

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Company Appeal No. 1 of 2024

Reserved on : 23.04.2025

Date of Decision: 25.04.2025

Elecon Engineering Company Limited ...Petitioner

Versus

M/s Inox Wind Limited & Anr. ...Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Sushil Kukreja, Judge.

Whether approved for reporting? Yes.

For the Appellant: Mr. V. D. Khidtta and Mr. Nishan Khidtta, Advocates.

For the Respondents: Mr. Sunil Mohan Goel, Senior Advocate with Mr. Vipul Sharda and Mr. Radiya Katochi, Advocates.

Tarlok Singh Chauhan, Judge

Aggrieved by the order dated 02.08.2024 passed by the learned Company Judge, whereby the company petition has been ordered to be transferred to the National Company Law Tribunal (for short '**NCLT**'), the appellant has filed the instant appeal.

2. The appellant filed the petition for winding up of the respondent-company on the ground that the respondent-company has failed and neglected to make the payment of the outstanding amount of Rs. 3,25,78,000/- (Rs.1,41,78,000/- towards supply of gear box materials i.e. H.G. Wind Gear Box

and Rs. 1,84,00,000/- towards Refundable Security Deposit), which is due and payable by the respondent-Company to the petitioner-Company. It was averred that the respondent-company has lost its substratum and has become commercially insolvent and is unable to make payment of the amount due to the petitioner-company and it is just and equitable that the respondent-company is ordered to be wound-up under the provisions of the Companies Act.

3. During the pendency of the company-petition, the respondent moved an application under Section 434(1)(c) of the Companies Act (for short '**Act**') for transferring the case to the NCLT at Chandigarh, which as observed above, came to be allowed by the learned Company Judge.

4. It is vehemently argued by Shri V. D. Khidtta, learned Advocate duly assisted by Shri Nishant Khidtta, Advocate, that the findings recorded by the learned Company Judge, is not only wrong and contrary to law but the same are perverse inasmuch as much reliance has been placed on the judgment passed by three-Judge Bench of the Hon'ble Supreme Court in **Action Ispat and Power Pvt. Ltd. vs. Shyam Metalics and Energy Limited 2021 (2) SCC 641**, which judgment in fact though forms the basis of the decision of the case but was not at all applicable. He has also placed strong reliance on the judgment

of the Karnataka High Court in **Company Application No. 31 of 2024 in Company petition No. 42 of 2016**, titled as **M/s Magnifico Minerals Pvt. Ltd. vs. M/s Saravana Alloys Steels Pvt. Ltd.** to contend that the discretion to transfer the case had to be exercised judiciously and not mechanically.

5. On the other hand, Shri Sunil Mohan Goel, learned Senior Advocate duly assisted by Shri Vipul Sharda, Advocate, would vehemently contend that the findings recorded by the learned Company Judge having rendered strictly in accordance with law, warrants no interference.

6. We have heard the learned counsel for the parties and have gone through the material placed on record.

7. It would be noticed that Section 434 (c) of the Act has been amended more than one time and before substitution made in the year, 2013, Section 434(c) reads as follow:

“(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.”

8. In the year 2016 by Act 31 of 2016, Section 434(c) was substituted w.e.f. 15.11.2016 and then 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.”

9. After the amendments on 29.06.2017 and 17.08.2018, the entire Section 434 including sub section (1)(c), reads as under:-

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 10E of the Companies Act, 1956 (1 of 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 (1 of 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 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 of 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).

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.

(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. As would appear from the substituted sub 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 proceedings by the phrase

“only such proceedings relating to winding up the companies” as may be prescribed by the Central Government.

11. 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 Proceedings) Rules, 2016 (for short '**Rules**').

12. Rule 5 of the aforesaid Rules, reads as under:-

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

(1) All petitions relating to winding up of a company 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 to be 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.”

13. The fifth provision 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 were likely to arise by reason of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (for short '**IBC**'). By reason of IBC there could be a possibility of initiation of proceedings under Sections 7 and 8 of IBC in relation to a company against whom a winding up petition is pending. A reading of the provisions of IBC with the Companies Act, 2013 undoubtedly would have primacy over the Companies Act, in case, there is a conflict 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.

14. The facts in ***Action Ispat and Power Pvt. Ltd. (supra)*** were that winding up application was filed under Section 433(e) and (f), 434 and 439 of the Companies Act against the company seeking winding up and it was 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 the 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 Hon'ble 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.

15. The Hon'ble Supreme Court observed that prime focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting it from its own management and from a corporate death by liquidation. The IBC Code was held to be a beneficial piece of legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The Hon'ble Supreme Court also 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 Law Tribunal and pre admission proceeding would be compulsorily transferred to NCLT.

16. The learned Company Judge has relied upon paras 14 and 25 of the aforesaid judgment in **Action Ispat and Power Pvt. Ltd. (Supra)**, to transfer the proceedings, which read as under:-

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

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 pre-admission 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 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.

17. It is vehemently argued by Mr. V. D. Khidtta, learned Advocate that the judgment passed by the Hon'ble Supreme Court in ***Action Ispat and Power Pvt. Ltd. (supra)*** was essentially passed in the background that there were parallel proceedings going on before the IBC as well as before the learned Company Judge and that is precisely why winding up petition was transferred to NCLT.

18. We, however, cannot agree with such submission as ***Action Ispat and Power Pvt. Ltd. (supra)*** judgment itself came up for consideration subsequently before the Hon'ble Supreme Court in ***A. Navinchandra Steels Pvt. Ltd. vs. Srei Equipment Finance Ltd. and Ors. (2021) 4 SCC 435***, wherein it was held as under:-

"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.”

19. Adverting to the facts in the present case, there is nothing that can be said to have irretrievable in the instant case in the sense mentioned in para 25 of the ***Action Ispat Judgment (supra)***, wherein it was clarified that So long as no actual sales of the immovable or movable properties had 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 now to be decided in accordance with the provisions of the Code. It has clearly been mentioned in the aforesaid paragraphs that only where a company is winding up or near corporate death and no transfer or winding up proceedings would then take place to the NCLT to be tried as a proceedings under 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.

20. Thus, what can be concluded from the aforesaid judgment is that unless the Court is convinced that the companies to suffer inevitable corporate death, the first choice would be to make an all out attempts to revive the company and this procedure has been elaborately laid in the IBC. The Companies Act, 2013 is clearly not suited for such situation and this is clearly reflected in amended and substituted Section 434 of the Act read with Sections 7 and 8 of the IBC and objects and reasons of both the statutes. Moreover there is no conflict between the two proceedings.

21. Learned counsel for the appellant would then argue that the transfer of the winding up petition was only discretionary, which could not have been exercised in a manner causing prejudice to the appellant.

22. No doubt, the Court has the discretion to transfer proceedings depending upon the stage of the proceedings. Obviously, the main consideration that would weigh before the Court as to whether the corporate death of the company is inevitable, then it would exercise its jurisdiction not to transfer such proceedings and where nothing can be said to have become irretrievable in the sense as mentioned in para 25 of the ***Action Ispat and Power Pvt. Ltd. (supra)***, then the Court would normally transfer such proceedings.

23. In view of the aforesaid discussion and for the reasons stated above, we see no reason to interfere with the view taken by the learned Company Judge. Consequently, we find no merit in this appeal and the same is accordingly dismissed.

(Tarlok Singh Chauhan)
Judge

(Sushil Kukreja)
Judge

25th April, 2025
(sanjeev)