

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Biswaroop Chowdhury

APO/30/2022
WITH
CP/77/2012
ACO/3/2023
FORTUNE FURNITECH PRIVATE LIMITED
&
TAPAS CHAKRABARTY & ORS.
VS.
ASSET RECONSTRUCTION COMPANY (INDIA) LTD. AND ANR.

WITH
APO/31/2022
ACO/7/2023
FORTUNE FURNITECH PVT. LTD. (IN LIQN)
&
SHIVA SHAKTI SECURITY SERVICES
VS
OFFICIAL LIQUIDATOR AND ANR.

WITH
APO/33/2022
ACO/3/2022
FORTUNE FURNITECH PRIVATE LIMITED (IN LIQN)
&
ALOKE KUMAR GANGULY
VS
OFFICIAL LIQUIDATOR & ANR

For the Appellants (APO 30 of 2022) :- Mr. Ranjan Bachawat, Sr. Adv.
Mr. Niloy Sengupta.

For the Appellants (APO 31&33 of 2022):- Ms. Urmila Chakraborty,
Mr. Arindam Paul, Adv.

For Official Liquidator (APO 31 of 2022) :- Ms. Manju Bhutoria,
Ms. Shreya Chowdhury, Advs.

For Official Liquidator (APO 30&33 of 2022):- Ms. Smita Das, Adv.

For the ASREC :- Mr. Abhrajit Mitra, Sr. Adv.
Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Soumabho Ghosh,
Mr. Vikash Singh,
Ms. Sristi Burman,
Mr. Piyush Kumar, Advs.

For the ARCIL :- Mr. Avishek Guha,
Ms. Akansha Chopra, Advs.

For the Purchaser

**:- Mr. Sakya Sen,
Mr. Kaushik Banerjee, Advs.**

Judgment On

:- 07.12.2023

I. P. Mukerji, J.:-

The company Fortune Furnitech Pvt. Ltd. was ordered to be wound of by this court during the operation of the Companies Act, 1956. The procedure and proceedings for its liquidation started in that period.

Thereafter, the Companies Act, 2013 was enacted by Parliament repealing the 1956 Act and replacing it by a wholly new Act.

The Insolvency and Bankruptcy Code, 2016 was enacted on 28th May, 2016.

Section 434 of the Companies Act, 2013 was substituted by a new Section 434 with effect from 15th November, 2016. The proviso to Section 434(1)(c) provided that pending winding up proceedings, at a particular stage as may be prescribed by the Central government, were to be transferred to the tribunal.

The Central government prescribed that those winding up applications of which notice had not been served on the respondent would be transferred to the tribunal.

Another proviso was added with effect from 6th June, 2018 to the effect that in any proceedings relating to the winding up of companies pending before the court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 an application may be filed for transfer of such proceedings. The court on such application may transfer the proceedings to the tribunal. In that case the proceeding would be dealt with by the tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.

The appeal (APO 33 of 2022) is preferred by Alok Kumar Ganguly an empanelled valuer with the official liquidator who had been engaged by letter to value the assets of the Company in liquidation. He is aggrieved by the impugned order of the learned Single Judge dated 20th January, 2022 transferring the winding up proceedings to the tribunal without payment of his dues as valuer.

An application (ACO 3 of 2022) is taken out in the appeal (APO 33 of 2022) by Alok Kumar Ganguly. He wants modification of the division bench order of this court made on 17th May, 2022. It related to the claim of the valuer. The order had assessed the claim of the valuer at Rs.3,11,000/- and had directed Rs.87,000/- being 28% of the value to be deposited by ARCIL and Rs.72,000/- being 72% of the value by ASREC. By the said application, the applicant wants an additional amount of Rs.1,00,000/- to be added to the claim and to be shared by the said two secured creditors in the said percentage.

The appeal (APO 31 of 2022) is preferred by Shiva Shakti Security Services complaining of the judgment and order dated 20th January, 2022, passed by the learned company judge transferring the case to the Tribunal. The appellant's grievance is that such transfer was made without ordering payment for the security service charges of the appellant of more than Rs.1,12,30,874/-. The appellant was engaged by the Official Liquidator with the sanction of the court to protect the assets of the company.

The application (ACO 7 of 2023) connected with the appeal (APO 31/2022) is filed by ASREC (India) Ltd., a secured creditor of the company in liquidation. They stated therein that the only property of the company in liquidation were parcels of land measuring 16.02 bighas, 17.045 bighas and 6.99 bighas aggregating to 40.46 bighas in Mouza – Dirghanga, District – Hooghly, West Bengal. The company had two secured creditors namely the applicant and ARCIL. Both of them had a combined claim of about Rs.110 crores from the company. It was also averred in that application

that these two secured creditors had negotiated with a company Square Four Logistics Park Pvt. Ltd. of 238A, A.J.C. Bose Road, Kolkata – 700020 which had agreed to purchase the above property for Rs.18,13,26,547/-. If the said property was sold to this intending purchaser, these two secured creditors ASREC and ARCIL would divide up the net sale proceeds in the ratio of 72 : 28 respectively representing the value of their respective loans to the company. It was also stated in the application that the value offered by the intending purchaser was over Rs.12 crores which was the market value of the said property.

By this application, the applicant seek confirmation from the court for sale of the said property to the said intending purchaser upon their making payment of Rs.16,73,26,544/-. It may be mentioned here that at the time of negotiation, the intending purchaser had, according to the statement made in the petition paid Rs.1,40,00,000/- to the applicant.

We have taken note of the view expressed by the official liquidator. It has some merit. The normal procedure for effecting the sale of the assets of a company in liquidation should not be so easily bypassed by making a private treaty with an intending purchaser to purchase the said immovable property belonging to the company, now in liquidation. It is true that offers were invited by the Official Liquidator but no offer anywhere near the said offer by the intending purchaser introduced by the secured creditors was received.

However, we are minded to give another chance to the official liquidator to get a higher offer than that brought by the secured creditors. We grant the official liquidator time till 12th January, 2024 to advertise the sale of the subject property and hold an e-auction amongst the offerers, each of whom should make an earnest deposit of 10% of the offer, to be eligible to participate in the e-auction. The e-auction should be concluded by 31st January, 2024. If any offer higher than the offer brought by the secured creditors succeeds at the e-auction, the official liquidator shall not

conclude the sale in favour of the offerer, but shall file a report in this court stating the said outcome of the auction. If no such offer is received the Official Liquidator shall also indicate the same in his report to be filed in Court by 5th February, 2024.

The appeal (APO 30 of 2022) has been preferred by the company paid staff in the office of the Official Liquidator being aggrieved by the said judgment and order of the learned single judge. The main grounds of appeal are that the learned single judge erred in not considering payment of the security charges claimed by the provider Shiva Shakti Security Services, not considering the condition of the company paid staff whose source of salary is through the fund received on sale of the assets of the company on its winding up, in not appreciating that the property of the company was grossly undervalued by the valuer and a fresh valuation ought to have been ordered and also failing to appreciate that in the facts and circumstances of the case, the winding up proceedings ought not to have been directed to be transferred to the tribunal.

In the application (ACO 3 of 2023) connected with the appeal APO 30 of 2022 ASG Business (India) Pvt. Ltd. asked for setting aside of the order dated 12th July, 2023 by a division bench of this court which directed payment to Shiva Shakti Security Services and the valuer. There was also a prayer for the applicant to be added as a party in the appeal and also for return of the cheque dated 26th April, 2019 drawn by them on Kotak Mahindra Bank, Dhanbad.

The questions which need consideration in this appeal are as follows:

- a) What are the types of winding up proceedings which are to be retained by the High Court and not transferred to the tribunal?
- b) While dealing with the transfer of proceedings from the High Court to the tribunal what consideration is to be made by the Court of the fact that a sizable number of company paid staff are working in the Official

Liquidator's offices attached to 22 High Courts in the country whose pay and allowances are met out of the fund generated by the Official Liquidator on sale of the assets of the companies in liquidation?

- c) If during liquidation the Official Liquidator attached to the High Court has incurred expenses to protect the assets of the company to what extent should those expenses be paid out of orders passed by the High Court?
- d) Whether the learned judge adopted the correct approach in not considering the applications on merits and instead making an order of transfer of the proceedings to NCLT, when this was nobody's prayer?

CASES:-

In **Kaledonia Jute and Fibres Pvt. Ltd. vs. Axis Nirman and Industries Ltd. and Ors.** reported in **(2021) 2 SCC 403**, the Supreme Court noted that initially under the Companies Act, 2013 only winding up applications of which notice had not been served on the Company under Rule 26 of the Companies (Court) Rules, 1959 could be transferred. By subsequent insertion of a proviso by amendment on 6th June, 2018 to Section 434(1)(c), a party to a winding up proceeding could apply to the court to seek transfer of the proceedings before it. The court opined that in a winding up application a party to the proceeding had to be given a very wide meaning, to include the creditors and contributories. Therefore, by the above dictum of the Supreme Court parties of the above category had a right to apply to the court for transfer of the proceedings. When winding up of a company had become a foregone conclusion and the steps taken by the company court were such as to indicate that the process of winding up was irreversible "making it just impossible to set the clock back, the company court must proceed with the winding up instead of transferring the proceedings to NCLT". The highest court opined that what also followed was that after this amendment even post admission winding up petitions, in applications after appointment of a company liquidator to take over the

assets of a company “discretion is vested in the company court to transfer such petition to NCLT.”

Whether an irreversible stage had been reached “would depend upon the facts and circumstances of each case.” This interpretation of the law was made by the Supreme Court in **Action Ispat and Power Pvt. Ltd. vs. Shyam Metalics and Energy Ltd.** reported in **(2021) 2 SCC 641**. In that case the Official Liquidator had taken possession of the registered office of the appellant company together with its factory premises, all books and other records. The Supreme Court held that this did not signify that any irreversible step had been taken. The irreversible step must be “corporate death.”

“.....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 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.....”

This was the dictum of the Supreme Court in **Navinchandra Steels Pvt. Ltd. vs. Srei Equipment Finance Ltd. and Ors.** reported in **(2021) 4 SCC 435**.

The question which now arises is whether this court in exercise of its jurisdiction under the said proviso to Section 434(1)(c) of the Companies Act should transfer the winding up application to the NCLT?

As far as this company is concerned, the winding up order was passed more than one decade ago. No creditor or contributory of the company has come forward to revive it or present a scheme to the court, for payment to the secured creditors and other creditors of the company, which include its workers. From time to time the court has passed orders to safeguard the assets of the company, by employment of security agencies on terms and

conditions set by it. These agencies have provided protection to the assets and are claiming amounts on account of their fees and charges. The court which passed orders authorizing their engagement has a duty to ensure that they are paid. It also has a similar duty towards the valuer who is also engaged by the court in assessing the value of the property of the company-in-liquidation.

As such, the chance of revival of the company is practically nil.

The secured creditors have also introduced an intending purchaser to the court who are willing to buy the assets of the company through which the claim of the secured creditors and others can be met. The Official Liquidator wants to conduct their sale through an e-auction. The secured creditors want early conduct of the sale of the assets to their nominee purchaser who is said to be prepared to make payment of a higher price.

If we take all these facts into account, nobody can deny that “death” of the company by sale and distribution of its assets is imminent.

If those assets are sold by the court and distributed by it, it would be speedier and more convenient than relegating the whole matter to the tribunal.

Another and a very strong ground made out in this appeal is that the impugned judgment and order was passed for transfer of the proceedings to NCLT when the application by ARCIL on which the order was passed sought revaluation of the assets of the company-in-liquidation, the secured creditor. Instead of considering the merits of the application the learned judge simply transferred the proceedings to the tribunal. There was no application before the court by any person for transfer of the proceedings. The said proviso expressly lays down that such transfer order could be made only when an application to that effect had been made. The learned judge ought to have dealt with the question of valuation of the assets as raised before him instead of leapfrogging procedure to pass an order of

transfer. Undoubtedly, the Supreme Court has said in the cases discussed above that when corporate death for a company is certain, then only the company court could retain winding up proceedings. If there was semblance of a chance of revival of the company, the matter was to be transferred to the tribunal.

As we have said, in our opinion, whether to transfer a pending winding up proceeding to the tribunal has to be decided on the facts and circumstances of each case. The categories of cases which can be so referred have not been closed by the above decisions of the Supreme Court.

Instances of such cases as is the case with this company may be as follows:-

- a) The winding up proceedings have been pending for years. The promoters of the company and its principal shareholders and directors at the time of its winding up have all disappeared or do not show any interest in the revival of the company.
- b) The secured creditors also do not show any interest in its revival.
- c) Workers who have been thrown out of employment are in great financial hardship for years. Their wages for working in the company remain outstanding and unpaid.
- d) After the winding up order has been made the official liquidator has taken steps for protection of the assets of the company and for this purpose has employed security personnel to guard those assets against pilferage and damage. This arrangement is made with the sanction of the company Court. It becomes the solemn duty of that court to ensure that these security providers are paid out of sale of the assets of the company or by the secured creditors whose assets are protected by them. When such is the obligation incurred by the court, it is desirable that the winding up proceedings are retained by court to enable the court to pass appropriate orders for payment of these service providers. These service providers might

also include surveyors and valuers with the official liquidator with the sanction of the Court to survey and value the assets of the company.

There is a body of employees called the company paid staff who are special employees in the office of the official liquidator and under directions of the company court, spanning several decades have been paid out of the funds in the hands of the official liquidator realized out of sale of the assets of the company in liquidation. The government has not made any provision for absorption of these employees. As long as the present employees remain in the rolls of the Official Liquidator as company paid staff, the company court should lean in favour of retention of winding up proceedings to the extent of providing salary to these personnel. There may not be any further recruitment but the existing staff till their age of superannuation should be retained out of the funds generated from liquidation proceedings.

In those circumstances, the only conclusion that can be drawn is that there is no credible hope of revival of the company and that it would suit the interest of all stakeholders and of the public if its liquidation was speedily carried out. Thus the learned judge ought not to have passed the impugned order relegating this matter to the tribunal.

We set aside the impugned order in each appeal and direct the winding up proceedings to be conducted and concluded as early as possible. We remit the issues involved in the appeals and the applications except Appeal APO 31 of 2022 and the application ACO 7 of 2023 to the learned trial court to pass necessary orders in aid of winding up of the company. All the appeals and the connected applications (APO 30 of 2022 with ACO 3 of 2023 and APO 33 of 2022 with ACO 3 of 2022) except the appeal APO 31 of 2022 with ACO 7 of 2023 are disposed of accordingly.

(I. P. Mukerji, J.)

Biswaroop Chowdhury, J.:-

I have perused the Judgment delivered by my Learned Brother and have agreed to the grounds cited and final order made therein. However I add the following grounds.

In the judgment my Learned Brother has discussed about the decisions of the Hon'ble Supreme Court with regard to transfer of the Liquidation Proceedings pending before High Court to Tribunals.

Upon perusing the decisions of the Hon'ble Supreme Court as discussed above and upon considering the proviso of Section 434(1)(c) of the Companies Act 2013 it is clear that Company Court has discretion to transfer proceedings to NCLT in accordance with the provisions of the Code, considering the facts and circumstances of each case. Further it is also observed by the Hon'ble Apex Court in Para – 39 of the Judgment in Kaledonia Jute and Fibres (P) Ltd (Supra) that the right to invoke the 5th proviso is specifically conferred only upon the parties to the proceedings. Therefore on a literal interpretation such a right should be held to be confined only to the parties to the proceedings. Thus it will be clear from the observations of the Hon'ble Apex Court in the decisions mentioned above that the suo-moto power of transfer which may be followed in case of pending proceedings of Winding up on the ground of inability to pay its debts, where the petition has not been served on the respondent rule-26 of the companies (Court) Rules 1959, cannot be exercised in cases where petition is served on the respondent, matter is admitted or when transfer is sought to be made by Court under 5th proviso to Section 434 (1)(c) of the Companies Act 1913. In such cases order for transfer should be made on the application of any party and upon giving the opposite parties an opportunity of being heard. In the instant matter copy of the petition is already served on the respondent, Liquidator appointed, Sale notice issued which is under challenge before Learned Trial Court and there is grievance that unless a scheme is framed with regard to salaries of Companies staff

they will suffer irreparable loss and injury. Learned Judge thus erred in passing order of transfer without any application for transfer to N.C.L.T. by any party and without considering the present stage of the proceedings. The order passed by the Learned Trial Judge hence cannot be sustained and with due respect the same should be set aside.

Urgent certified photo copy of this judgment and order if applied for be furnished to the appearing parties on priority basis upon completion of necessary formalities.

(Biswaroop Chowdhury, J.)