities to the tune of Rs.12,75,00,000/- in the year 2006 from the Federal Bank and subsequently, they have approached UCO Bank Consortium comprising of the Assignor Bank, UCO Bank and Canara Bank for loan facilities which sanctioned credit facilities to the tune of Rs.85,01,00,000/- under the Consortium, and this apart, several loan documents were executed by way of deposit of title deeds of the properties of the appellant in favour of the Assignor Bank. Since the credit facilities were not regularized and the appellant failed to repay the loan amount, the amount was declared as Non Performing Asset in June, 2014, therefore, the said debt was assigned to the first respondent herein on 30.06.2014 by the said Assignor Bank by virtue of the Assignment Agreement registered as Document No.110/2015. Therefore, the first respondent is entitled to recover a huge public money to the tune of Rs.74,55,13,493/- from the appellant as on 31.03.2018.

5. It is further argued that while going through the records, the first respondent came to know the case filed by M/s.IFCI Venture Capital Funds Limited, New Delhi, in C.P.No.14 of 2014 and subsequent order passed by this Court on 12.11.2014 for winding up of the appellant Company and further direction to appoint the Official Liquidator as a Provisional Liquidator. Upon further verification, the first respondent herein came to know that an application was already filed by the appellant Company in C.A.No.1238 of



2014 seeking to recall the order dated 12.11.2014 of this Court appointing the Provisional Liquidator. However, the said application was dismissed on 15.10.2015. Subsequently, when appeal was filed in O.S.No.253 of 2015 by the appellant Company, the Hon'ble Division Bench, by order dated 06.04.2016, disposed of the said appeal with the following directions to be complied with by the appellant Company:-

(1) The order of admission of the winding up dated 12.11.2014 will be kept under suspension till 31.07.2016.

(2) The appellant will pay a sum of rupees Rs.1.00 Crore (Rupees One Crore) to the respondent on or before 30.04.2016 and a further sum of Rs.1.00 Crore (Rupees One Crore) on or before 30.06.2016. The non-compliance of any of these payments within the time stipulated would automatically remove the suspension order.

(3) In the mean time, the appellant will work out with Finance and see if they can locate someone to purchase the shares as acceptable to the respondent and the consideration for the same would be deposited with the respondent.

(4) Any further monitoring in this behalf would be within the purview of the learned Company Judge.

6. Continuing further, learned counsel argued that the appellant Company has not complied with the above said directions. Therefore, considering the fact that huge public money is outstanding, the first respondent has filed C.A.No.575 of 2018 in C.P.No.14 of 2014 seeking to permit them to initiate a Corporate Insolvency Resolution Process before



the NCLT, Chennai, under Section 7 of the Insolvency and Bankruptcy Code against the appellant Company, despite the Company Petition pending before this Court.

7. In support of his submissions, learned counsel for the first respondent has relied on a judgment of the Hon'ble Apex Court in the case of *Jothun India Private Limited Vs. PSL Limited, reported in 2018 SCC Online Bombay 36*, for a proposition that there cannot be any provisions in the Companies Act, 1956, to injunct the proceedings before the NCLT instituted under the Insolvency and Bankruptcy code. It is further argued that this Court has not passed any final order directing winding up of the appellant Company and appointing the Official Liquidator to take charge of the assets of the appellant Company, hence, the first respondent still has a remedy to initiate a Corporate Insolvency Resolution Process before the NCLT, Chennai, to recover its huge amount of dues from the appellant Company, he pleaded.

8. Concluding his arguments, learned counsel for the first respondent argued that learned Single Judge, taking note of the fact that the appellant Company did not honour their commitment despite the extension of time to make payment and that the first respondent being a secured creditor is left in lurch, has rightly held that the first respondent is entitled to initiate Corporate Insolvency Resolution Process before the NCLT,



Chennai, irrespective of the company petition pending before this Court. In a similar issue, the Hon'ble Supreme Court in *Nirchiliya and others Vs. Management of Saffire Theatre, Madras and other reported in 1991 (1) LLJ 111*, held that as long as there is no finality to one particular proceeding, both proceedings shall go on and in case of attainment of finality in one proceeding, then the other proceeding shall automatically cease to exist. Therefore, in view of such ruling of the Hon'ble Supreme Court, the impugned order passed by the learned Single Judge does not require interference, he pleaded.

9. We also find merit on the above said submissions. The contention of the learned Senior counsel for the appellant company that the proceedings initiated under the Companies Act will have to be construed as a proceeding in rem that has to be read in conjunction with Section 447 of the Companies Act and therefore, the first respondent cannot go before the NCLT is untenable. Learned Official Liquidator representing before the learned Single Judge submitted that the appellant Company was ordered to be wound up and thereafter, Official Liquidator was appointed as Provisional Liquidator of the Company and subsequently, when the officials went to take possession of the Company, there was a huge mob and there was an agitation against the officials of the Official Liquidator. Thus, it is clear that since the Official Liquidator was not permitted to take physical possession of the appellant Company, no specific order is required from this



Court for the first respondent to approach the NCLT, for, as per Section 64(2) of the Insolvency and Bankruptcy Code, the Company Court is prohibited from injuncting NCLT from exercising its jurisdiction under the provisions of Insolvency and Bankruptcy Code. For better appreciation, Section 64(2) of the Insolvency and Bankruptcy Code is extracted below:-

“64(2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.”

10. This apart, the Bombay High Court in *Jotun Indian Private Limited Vs. PSL Limited (Comp.A.No.572 of 2017 in C.P.No.434 of 2015, dated 05.01.2018)* held that there is no bar on NCLT from proceeding with the application filed under the provisions of Insolvency and Bankruptcy Code. Therefore, the only question that arises for consideration is whether two parallel proceedings shall go on simultaneously. The answer lies in the judgment of the Hon'ble Apex Court in *Nirchiliya's case (cited supra)*, in which, it is held that parallel proceedings are permissible, for, in case, one proceeding comes to the conclusion, then the other proceeding cannot go on and as long as there is no finality to one particular proceeding, both proceedings shall go on and in case of attainment of finality in one proceeding, then the other proceeding shall automatically

cease to exist.

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11. In *A.Navinchandra Steels Private Limited Vs. Srei Equipment Finance Limited and others* [(2021) 4 SCC 435], the Hon'ble Apex Court held that pendency of admitted winding-up proceedings will not be a bar to the petition filed under Section 7 or Section 9 of Insolvency and Bankruptcy Code, as the latter are independent and overriding proceeding. Paragraph Nos.25 to 27 thereof are extracted hereunder:-

25. A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the Appellant that given Section 446 of the Companies Act, 1956 / Section 279 of the Companies Act, 2013, once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true that Sections 391 to 393 of the Companies Act, 1956, may, in a given factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the Companies Act, 2013 is instructive and provides as follows:

230. Power to compromise or make arrangements with



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creditors and members. ---- (1) Where a compromise or arrangement is proposed

(a) between a company and its creditors or any class of them;
or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.--- For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods'.

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.

26. On facts also, in the present case, nothing can be said to have become irretrievable in the sense mentioned in paragraph 25 of Action Ispat (supra).

27. It is settled law that a secured creditor stands outside the winding up and can realise its security dehors winding up proceedings.

In *M.K. Ranganathan v. Govt. of Madras*, (1955) 2 SCR 374, this Court held:

15. The position of a secured creditor in the winding up of a company has been thus stated by Lord Wrenbury in *Food Controller v. Cork* [1923 Appeal Cases 647]:



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'..... The phrase outside the winding up is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say 'the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is in winding up or not. I remain outside the winding up' and shall enforce my rights as mortgagee. This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up.'

It is also summarised in Palmers Company Precedents Vol. II, page 415:

'Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made'.

The secured creditor is thus outside the winding up and can realise his security without the leave of the winding up Court, though if he files a suit or takes other legal proceedings for the realisation of his security he is bound under Section 231 (corresponding with Section 171 of the Indian Companies Act) to obtain the leave of, the winding up Court before he can do so although such leave would almost automatically be granted. Section 231 has been read together with Section 228(1) and the attachment, sequestration, distress or execution referred to in the latter have reference to proceedings taken through the Court and if the creditor has resort to those proceedings he cannot put them in force against the estate or effects of the Company after the commencement of the winding up without the leave of the



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winding up Court. The provisions in Section 317 are also supplementary to the provisions of Section 231 and emphasise the position of the secured creditor as one outside the winding up, the secured creditor being, in regard to the exercise of those rights and privileges, in the same position as he would be under the Bankruptcy Act.

16. The corresponding provisions of the Indian Companies Act have been almost bodily incorporated from those of the English Companies Act and if there was nothing more, the position of the secured creditor here also would be the same as that obtaining in England and he would also be outside the winding up and a sale by him without the intervention of the Court would be valid and could not be challenged as void under Section 232(1) of the Companies Act.

This principle has been followed in *Central Bank of India v. Elmot Engineering Co.*, (1994) 4 SCC 159 (at paragraph 14), *Industrial Credit and Investment Corpn. of India Ltd. v. Srinivas Agencies*, (1996) 4 SCC 165 (at paragraph 2), and *Board of Trustees, Port of Mumbai v. Indian Oil Corpn.*, (1998) 4 SCC 302 (at paragraph 12).

From the above said ratio laid down by the Hon'ble Apex Court, it is conspicuously clear that there is no bar to initiate fresh proceeding under Section 7 of the Insolvency and Bankruptcy Code before the NCLT, pending Company Petition before the Company Court, as it is an independent proceeding having overriding effect over the winding-up petition filed under the provisions of the Companies Act. Therefore, the contention of the learned Senior counsel for the appellant that permitting the first respondent to initiate fresh proceeding before the NCLT would create inconsistency and multiplicity of proceedings is legally untenable, as fresh proceeding sought to be initiated under Section 7 of the



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Insolvency and Bankruptcy Code is an independent proceeding.

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12. Further, it is pertinent to note that when the Provisional Liquidator appointed by this Court went to take possession of the Company, he was not allowed to take over the physical possession of the Company, as there was a huge mob and agitation against the officials of the Provisional Liquidator, as a result, huge public money to the tune of Rs.74,55,13,493/- is pending outstanding from the appellant company as on 31.03.2018. Therefore, in view of such stumbling block created by the appellant Company precluding the Provisional Liquidator from performing his duty, in our considered view, the impugned order passed by the learned Single Judge holding that there is no need for the first respondent to seek leave of the Court to approach the NCLT which is automatic, is upheld, since the same is perfectly in order.

13. Thus, for the reasons stated above, the impugned fair and decreetal order passed by the learned Single Judge is confirmed and the Original Side Appeal filed by the appellant Company stands dismissed. No Costs. C.M.P.No.13981 of 2019 is closed.

(T.R., J.) (D.B.C., J.)
21.06.2022

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Index: yes
Speaking



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To
The Official Liquidator,
High Court of Judicature, Madras,
2nd Floor, Corporate Bhavan,
No.29, Rajaji Salai,
Chennai – 1.

T.RAJA, J.
and
D.BHARATHA CHAKRAVARTHY, J.
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