

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 12023 OF 2018
[ARISING OUT OF SLP(CIVIL) NO.18598 OF 2018]

JAIPUR METALS & ELECTRICALS
EMPLOYEES ORGANIZATION
THROUGH GENERAL SECRETARY
MR. TEJ RAM MEENA

...APPELLANT

VERSUS

JAIPUR METALS & ELECTRICALS LTD.
THROUGH ITS
MANAGING DIRECTOR & ORS.

...RESPONDENTS

J U D G M E N T

R.F. NARIMAN, J.

1. Leave granted.
2. The present appeal has been filed by an employees' union challenging the judgment of the High Court of Judicature for Rajasthan dated 01.06.2018, in which the High Court has refused to transfer winding up proceedings pending before it to

the National Company Law Tribunal (“**NCLT**”), and has set aside an order dated 13.04.2018 of the NCLT by which order a financial creditor’s petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“**Insolvency Code**” or “**Code**”) has been admitted.

3. This case has had a chequered history. On 30.09.1997, the account of the Respondent No. 1 company had become a non-performing asset, and since the company’s net worth had turned negative, a reference was made to the Board for Industrial and Financial Reconstruction (“**BIFR**”) under the Sick Industrial Companies (Special Provisions) Act, 1985 (“**SIC Act**”). On 26.09.2002, the BIFR was of the *prima facie* opinion that the company ought to be wound up, which opinion was forwarded to the High Court. The High Court ultimately registered the case as Company Petition No. 19/2009. The Alchemist Asset Reconstruction Company Ltd. (Respondent No. 3) acquired substantially all the financial debts of Respondent No. 1. The State of Rajasthan tried to revive the company, but with no success. Ultimately, in a writ petition filed

by a workers' union, being Writ Petition No. 504/2000, the High Court, on 07.12.2017, directed the Official Liquidator to be provisionally attached to the Court, and to join in the evaluation of the value of goods and material lying in the factory premises of the company so that dues of the workmen could be paid.

4. In the meanwhile, on 11.01.2018, the Respondent No. 3 herein preferred an application under Section 7 of the Insolvency Code, stating that it had an assigned debt of INR 356 crores owed to it by the Respondent No. 1. Considering the fact that the debt was admitted by the company and that till date no liquidation order had been passed in the winding up proceedings that were pending before the High Court, the NCLT held, referring to the non-obstante clause contained in Section 238 of the Insolvency Code, that it was satisfied that the conditions of Section 7 had been fulfilled and that, therefore, the application should be admitted. Accordingly, a moratorium was declared in terms of Section 14 of the Code and an interim resolution professional was appointed.

5. Meanwhile, in Company Petition No. 19/2009 and other connected matters, being various writ petitions that were filed by labour unions, the High Court, by an interim order dated 26.04.2018, stayed implementation of the order passed by the NCLT on 13.04.2018. Against this order, a Special Leave Petition (“**SLP**”) was preferred in which this Court, on 09.05.2018, dismissed the SLP as withdrawn and directed the petitioner to make submissions before the High Court in the pending company petition and allied matters. The High Court then passed the impugned judgment dated 01.06.2018, in which it refused to transfer the winding up proceedings pending before it, and set aside the NCLT order dated 13.04.2018, stating that it had been passed without jurisdiction. Accordingly, the writ petitions and the company petition were placed for further orders on 05.07.2018. On 16.07.2018, this Court issued notice and stayed the operation of the impugned judgment.

6. Shri Sidharth Luthra, learned Senior Advocate, appearing on behalf of the appellant, and Shri P. Chidambaram, learned Senior Advocate, appearing on behalf of Respondent No. 3,

have argued that a perusal of the Eleventh Schedule of the Code and amendments made to the Companies Act, 2013, particularly to Section 434 therein, would show that all winding up proceedings pending before the High Court are to stand transferred to the NCLT at such stage as may be prescribed by the Central Government by rules made in this behalf. They then referred to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 ("**2016 Transfer Rules**"), and in particular, to Rule 5(2) thereof. They then argued that as Rule 5(2) was not continued on and after 29.06.2017, it would be clear that winding up of companies that are initiated under the SIC Act cannot, after such omission, be continued to be dealt with by the High Court. According to them, the High Court judgment was incorrect as Rule 5, and not Rule 6, of the 2016 Transfer Rules applied. Post omission of Rule 5(2), therefore, proceedings would in any case stand transferred to the NCLT. Alternatively, they argued that in any case, the 2018 amendment made to Section 434(1)(c) added a proviso, by which any party to any winding up proceedings that are pending before a High Court may file an application for transfer of such

proceedings, and the Court is then obliged to transfer such proceedings to the NCLT. They also argued that in any case, a Section 7 application made by Respondent No. 3 before the NCLT was an independent application which was correctly admitted by the NCLT, which correctly applied Section 238 of the Insolvency Code.

7. Shri Siddharth Dave, learned counsel appearing on behalf of Respondents No. 4 and 5, supported the judgment of the High Court. According to the learned counsel, even if Rule 5 of the 2016 Transfer Rules were to apply, Rule 5(2) made it clear that the present proceedings would continue before the High Court, being proceedings for winding up of a company pursuant to Section 20 of the SIC Act. The omission of this Rule in the amendment made to Rule 5 on 29.06.2017 would not impact the High Court continuing to deal with this matter as the SIC Act had been repealed with effect from 01.12.2016, and together with the repeal, it was necessary to state that proceedings for winding up that were initiated under Section 20 of the SIC Act would continue to be dealt with by the High Court. Once this

was stated to be so, when the amendment was made to Rule 5, it became unnecessary to continue with the said provision as all such proceedings are to continue to be dealt with by the High Court on and from the date of repeal of the SIC Act. Equally, according to the learned counsel, Section 238 of the Code has no application as it is a non-obstante clause which interdicts a clash between the Insolvency Code and other statutes. Inasmuch as the amendments to Section 434 of the Companies Act, 2013 have been made pursuant to the Eleventh Schedule of the Insolvency Code itself, Section 238 would have no application, and, therefore, the winding up proceedings pending before the High Court would have to reach their logical conclusion. This being so, the High Court judgment is correct.

8. Having heard learned counsel for all parties, we first need to deal with a preliminary objection raised by Shri Siddharth Dave. According to the learned counsel, an appeal against the judgment dated 01.06.2018 has been filed by Respondent No. 3, and since this appeal is still pending, we should not entertain an SLP filed at the behest of an employees' union which is in

cahoots with Respondent No. 3. Ordinarily, we would have relegated the appellant to the Division Bench, but since the questions raised are of importance generally, it is better that an authoritative decision be given at the earliest. It is for this reason that we have entertained this SLP directly against the order of a single Judge. Shri Luthra has also pointed out that it is incorrect to say that the client that he represents is a derecognized or unrecognized union in cahoots with Respondent No. 3, and has pointed out a certificate of registration of the said union. Be that as it may, since this SLP raises important questions of law which need to be decided at the earliest, we have disregarded this preliminary objection.

9. Section 255 of the Insolvency Code reads as follows:

“255. Amendments of Act 18 of 2013.—The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule.”

In pursuance of this Section, the Eleventh Schedule to the Code makes various amendments to the Companies Act, 2013. On 15.11.2016, with effect from 01.12.2016, Section 434 of the Companies Act, 2013 was substituted as follows:

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

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under subsection (1) of Section 10-E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(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:

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.”

On and from 17.08.2018, by an amendment made to the Eleventh Schedule of the Code, Section 434 was substituted as follows:

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

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of Section 10-E of the Companies Act, 1956, immediately before such date

shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

(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 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 an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.”

10. On 07.12.2016, in exercise of powers under Section 434 of the Companies Act, 2013 read with Section 239 of the Insolvency Code, the Companies (Transfer of Pending Proceedings) Rules, 2016, came into force with effect from 01.04.2017. What is of relevance for decision in the present

case is Rules 5 and 6 of the 2016 Rules, which are set out as follows:

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.—(1) 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 Section 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 accordance 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.

6. Transfer of pending proceedings of winding up matters on the grounds other than inability to pay debts.—All petitions filed under clauses (a) and (f) of Section 433 of the Companies Act, 1956 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 exercising territorial jurisdiction and such petitions shall be treated as petitions under the provisions of the Companies Act, 2013 (18 of 2013).”

11. By an amendment dated 29.06.2017, Rule 5 was then substituted as follows:

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.—(1) 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 under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Companies Act, 2013 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 accordance 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 upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petition shall, after the 15th day of July, 2017, be eligible to file fresh applications under Sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this Rule and remains in the High Court and where there is another petition under clause (e) of Section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

12. It is clear that under Section 434 as substituted by the Eleventh Schedule to the Code *vide* notification dated 15.11.2016, all proceedings under the Companies Act, 2013 which relate to winding up of companies and which are pending immediately before such date as may be notified by the Central Government in this behalf shall stand transferred to the NCLT. The stage at which such proceedings are to be transferred to

the NCLT is such as may be prescribed by the Central Government.

13. When Rules 5 and 6 of the 2016 Transfer Rules (un-amended) are read, it is clear that three types of proceedings are referred to. Under Rule 5(1), petitions which relate to winding up under clause (e) of Section 433 of the Companies Act, 1956 on the ground of inability to pay debts that are pending before the High Court are to be transferred to the NCLT in case the petition has not been served on the respondent. They shall then be treated as applications under Sections 7, 8, or 9 of the Code and dealt with in accordance with Part II of the Code. Similarly, all petitions filed under clauses (a) and (f) of Section 433 of the Companies Act, 1956 pending before the High Court, in which the petition has not been served on the respondents, shall be transferred to the NCLT. Only such petitions will continue to be treated as petitions under the provisions of the Companies Act, 2013. The third category of cases dealt with by Rules 5 and 6 is contained in Rule 5(2). This category relates to cases where the BIFR has

forwarded an opinion to the High Court to wind up a company under Section 20 of the SIC Act. All such cases, whatever be the stage, shall continue to be dealt with by the High Court in accordance with the provisions of the SIC Act.

14. It is clear that the present case relates to Rule 5(2) alone. Despite the fact that Section 20 of the SIC Act speaks of a company being wound up under the Companies Act, 1956 under the just and equitable provision, which is Section 433(f) of the Companies Act, 1956, yet, since cases that fall under Section 20 of the SIC Act are dealt with separately under Rule 5(2), they cannot be treated as petitions that have been filed under Section 433(f) of the Companies Act, 1956, which are separately specified under Rule 6. The High Court is therefore not correct in treating petitions that are pursuant to Section 20 of the SIC Act as being pursuant to Section 433(f) of the Companies Act, 1956 and applying Rule 6 of the 2016 Transfer Rules.

15. However, though the language of Rule 5(2) is plain enough, it has been argued before us that Rule 5 was

substituted on 29.06.2017, 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 the NCLT, as otherwise, a specific rule would have to be framed transferring such cases to the 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 29.06.2017 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 01.12.2016, 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 17.08.2018, 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 the NCLT. The proceedings so transferred would then be dealt with by the 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 17.08.2018. Once this is done, the High Court must transfer such proceedings to the NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code.

16. The High Court judgment, therefore, though incorrect in applying Rule 6 of the 2016 Transfer Rules, can still be supported on this aspect with a reference to Rule 5(2) read with

Section 434 of the Companies Act, 2013, as amended, with effect from 17.08.2018.

17. However, this does not end the matter. It is clear that Respondent No. 3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No. 3 at any time before a winding up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows:

“238. Provisions of this Code to override other laws.—The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

18. Shri Dave’s ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be

rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the

Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment.

.....J.
(R.F. NARIMAN)

.....J.
(M.R. SHAH)

**New Delhi;
December 12, 2018.**