

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

BEFORE:

The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar

APO/12/2023
With
CP/572/2014
IA NO: ACO/1/2023

In the matter of:
M/S. Abhijeet Projects Ltd
Vs.
Yogesh Khanna
VS
The Official Liquidator, High Court Calcutta

APO/14/2023
In
IA NO: ACO/1/2023

M/S. Total Plastic Solutions Pvt. Ltd. (In Liqn)
-And
M/S. Durga Trading Corporation
Vs.
The Official Liquidator & Anr.

APO/35/2023
IA NO: ACO/2/2023

M/S. Shree Panchamukhi Enterprises
Vs
The Official Liquidator Appointed In M/S. Corporate Ispat Alloys Ltd.

For the applicant
(in APO/12/2023,
APO/35/2023

: Mr. Ratnanko Banerjee, Sr. Adv.,
Mr. Nirmalya Dasgupta, Adv.,
Mr. Kuldip Mullick, Adv.,
Mr. Dibanath Dey, Adv.,

For the Applicant
(in APO/14/2023)

: Mr. Debrup Bhattacharyya, Adv.,
Mr. Deepak Kumar Singh, Adv.,

For the applicant : Mr. Hemant Tiwari, Adv.
in APO/35/2023

For the Official Liquidator : Ms. Debjani Mitra Neogi, Adv.
(In APO/12/2023,
And APO/14/2023).

For Official Liquidator : Ms. Smita Das De, Adv.
(in APO/35/2023)

Hearing concluded on : 8th August, 2023

Judgment on : 16th August, 2023.

Soumen Sen, J.:- All the appeals involve common questions of law and fact and accordingly are heard analogously.

The principal issue raised in this appeal by the appellants is:

Whether the company court can *Suo Motu* transfer a proceeding relating to winding up to NCLT or can such transfer only be made pursuant to an application by one of the parties?

Mr. Ratnanko Banerjee the learned Senior Advocate appearing on behalf of the appellants/petitioners in M/s. Abhijeet Projects Limited, (in Liquidation) and M/s Corporate Ispat Alloys Limited (in Liquidation) has assailed the judgment on the ground that having regard to the clear mandate of Section 434(1)(c) last proviso of the Companies Act, 2013 read with Rules 5 and 6 of companies (Transfer of Pending Proceedings) Rules, 2016, the direction to transfer the company petition to the National Company Law Tribunal Kolkata is without jurisdiction.

It is submitted that the learned Single Judge on a complete misreading of the amended provision of the companies Act, 2013 and the decisions in ***Action Ispat and Power Pvt. Ltd. Vs. Shyam Metalics and Energy Ltd.*** reported in **2021(2) SCC 641** and ***A. Navinchandra Steels Private Limited vs. Srei Equipment Finance Limited & Ors.***, reported in **AIR 2021 SC 1180** directed transfer of the Company petition after having recorded that there is no irreversible situation which has arisen warranting the court retaining the liquidation proceeding.

Mr. Banerjee submits that Section 434 does not contemplate automatic transfer of all winding up petitions which would be discernible from the fifth proviso to Section 434(1) (c). The said proviso was introduced by Act, 26 of 2018 with effect from 6th July, 2018. The said proviso contemplates transfer of any proceeding to the National Company Tribunal on an application made by a party. The very fact that the company Court retains the jurisdiction to deal with winding up petitions that were pending when the companies Act, 2013 came into force is clear from the unamended Section 434 which was subsequently substituted by Act, 31 of 2016 and made applicable with effect from 15th November, 2016. Both the provisions clearly retain the jurisdiction of the company court and it clearly spell out that the company court has no discretion to transfer the proceeding *Suo Motu* without there being an application filed by the petitioning creditor or a person interested in the said proceeding.

It is submitted that the reliance on the aforesaid judgments of the Hon'ble Supreme Court was erroneous as in both the matters, applications were filed and parallel proceedings were pending.

It is submitted that the first proviso to Section 434(1)(c) makes a reference to the stages of the winding up proceeding appropriate for transfer as may be prescribed by the Central Government for the purpose of determination of transfer of winding up proceeding to NCLT. The said proviso read with the last proviso makes it clear that there is no absolute ouster of jurisdiction.

It is submitted that the Act does not contemplate complete ouster of jurisdiction of the company court or makes the official liquidator functus officio.

It is submitted that the learned Single Judge was possibly influenced by the use of the expression "irreversible" in **Action Ispat** (*supra*) and referred to in **A. Navinchandra Steels Private Limited** (*supra*). The ratio of the said decisions have been applied without proper appreciation of the facts and without considering the stages of the pending proceedings before the High Court.

Mr. Banerjee has referred to Section 31 of the Recovery of Debts and Tenancy Act, 1993 and Section 15 of the Commercial Courts Act, 2015 to show that the said Sections have completely ousted the jurisdiction of the Civil Court in clear terms unlike Section 434 of the Companies Act.

Mr. Moloy Kumar Sil the learned Counsel representing UCO Bank, a secured creditors of M/s Corporate Ispat Alloys Ltd. (in liquidation), has submitted that in view of the statement and object of the Companies Act, 2013 and having regard to the judgment of the Hon'ble Supreme Court in ***Action Ispat and Power Pvt. Ltd.*** (*supra*) read with Section 434 (1)(c) of the Companies Act, 2013 one can safely conclude that in so far as post-admission winding up matters are concerned, 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 Hon'ble Supreme Court of India is whether any irreversible situation has arisen warranting the Court to stay its hands and not to 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.

Furthermore, it has already been held in *Action Ispat* that the Court has been vested with the discretion to decide whether a pending proceeding where assets have been taken over by the liquidator ought to be transferred to the NCLT.

In light of the aforesaid, the view that the Company Court cannot decide whether or not to transfer a pending proceeding where it had not reached a stage of irreversibility to the NCLT in the absence of a formal application having been made in that regard is perhaps not tenable as such

discretion is vested in the Company Court and is not triggered only by the filing of an application. Such discretion being vested in the Company Court, is part of the inherent powers exercisable by it and the given the object and purpose of the transfer provisions in Section 434 (1)(c) of the Companies Act, 2013 filing of an application is a mere formality.

As such, it is submitted that the impugned order transferring the winding up proceeding to the NCLT is not bad in law and the appeal filed against the same is liable to be dismissed.

The learned Counsel for the official liquidator in all the matters have supported the submission in favour of retaining the jurisdiction of the Company Court in appropriate cases depending upon the stage of the proceeding.

In the year 2016 by Act 31 of 2016 Section 434 was substituted with effect from 15th November, 2016. Before substitution Section 434(1)(c) reads as follows:

(c) 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 to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer.

After the substitution Section 434(1)(c) reads as follows:

(c) 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 to the Tribunal

and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government:

Provided further that only such proceedings relating to cases other than winding up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:

[Provided also that-]

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings, or

(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]

[Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of Section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959]

[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 (Amendment) Ordinance, 2018, may file an 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 an application for initiation of corporate insolvency Code application for transfer of resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016)]. (emphasis supplied)

As would appear from the substituted Section 434(1)(c), the original sub-section has undergone several changes between 7th December, 2016 and 17th August, 2018. The first proviso to Section 434 (1)(c) after the substitution in 2016 clarified transfer of pending proceeding by the phrase “only such proceeding relating to winding up the companies” as may be prescribed by the Central Government. The stage at which such pending proceeding relating to the winding up of companies needs to be transferred has been prescribed and laid down by the Companies (Transfer of Pending Proceeding) Rules, 2016.

Rule 5 of the aforesaid rules read: -

5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.-

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 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 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.

(2) All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.

The said rule was notified on 29th June, 2017. The fifth proviso to Section 434(1)(c) introduced by Act 26 of 2018 with effect from 6th June, 2018 was primarily to tide over the difficulties and the conflict that are likely to arise by reason of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018. By reason of IBC there could be a possibility of initiation of proceeding under Sections 7 and 8 of IBC in relation to a company against whom a winding up petition is pending. The reading of the provisions of IBC with the Companies Act, 2013 undoubtedly would show that the provision of IBC would have primacy in case of conflict over the Companies Act, 2013 as the ultimate object of IBC is to resuscitate the corporate debtors who are in the red. This approach is also in some cases necessary to transfer the winding up proceeding to NCLT to prevent parallel proceeding.

In ***Action Ispat and Power Pvt. Ltd.*** (*supra*) a winding up application was filed under Section 433(e) and (f), 434 and 439 of the Companies Act against the Company seeking winding up in which it was also alleged that for the goods supply Action Ispat had failed to pay a sum of Rs.4.55 crores. The Company Judge in Delhi High Court passed an order on 27th August, 2018 admitting the winding up petition and appointed the official liquidator

attached to the Supreme Court as the liquidator of the Company with further direction to take over all the assets, books of accounts and records of the Company forthwith. An application was then filed before the Company Judge by SBI being a secured creditor of Action Ispat seeking transfer of the winding up petition to the NCLT in view of the fact that the SBI had filed an application under Section 7 of the IBC Code 2016 which was pending before NCLT. The issue before the Supreme Court was whether the discretion exercised by the Company Court in transferring the winding up proceeding to NCLT was liable to be set aside.

In ***Action Ispat and Power Pvt. Ltd.*** (*supra*) the Hon'ble Supreme Court observed that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The IBC Code was held to be a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The Hon'ble Supreme Court noticed that after the introduction of the transfer rules 2016 only those proceedings which are at the stage of pre service of notice of the winding up petition stand compulsorily transferred to NCLT. The Hon'ble Supreme Court noticed that by reason of Rules 5 and 6 of the transfer rules which would result in parallel proceedings to continue before the Company Court and pre admission proceeding would be compulsorily transferred to NCLT. The observations of the Hon'ble Supreme Court in this regard are at paragraph 14.1 to 14.4, the said paragraphs are stated below:

“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 (supra) 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 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, 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 NCLT. The question that arises before us in this case is how is such discretion to be exercised?”

What would be the course upon to a Court in such a situation has been explained in paragraph 25 of the Judgment which reads:

“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 preadmission 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."
(Emphasis supplied)

In **Action Ispat and Power Pvt. Ltd.** (*supra*) the liquidators had taken possession and control of the Registered Office of Action Ispat and its factory premises, records and books and no irreversible steps towards winding up of the Company had otherwise taken place and in that perspective the Hon'ble Supreme Court observed that the Company Court has correctly exercised its discretion vested in it by the fifth proviso Section 434(1)(c) and did not interfere with the order of transfer.

In **A Navinchandra Steels Private Limited** (supra) the ratio in **Action Ispat and Power Pvt. Ltd.** (supra) was clarified and applied. It was held that:

“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 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 31 of Action Ispat (supra)."

It was thus clarified that 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 the NCLT to now be decided in accordance with the provisions of the Code.

In paragraph 25 of the Judgment it has been clearly stated 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.

The aforesaid judgments thus, clearly spell out that unless the court is convinced that the company is to suffer an inevitable corporate death the first choice would be to make an all out attempt to revive the company and this procedure has been elaborately laid down in IBC. The Companies Act, 2013 is not suited for such situation. This is clearly reflected from the amended and substituted Section 434 of the Companies Act, 2013 read with Sections 7 and 8 of the IBC and the objects and reasons of both the statutes. There is no conflict between the two provisions.

In the light of the aforesaid discussion we are of the view that the Court has discretion to transfer the proceeding depending upon the stage of the proceeding. If it appears to the Company Court that the die is cast and the corporate death of the company is inevitable there is no requirement to transfer such proceeding. The said discretion is not always dependent upon any formal application being made but it is always desirable that the views of the petitioning creditor, secured creditors and the official liquidator are ascertained.

Given the aforesaid facts and circumstances and considering the status report filed by the official liquidator, we may now decide the appeals.

Re: M/s. Total Plastic Solutions Pvt. Ltd. (In Liquidation)

Applying the aforesaid principles we find that the direction of the Company Court to transfer CA No. 8 of 2022, CP No. 419 of 2013 (M/s.

Total Plastic Solutions Pvt. Ltd.(In Liquidation) was not proper as the report of the official liquidator in paragraph 9 has clearly stated that the corporate death of the company is inevitable.

For the sake of convenience, paragraph 9 of the report is reproduced below:

“9. As per direction made by His Lordship vide order dated 14.09.2022 it is submitted that after disposal of CA No.8 of 2022 disbursement of dues of merely two creditors of the company (In Liquidation) will be made. Thereafter, the only step remains to place an application under Section 481 of the Companies Act, 1956 read with Rule 282 of the Companies (Court) Rules, 1959 for final dissolution of the company (In Liquidation). A copy of the order dated 14.09.2022 is annexed herewith and marked as ‘A’.

In view thereof the order dated 12th December, 2022 is set aside. The winding up of the company is required to be completed by the Company Court.

APO 14 of 2023 with I.A. No. ACO/1/2023 is allowed. However, there shall be no order as to costs.

Re: M/s. Abhijeet Projects Limited (In Liquidation)

In M/s. Abhijeet Projects Limited (in Liquidation) the official liquidator filed a status report. There are about 15 creditors which consists of banks and financial institutions.

On 20th July, 2023 an order was passed directing the Official Liquidator to obtain the views of the Secured Creditors. Pursuant to such direction the Official Liquidator had convened a meeting of all the secured creditors on 31st July, 2023. The Official Liquidator has filed an affidavit disclosing the deliberations and minutes. The relevant paragraphs are reproduced below:

“6. That on 31st July, 2023, the proposed meeting was convened virtually with the secured creditors wherein only IDBI bank Ltd, Indian Overseas Bank and Central Bank of India have been represented. An extensive discussion was undertaken with regard to transfer of the proceedings to NCLT as directed by the Hon'ble Single Judge on 20th December, 2022. In the said meeting, some of the secured expressed their initial consent for transfer of the proceedings to NCLT and some of them sought for the time. to place the issue before their higher authority to provide the written view in that regard. Such request of the secured creditors was considered with an instruction to convey their views by Monday ie 31st July, 2023.

7. That the minutes of the meeting was being sent to all the secured creditors on the same day with a request for trail mail confirmation of their views in regard to transfer of the proceedings to NCLT. A copy of the minutes dated 31st July, 2023 is annexed with this affidavit as exhibit 2.

8. That the Official Liquidator has so far received and or obtained the views from Indian Overseas Bank, IDBI Ltd and Central Bank of India which contemplates that they are in the views of transferring the proceedings to NCLT as directed by the Hon'ble Judge taking company matters. It is hot out of place to mention that IDBI sought for a clear copy of the minutes.”

However the views of the secured creditors have not been accurately stated. One of the secured creditors, IDBI has clearly expressed its intention to continue with the proceeding in this Court as would be evident from the email dated August 1, 2023. In the said email the secured creditor has stated that the company petition shall not be sent to NCLT. The said email dated 1st August, 2023 reads:

“As per the trail mail, our opinion regarding transferring the case C.P. No.572/2014 to NCLT was sought.

After much deliberations and consultation with our Legal Team, we have decided that we are not in favour for transferring the case to NCLT as it will be time consuming for recovery for the banks/creditors. Moreover, the proceedings of sale of aircraft by DRT may also come to a stand-still due to moratorium where the sale of the aircraft (exclusive charged property) is in the advanced stage through DRT.” (emphasis supplied)

The ouster of jurisdiction should not be easily inferred. The continuance of existing legislation, in the absence of an express provision of repeal, being presumed, the burden to show that there has been a repeal by implication lies on the party asserting the same. [See. **Lybbe v. Hart (1883) 29 Ch D 8 @ page 15]**

A general rule applicable to the construction of statutes is that there is not to be presumed without express words, an authority to deprive the tribunal of a jurisdiction it had previously exercised. Moreover, the rule of implied prohibition is, however, subservient to the basic principle that the court must, as far as possible, adopt a construction which effectuates the legislative intent and purpose. [See, **G.P. Singh Principles of Statutory Interpretation, 15th Edition, Jamal Uddin Ahmad v. Abu Saleh Najmuddin, AIR 2003 SC 1917: 2003 (4) SCC 257**, Paragraphs 11 and 12]

The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act “that the two cannot stand together”[**Municipal Council, Palai v TJ Joseph, AIR 1963 SC 1561]**

The secured creditors unlike **Action Ispat and Power Pvt. Ltd.** (*supra*) did not file any application under Section 7 and 8 of IBC. In the event such applications were filed the company court could have been justified in transferring the proceeding to the Tribunal following **Action Ispat and Power Pvt. Ltd.** (*supra*) on a satisfaction being recorded that the corporate death of the company is not inevitable and NCLT would be the preferred choice. The court exercises its jurisdiction only upon an application being filed for transfer. In absence of any application it has to be presumed that all had agreed and willing to proceed with the winding up before the Company court. All the secured creditors have the opportunity to file an application for transfer. They have not done so far, on the contrary, IDBI had opposed such transfer. There was no parallel proceeding either.

On such facts discretion could not have been exercised in favour of transferring the proceeding to NCLT. The creditors were not heard.

Under such circumstances the order impugned is set aside. The Company Court shall proceed with the winding up of the company.

APO 12 of 2023 with I.A. No. ACO 1 of 203 are allowed. However there shall be no order as to costs.

Re: M/s. Corporate Ispat Alloys Limited (In Liquidation)

On 20th July, 2023 an order was passed directing the Official Liquidator to obtain the views of the Secured Creditors. Pursuant to such direction the Official Liquidator had convened a meeting of all the secured creditors on 28th July, 2023.

In terms of the aforesaid order the Official Liquidator has also filed an affidavit in M/s. Corporate Ispat Alloys Limited (in Liquidation) disclosing the views of the secured creditors. The relevant paragraphs are:-

“6. That on 28th July, 2023 the proposed meeting was convened virtually with the secured creditors wherein all of them have been represented. An extensive discussion was undertaken with regard to transfer of the proceedings to NCLT as directed by the Hon’ble Single Judge on 7th November, 2022. In the said meeting, some of the secured expressed their initial consent for transfer of the proceedings to NCLT and some of them sought for the time to place the issue before their higher authority to provide the written view on that issue. Such request of the secured creditors was considered with an instruction to convey their views by Monday i.e. 31st July, 2023.

7. That the minutes of the meeting was being sent to all the secured creditors on the same day with a request for trail mail confirmation of their views in regard to transfer of the proceedings to NCLT. A copy of the minutes dated 28th July, 2023 is annexed with this affidavit as exhibit 2.

8. That the Official Liquidator has so far received and or obtained the views from UCO Bank, Axis Bank, IFCI Ltd., Punjab National Bank and Union Bank of India which contemplates that they are in the views of transfer the proceedings to NCLT as directed by the Hon’ble Judge taking company matters. The email confirmation upholding transfer of the proceedings to NCLT so received from the secured creditors are collectively annexed as exhibit 3.
(emphasis supplied)

In the said report the Official Liquidator in paragraph 8 has clearly stated that five financial institutions are of the view that the transfer of

proceeding to NCLT as directed by the Hon'ble Judge taking company matters may be implemented. In other words they consented to the proceeding being transferred to NCLT. Although the Act contemplates filing of an application for transfer of proceedings pending immediately before the commencement of the Insolvency and Bankruptcy Amendment Ordinance, 2018 in the present case having regard to the views expressed by the secured creditors insistent of any application for transfer would be a mere formality.

Moreover, the status report filed by the Official Liquidator in relation to the company liquidation shows that there has been no substantial progress in the liquidation proceeding and it cannot be said that the company in liquidation has suffered and/or likely to suffer a corporate death. The views of the secured creditors in deciding the matter is a relevant consideration.

Under such circumstances the order passed by the learned Single Judge in M/s. Corporate Ispat Alloys Limited is upheld.

The department is directed to transfer the record of CP/896/2016 to the National Company Law Tribunal, Calcutta, forthwith.

APO 35 of 2023 with IA. No. ACO/2/2023 is dismissed. However, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)