OD-1

ORDER SHEET

APOT/140/2024
WITH
CP/808/2016
IA NO: ACO/1/2024

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

IN THE MATTER OF :
BELLS CONTROL LIMITED (IN LIQN.)
AND
FESTINO MARKETING PVT. LTD.
VERSUS
OFFICIAL LIQUIDATOR, HIGH COURT, CALCUTTA AND ANR.

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date : 2nd January, 2025.

Appearance:
Mr. Krishnaraj Thaker, Adv.
Mr. Debdut Mukherjee, Adv.
Mr. Tamoghna Saha, Adv.
...for the appellant

Mr.Pratik Ghose, Adv.
Mr. Avishek Roy Chowdhury, Adv.
..for respondent no.2

1. This appeal is arising out of an order passed by Justice Ravi Krishan Kapur on 12th March, 2024 in an application filed by one of the unsecured creditors for transfer of proceeding to NCLT.

2. While disposing of the matter, in paragraph 7 of the impugned order, Justice Kapur has directed NCLT to deal with the proceeding from the post admission stage of liquidation. In arriving at the said finding, the learned Single Judge has taken consideration of the fact that expert body has examined the question of revival of the company (in

liquidation) and the order dated 16th January, 2017 passed by Justice I.P. Mukerji, as his Lordship then was and now the Chief Justice of Meghalaya High Court there is no further question of re-opening of the order of winding up upon acceptance of the recommendation of AAIFR. The BIFR did not find it viable to revive the company on objective criteria. The provisions of SICA would prevail over the provisions of the new repealed Companies Act, 1956. The provisions of SICA contain non-abstante clauses. It is a special statute. The jurisdiction of the company court in matters relating to the winding up of a sick company would arise only when BIFR or AAIFR as the case may be, has exercised its jurisdiction under Section 20 of SICA recommending winding up of the company upon arriving at the finding that there does not exist any chance of revival of the company.

3. Winding up proceedings in relation to a matter arising out of the recommendations of the BIFR commences on the date when the Company Judge applies its mind to initiate a proceeding relying on or on the basis thereof and it is on such date the proceedings for winding up would be deemed to have been started. The order dated 16th January 2017 is reproduced below:

"The Court: An affidavit of service is on record. Learned counsel for the petitioner submits that the cause papers have been duly served on the company. None appears for them. The Board for Industrial and Financial Reconstruction of its order dated 16th May, 2007 recommended winding up of the company, which was confirmed by AAIFR by its order dated 13th April, 2011.

The matter is now before this court for passing a formal order of winding up.

When the above is the position, this court has no manner of hesitation in directing winding up of the company. I accordingly do so. I also direct the official Liquidator attached to this court to forthwith take possession of the assets and effects of the company.

This application is, accordingly, disposed of."

4. Thereafter several orders were passed by a co-ordinate bench in an appeal against the said order at the instance of a contributory being **APO No. 370 of 2017, ACO No.85 of 2017, ACO No. 86 of 2017 in CP No. 808 of 2016** in the High Court at Calcutta, Civil Appellate Jurisdiction, Original Side (Re. Bells Control Ltd.(in Liqn.) and Kotak Mahindra Bank Ltd. vs. Shantanu Deb Mookerjea & Ors.). The said appeals were disposed of on 22nd August, 2017, inter alia, with the following observations:

"APO 370 of 2017 and ACO No. 86 of 2017 are disposed of by recording that the status as existed immediately prior to the order dated April 17, 2017 being passed will be preserved, now that the Official Liquidator is in possession of such of the assets that had been relinquished pursuant to the relevant order. The contributory's application, CA No. 187 of 2017, will be decided in accordance with law upon notice to all concerned, particularly the appellant herein.

There will be no order as to costs.

It is recorded that several other properties, including the immovable properties, of the company (in liquidation) are not in the control of the Official Liquidator and the Official Liquidator and the creditors of the *company (in liquidation) will be entitled to seek appropriate directions from the Company Court in such regard."*

5. The order of the co-ordinate bench however has diluted the order dated 16th January, 2017 and 17th April, 2017 to the extent indicated in the said order.

6. During the pendency of such proceeding an application has been find for transfer of the winding up proceedings being CP No.808 of 2016 to the National Company Law Tribunal (NCLT). The contention of the appellant appears to be that in view of the amended provisions of Section 434 of the Companies Act, 2013 the winding up proceedings along with all connected applications cannot be proceeded with any further before this court and should be transferred to the NCLT.

7. It is being strenuously argued that NCLT is required to appoint a Resolution Professional in order to assess the revival of the company. The said submission is made on the basis of observation made in paragraph 17 of ***Jaipur Metals and Electricals Employees Organisation v. Jaipur Metals and Electricals Limited*** reported at **2019 (4) SCC 227** which reads:

"17. However, though the language of Rule 5(2) is plain enough, it has been argued before us that Rule 5 was substituted on 29-6-2017, as a result of which, Rule 5(2) has been omitted. The effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SIC Act to NCLT, as otherwise, a specific rule would have to be framed transferring such cases to NCLT, as has been done in Rule 5(1). The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, only once,

on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court. It was unnecessary to continue Rule 5(2) even after 29-6-2017 as on 15-12-2016, all pending cases under Section 20 of the SIC Act were to continue to be dealt with by the High Court before which such cases were pending. Since there could be no opinion by the BIFR under Section 20 of the SIC Act after 1-12-2016, when the SIC Act was repealed, it was unnecessary to continue Rule 5(2) as, on 15-12-2016, all pending proceedings under Section 20 of the SIC Act were to continue with the High Court and would continue even thereafter. This is further made clear by the amendment to Section 434(1)(c), with effect from 17-8-2018, where any party to a winding-up proceeding pending before a court immediately before this date may file an application for transfer of such proceedings, and the Court, at that stage, may, by order, transfer such proceedings to NCLT. The proceedings so transferred would then be dealt with by NCLT as an application for initiation of the corporate insolvency resolution process under the Code. It is thus clear that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the SIC Act pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings post 17-8-2018. Once this is done, the High Court must transfer such proceedings to NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code.”

8. We do not find any provision which may bar an applicant to apply for revival of the company under changed circumstances. No such circumstances however, have been revealed before us. Moreover, the application of the contributory is also required to be decided. The appellant has a claim of only Rs.18 lakhs and is not supported by any

other creditor. There is not a single averment in the petition that the appellant is willing to revive the company. However, we are not expressing any final opinion with regard to the revival of the company and it would be for the NCLT to take a decision in this regard considering the order passed by the co-ordinate bench on 22nd August, 2017.

9. In the instant case unlike in **Jaipur Metals** (supra) there has been a decision on winding up subject to the rights preserved by the Co-ordinate Bench in the orders referred earlier.

10. With these observations, the appeal and the application are disposed of. However, there shall be no order as to costs.

11. Affidavit of service filed in Court today is kept with the record.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

bp/R.Bhar