

Comp.A.Nos.273, 177 & 161 of 2019, 59 to 61, 336, 431, 432, 479 &  
480 of 2018, 462, 463 & 476 to 480 of 2017 and 220 & 221 of 2016  
in CP No.267 of 2015 and OSA No.93 of 2019

S.MANIKUMAR, J.  
**AND**  
SUBRAMONIUM PRASAD, J.

[Order of the Court was made by **SUBRAMONIUM PRASAD, J.**]

By order dated 14.07.2017, a learned Single Judge, has referred a question of law, to a Hon'ble Division Bench, so that an authoritative pronouncement can be given on the question. The order also states that after the Hon'ble Division Bench answers the reference, the Bench may direct the Company Court to proceed in accordance with their directions. The Question of Law referred is:

"Whether when a batch of petitions, seeking winding up on the ground of inability to pay, filed under the provisions of the Companies Act, 1956, are pending before this Court and were not expressly transferred to the NCLT, could the provisions of the IBC be invoked and applications be preferred to the National Company Law Tribunal?"

2. The facts in brief, as placed by the respondent in the company petition viz., CP No.267 of 2015 and the applicant in Company Application Nos.462, 463, 480 of 2017, are that one Ganesh Lal Jain has filed CP No.267 of 2015 in this Court against the applicant viz., Vasan Health Care Private

Limited, for winding up of the company under Sections 433(2) and 433(f) read with Sections 434 & 439(1) of the Companies Act, 1956, for non payment of dues of Rs.4,74,26,261/-.

3. On 10.08.2015, this Court admitted the Company petition and passed the following order.

"1. That the Official Liquidator, High Court, Madras, be and hereby is appointed as Provisional Liquidator of the respondent company viz., M/s.Vasan Health Care Pvt. Limited.

2. That the Official Liquidator appointed herein be and hereby is directed to take charge of the assets of the aforesaid respondent company.

3. That the Ex-Directors of the respondent company be and hereby is directed to file their statement of affairs before the Official Liquidator within a period of 21 days.

4. That the notice of this company petition be affixed on the Court notice board, and at the premises of the registered office of the respondent company.

5. That the notice of this company petition returnable by 01.10.2015 be served on the respondents herein and at the Registrar of Companies, Madras.

6. That the petitioner herein be and hereby is directed to publish the company petition in one issue of Tamil Daily viz., "Makkal Kural" and in one issue of English Daily viz., "News Today" (both Chennai Edition) and also in the Tamil Nadu Government Gazette by fixing the date of hearing on 01.10.2015.

7. That the petitioner company shall deposit a sum of Rs.20,000/- (Rupees Twenty Thousand only) towards the initial

expenses to the Official Liquidator in this matter.

8. That the Company Petition No.267 of 2015 do stands adjourned to 01.10.2015."

4. Another Company Petition viz., CP No.389 of 2015 has been filed by one M/s.PVR Limited under Sections 433(2) and 433(f) read with Sections 434 & 439(1) of the Companies Act, 1956, for non payment of dues of Rs.1,43,80,284/-.

5. CP No.418 of 2015 has been filed by one Safilo India Private Limited, under Sections 433(2) and 433(f) read with Sections 434 & 439(1) of the Companies Act, 1956, for non payment of dues of Rs.1,24,01,689/-

6. Applications have been filed by M/s.Vasan Health Care Private Limited (hereinafter referred to as applicant company), numbered as CA Nos.967 & 968 of 2015, seeking to setaside the order dated 10.08.2015, and for a stay of the said order. This Court on 16.09.2015, directed the official liquidator to hold on, from taking charge of the assets of M/s.Vasan Health Care Private Limited, till a schedule of payment is filed by M/s.Vasan Health Care Private Limited, (hereinafter called as Applicant Company). The said order was extended on 23.09.2015, and is still in force as on today.

7. On 12.10.2015, the Company Court recorded a compromise entered into between the parties to CP No.267 of 2015, i.e., the landlord and the applicant company, by giving a schedule of payment. This Court further directed that in case of two successive defaults, the petitioner in CP No.267 of 2015 shall be entitled to seek for revival of the present winding up order dated 10.08.2015. Thus, C.P.No.267 of 2015, was closed, in terms of memo of settlement, vide order dated 12.10.2015. C.A.Nos.220 & 221 of 2016 in CP No.267 of 2015 have been filed by the Landlords, seeking to revive C.P.No.267 of 2015 pursuant to the applicant company defaulting the terms of the Memo of Compromise.

8. In the meantime, several company petitions have been filed under Sections 433(2) and 433(f) read with Sections 434 & 439(1) of the Companies Act, 1956, contending that the Applicant Company should be wound up for its inability to pay its dues. The details are as under.

<i>Sl.No.</i>	<i>C.P.No.</i>	<i>Petitioner's name</i>	<i>Amount due</i>
1	523/15	T.Velayudam	Rs.1,53,64,470/-
2	82/16	M/s.Trivitron Health Care Pvt. Ltd.	Rs.1,60,81,950/-
3	99/16	N.Krishnan	Rs.51,42,432/-
4	100/16	M/s.Rushail Pharmadin	Rs.52,39,126/-
5	240/16	M/s.Mathus (Medical)	Rs.1,98,25,771/-
6	263/16	K.Sudhakaran	Rs.75,90,943/-
7	159/16	IDBI Trusteeship Services Ltd.	Rs.82,39,31,810/-
8	233/16	M/s.L&T Finance Ltd.	Rs.11,43,81,265/-
9	286/16	Mayur Real Estates Pvt. Ltd.	Rs.2,36,22,168/-

<i>Sl.No.</i>	<i>C.P.No.</i>	<i>Petitioner's name</i>	<i>Amount due</i>
10	304/16	Devine Meditech	-----
11	301/16	Dr.Premraj	Rs.34,35,00,000/-
12	300/16	C.S.Rajalakshmi	Rs,15,15,78,992/-
13	315/16	Maitri Advertising Works Pvt. Ltd.	Rs.---

9. All the company petitions mentioned above, have been taken up together and this Court by an order dated 20.10.2016, found that substantial amounts, have to be paid by Vasan Health Care Pvt. Ltd. It was also found that apart from the creditors, there are banks, who have instituted proceedings and all of them have secured interest, in the assets of the applicant/respondent company, Vasan Health Care Pvt. Ltd., in the various company petitions. The banks include Andhra Bank, Bank of Maharashtra, Corporation Bank, HDFC Bank, IDBI Bank, IndusInd and Kotak Mahindra Bank.

10. During the hearing, it was stated by the learned counsel that despite generation of huge amount, as revenue from operations, for some strange reasons, the respondent company / applicant has shown that it suffered a loss for the year 2014-15. This Court appointed Andhra Bank, to submit a report, with regard to revenue, which is generated by the respondent company, on year to year basis.

11. On 21.11.2016, this Court gave further directions, to Andhra Bank to carry out a forensic audit of the accounts of the respondent company / applicant, by identifying and appointing an auditor, in consultation with secured creditors. The matters have been adjourned, from time to time by the Company Court of this Court.

12. Companies Act, was amended and Insolvency and Bankruptcy Code, 2016 (hereinafter called IBC) was enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

13. Section 255 of the IBC, brings out amendments in the Companies Act, 2013 in the manner specified in the Eleventh schedule. Section 433 (1)(e) of the Companies Act, 1956 deleted and winding up, on the ground of inability to pay was put in the 11th Schedule.

14. M/s.Alcon Laboratories (India) Private Limited has filed an application in CA/1(IB)/CB/2017 before the National Company Law Tribunal (NCLT), Chennai. The respondent / applicant Company, raised an objection that the petition before the NCLT is not maintainable, because the High Court of Madras, is already considering various winding up petitions filed against the company. The NCLT, Chennai by an order dated 21.04.2017, rejected the objection stating that the High Court of Madras had permitted Andhra Bank to appoint a suitable person to conduct forensic audit of the corporate debtors and the pendency of the winding up petition cannot be a bar, under the IBC for initiating the corporate insolvency resolution process, because the High Court has not passed any order of winding up of the corporate debtor and no Official Liquidator has been appointed. This order was challenged by filing an appeal AT(Insolv.) No.41 of 2017 before the National Company Law Appellate Tribunal (NCLAT), New Delhi.

15. The NCLAT, in its order dated 01.05.2017 framed a question as to whether the insolvency resolution process instituted under Section 9 of the IBC is maintainable, in a case, where winding up petitions against the corporate debtors preferred by a third party (not the operational creditors) is pending?

16. The applicant, filed applications C.A.Nos.462 & 463 of 2017 to withdraw CA/1(IB)/CB/2017, pending before the NCLT, Chennai Bench to be heard and decided alongwith CP No.267 of 2015 and also to stay the operation of the order of NCLT, Chennai, made in CA/1(IB)/CB/2017, respectively. This Court by an order dated 04.05.2017 stayed all further proceedings in CA/1(IB)/CB/2017, initiated by M/s.Alcon Laboratories (India) Private Limited, Bangalore.

17. When this was pointed out to NCLAT, Delhi, the NCLAT, opined that in view of clause (a) of sub-section (1) of Section 14 of the IBC, all pending suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, stands stayed. NCLAT, Delhi, further observed that Section 238 of the IBC mandates that the provisions of the IBC 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 such law. NCLAT, Delhi, therefore on 19.05.2017, directed the applicant company to bring all these facts to this Court and observed that if this Court does not vacate the stay, the Appellate Tribunal would proceed ahead with the matter. It is in these circumstances, that the question



stated above was framed by the learned Single Judge and placed before this Division Bench.

18. Notification No.GSR.1119(E) dated 07.12.2016 has been issued in exercise of powers conferred under sub-sections (1) and (2) of Section 434 of the Companies Act, 2013 (18 of 2013), read with sub-Section (1) of Section 239 of the IBC (31 of 2016), bringing out the Companies (Transfer of Pending Proceedings) Rules, 2016. Rule 5 and 6 of the said Notification, read 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 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, 1986 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)”

19. On the same date, another notification in S.O.3676(E) has been issued bringing out Companies (Removal of Difficulties) Fourth Order, 2016. Clause 2 of the said order reads as under.

“(2) In the Companies Act, 2013, in Section 434, in sub-section (1), in clause (c), after the proviso, the following provisos shall be inserted, namely:—

“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 further 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””

20. Issues arose, as to which case, pending before the High Court, should be transferred to NCLT. The High Court of Bombay in ***West Hills Realty Pvt. Ltd., Vs. Neelkamal Realtors Tower Pvt. Ltd.***, reported in **2017 (200) CompCas 179 (Bom)**, observed as under.

"12. In fact, if anything, the argument that Rule 26 contemplates a postadmission notice and only in the event such notice is actually served on the respondent that the petition shall stand transferred to NCLT, will lead to a peculiar situation. It will mean that those petitions, which are admitted and where notice of the petition is not served on the respondent pursuant to the order of admission, will stand transferred to NCLT and will be taken up for admission once again by requiring the petitioners in those petitions to furnish information for admission of the petitions under section 7, 8 or 9 of the Code, as the case may be. That would be clearly anomalous.

13. In the premises, it follows that every winding up petition under clause (e) of section 433 which is pending before the High Court and which is not served by the petitioner on the respondent company shall stand transferred to NCLT under Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. If such pending petition is served by the petitioner on the

respondent, the petition will continue to be dealt with by this Court and the applicable provisions will be the provisions of 1956 Act.

21. Similarly the Bombay High Court in **Mr. Ashok Commercial Enterprises vs. Parekh Aluminex Limited**, reported in 2017 SCC Online Bom 421, took a similar view, that all winding up petitions, where pre admission notice was issued and served on the respondents, would be retained by High Court.

22. This view has been followed by the Delhi High Court in **Grundfos Pumps India Private Limited Vs. ITC Ltd.**, reported in 2018 SCC Online Del 6630 and Rajasthan High Court in **Shreeji Shipping Vs. Hindustan Zinc Limited**, in S.B.Company Petition No.9 / 2016 by judgment dated 22.03.2017.

23. But, this Court in **Mr. Sanjay Goel v. EL Forge Ltd.** being CP Nos. 14/2015, 239/2015, 242/2015, 94/2016 and 364/2016 dated 11.1.2017, took a directly contrary view.

24. The Hon'ble Supreme Court by judgment in **Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.**, reported in 2019 SCC Online SC 87, held that the view taken by this Court is not sustained and the view

taken by the Bombay High Court in *West Hills Reality (P) Ltd.* (cited supra) and *Ashok Commercial Enterprises* (cited supra) lays down the correct law.

25. M/s.Alcon Laboratories (India) Pvt. Ltd., filed a petition before NCLT, Chennai, numbered as C.A./1(IB)/CB/2017. The question therefore, which arises for consideration is, "Can the NLCT proceed with the petition filed by M/s.Alcon Laboratories (India) Pvt. Ltd., in petition no.C.A./1(IB)/CB/2017, despite the fact that winding up petitions in CP No.267 of 2015 etc, are pending before this Court".

26. Heard the learned counsel for the parties and perused the materials available on record.

27. At this juncture it is pertinent to refer to a judgment of the learned Single Judge of Bombay High Court in *Jotun India Pvt Ltd., Vs. PSL Limited*, reported in 2018 SCC OnLine Bom 36 : (2018) 2 AIR Bom R 350. The Bombay High Court was dealing with a case where the respondent/PSL Limited had filed an application in the High Court for recalling an order dated 19.07.2017 passed by another learned Single Judge of Bombay High Court, who had stayed a petition under Section 10 of IBC before the NCLT,

Ahmedabad for insolvency resolution. The question therefore, which arose for consideration before the learned Single Judge was whether the Company Court has any jurisdiction to stay the proceedings filed by a Corporate Debtor before NCLT, even though a previously instituted company petition by a creditor may have been admitted (and therefore the petition was not transferred to NCLT) but where a provisional liquidator has not been appointed.

28. At this juncture, it is pertinent to mention that a petition had been filed by Jotun India Private Limited against PSL Private Limited under Section 433 and 434 of the Companies Act, 1956 claiming that an amount of Rs.7.25 crores with interest is outstanding. It is also pertinent to mention that in the said case, PSL Limited had been referred to the Board of Industrial and Financial Reconstruction (BIFR) under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The Sick Industrial Companies (Special Provisions) Repeal Act, 2003, when came into effect from 01.12.2016, the repeal Act, allowed a company whose reference was pending before the BIFR as on 01.12.2016 to file before NCLT an application under Section 10 of the IBC within a period of 180 days from the notification of the Repeal Act.

29. While hearing this petition, a learned Single Judge of the Bombay High Court, held that the admission of winding up petition by the jurisdictional High Court, does not mean that the NCLT either loses jurisdiction or cannot exercise jurisdiction in case of a petition which is filed by another creditor (financial, operational or the company itself under Section 10 of IBC).

30. Learned Single Judge of the Bombay High Court was of the opinion that legislature is deemed to be aware of the provisions of the Companies Act, while enacting the provisions of IBC as well as the fact that the company petitions that may have been filed prior to IBC coming into force, may have been admitted and pending final disposal in the jurisdictional High Court.

31. Learned Single Judge of the Bombay High Court was of the opinion that if the legislature intended that those winding up petitions, of which the jurisdictional High Court remained seized, will have primacy over NCLT proceedings, which have been filed in respect of the same company by another creditor, the legislature should have said so, either in IBC or in the transfer rules Notification.

32. Learned Single Judge of the Bombay High Court held that the provisions of Section 64 (2) of IBC would indicate that the legislature did not intend that the Company Court would have the power to injunct the proceedings before NCLT.

33. Learned Single Judge of the Bombay High Court was of the opinion that however, it does not mean that, if in a post notice winding up petition, a new proceeding is filed under IBC, and where orders are passed by NCLT, including under Section 14 of IBC, the consequences provided for under IBC will not apply to the post notice proceedings, whatever their stage may be.

34. Learned Single Judge of the Bombay High Court held that if it is to be accepted that NCLT cannot be go on, in such of those cases, where winding up cases in the High Court are pending, it would mean that there is no right available for any person covered by Section 6 of IBC to file a proceedings under IBC, in respect of a Company, against whom a winding up petition is retained in the High Court. Learned Single Judge of the Bombay High Court was of the firm opinion that such an interpretation is not supported by the language of IBC.



35. Learned Single Judge held that the expression as well as the implied intention of the legislature to (i) take away the right to file winding up petitions under the Companies Act, 1956; and (ii) to apply the provisions of IBC without exception to all proceedings undertaken regarding insolvency resolution and revival of companies. Learned Single Judge of the Bombay High Court in his conclusion would rely on Sections 14, 63, 64(2) of IBC. Learned Single Judge observed as under.

93. The fact that post notice winding up petitions continue to be governed by the Companies Act, 1956 only means - that to those proceedings it will be the Companies Act, 1956 which will apply. It does not, however, mean that if, in a post-notice winding up petition a new proceeding is filed under IBC, and where orders are passed by NCLT, including under Section 14 of IBC, the consequences provided for under IBC will not apply to post notice proceeding, whatever their stage may be.

94. In fact, if petitioner's arguments were to be accepted, it would mean that there is no right available for any person covered by Section 6 of IBC to file a proceeding under IBC, in respect of a Company, against whom a winding up petition is retained in the High Court. Such an interpretation is not supported by the language of IBC.

95. Further, there is express as well as an implied intention on the part of the legislature to (i) take away the right to file winding up petitions under the Companies Act, 1956; and (ii) to apply the provisions of IBC without exception to all proceedings undertaken regarding insolvency resolution and revival of companies. This is also apparent from the peremptory and express language of Sections 14, 63 and 64(2) of IBC.

96. It is also clear from the Companies (Removal of Difficulties) Fourth Order that in fact what is saved are only the proceedings of winding up pending before the jurisdictional High Court and not the Company itself in relation to which such proceedings are saved. That is to say, such a Company is still subject to the provisions of IBC, if invoked and only the post notice winding up proceedings, which are retained by the High Court, are saved. This does not mean that IBC is inapplicable to the said Company, if it is invoked.

97. It is clear from the above that the winding up petitions retained by the High Court are being decided under the Companies Act, 1956 only as a transitional provision. It only provides that winding up proceedings under Section 433(1)(e) pending in the High Court would continue in the High Court - *Prasanta Kumar Mitra*(Supra).

98. Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC, vis-à-vis the company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation. This is contrary to the plain language of IBC. If the contentions of petitioner were to be accepted, it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator appointed, provisions of IBC can never apply to such companies for all times to come.

99. Even under the 29th June 2017 Notification, it is only those petitions pending in the High Court where a notice may not have been issued which would not get transferred, if a winding up petition against such a company has already been admitted. But even in such a case, there is no express or implied bar from other

creditors of such a company or the corporate debtor from filing fresh proceedings under IBC. If at all, such creditors/corporate debtors are barred from approaching the High Court and not NCLT under IBC.

100. The mere fact that post notice winding up proceedings are to be “dealt with” in accordance with the provisions of the Companies Act, 1956 does not bar the applicability of the provisions of IBC in general to proceedings validly instituted under IBC, or does it mean that such proceeding can be suspended.

(VII) The Company Court does not have the jurisdiction to restrain NCLT, Ahmedabad, from proceeding with IBC

Application:

101. This is clear from a perusal of the following provisions of IBC:

*63. Civil court not to have jurisdiction: No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code.*

*64. Expeditious disposal of applications:*

(1) ...

(2) *No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.*

*231. Bar of jurisdiction: No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.*

102. The jurisdiction of the Company Court in relation to proceedings under IBC is expressly barred by virtue of section 63 of IBC. Further, by virtue of Section 64(2) of IBC, the Company Court is prohibited from injuncting NCLT from exercising its jurisdiction under IBC. By virtue of section 238 of IBC, it overrides the provisions of the Companies Act, 1956. The Apex Court has, in a few cases, considered provisions similar to Section 64(2) of IBC. In *Ghanshyam Sarda v. Shiv Shankar Trading Company*(supra), the Hon'ble Supreme Court considered the bar of the Civil Court's jurisdiction under the Sick Industrial Companies Act, 1985 ("SICA"),

*IBC*  
64. (2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.

*Sick Industrial Companies Act, 1985*  
26. Bar of Jurisdiction:  
No order passed or proposal made under this Act shall be appealable except as provided therein and no civil court shall have jurisdiction in respect of any matter which the Appellate Authority or the Board is empowered by, or under, this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

36. Learned Single Judge of the Bombay High Court was also of the view that the jurisdiction of the Company Court in relation to proceedings under IBC is expressly barred by virtue of Sections 63 and 238 of IBC.

37. This view was affirmed by the Hon'ble Division Bench of the Bombay High Court in appeal, by judgment dated 26.07.2018, reported in 2018 SCC OnLine Bom 1952.

38. Hon'ble Division bench in paragraph No.32 and 33 observed as

under:

32. The vital issue raised before this court is as to whether the Company Court could injunct the NCLT in saved petitions wherein notice of winding up was issued? Amongst various issues and the consequences which were demonstrated by the learned counsel appearing for the appellant, the foremost is that in case the NCLT is allowed to go ahead with the proceedings filed before it, then the purpose of winding up proceedings would get frustrated. There is a definite purpose behind the legislature creating two classes of petitions, one saved petitions and other petitions pending before the NCLT, according to the learned counsel for the appellant. Therefore, in the category of saved petitions, the outcome shall be winding up of the company in accordance with the Companies Act. Allowing NCLT to proceed, would delay winding up proceeding and would further frustrate the cause of filing of company petition which may cause loss, hardship and prejudice to the appellant herein. Considering the various provisions of the Repeal Act 2003, IBC, 2016, Scheduled attached to the IBC, 2016, Central Government Rules issued from time to time and the notifications and more precisely the statement of objects and reasons of the IBC, 2016, we are not convinced to accept the proposition propounded by the learned counsel appearing for the appellant. IBC, 2016 is framed with a purpose to make sincere efforts for revival of the company. The scheme under the IBC, 2016 is to revive the Company within the stipulated time frame of 180 days and in case the efforts fail then the outcome is to take necessary steps under the provisions of IBC, 2016 for initiation of liquidation process in accordance with Chapter III of the IBC, 2016. Under the scheme of IBC, 2016, in case a resolution plan fails, ultimate outcome is liquidation of the company. These provisions will have to be considered keeping in

view the purpose of enactment of the IBC, 2016. We must reiterate the observations of the Bankruptcy Law Reforms Committee wherein it was observed that, “Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors”. The Committee further stated that the objectives desired from implementing the new Code to resolve insolvency and bankruptcy is, (a) low time to resolution, (b) low loss in recovery and (c) higher levels of debt financing across a wide variety of debt instruments. The Committee had further observed that for many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. The recovery rates obtained in India are among the lowest in the world when default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis. The Committee further observed that lending in India is concentrated in a few large companies that have a low probability of failure. The Committee observed in respect of speed being essence as under:—

“Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the ‘calm period’ can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation”.

The Apex Court in the case of *Innoventive Industries Ltd. v. ICIC Bank* (Supra) observed in para 11 as under:

“11. ....According to us, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously

cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellant. This being the case, the present appeal is obviously not maintainable. However, we are not inclined to dismiss the appeal on this score alone. Having heard both the learned counsel at some length, and because this is the very first application that has been moved under the Code, we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts.”

33. The issue raised is that these principles stated above may be made efficaciously applicable to petitions which are not saved but as regards saved petitions are concerned, provisions of the Act and the Rules therein alone shall govern. We are not convinced to accept the said proposition.

39. However in the last paragraph, the Hon'ble Division Bench observed as under

"45. In view of the afore-stated reasoning and the case laws cited, we are of the considered opinion that the Company Court while dealing with the winding up petitions (saved petitions) shall have no jurisdiction to stay the proceedings before the NCLT in respect of revival or resolution issue. We may further state that in case the forum under the IBC, 2016 i.e. NCLT fails to revive or successfully implement the resolution plan, then the Company Judge seized with the winding up petitions (saved petitions) would deal

with the petition in accordance with law. We are of the view that allowing both the forums i.e. Company Court and the NCLT to go ahead with the liquidation proceedings/winding up proceedings simultaneously would not serve any purpose. There is likelihood of creation of confusion and complexity. To harmonize this likely situation, we observe that the Company Judge, in saved petitions, would exercise jurisdiction in case revival efforts by NCLT fails."

40. The view of the learned Single Judge came up for consideration before the Hon'ble Supreme Court in *Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.*, reported in 2019 SCC Online SC 87, wherein, the Hon'ble Supreme Court, after reproducing para 93, 98, 100 of the learned Single Judge of the Bombay High Court in *PSL Vs. Jotun* quoted above) observed as under

19. Mr. Sen also referred us to a judgment of the learned Single Judge of the High Court of Bombay reported, in (2018) 2 AIR Bom R 350 in *PSL Limited v. Jotun India Private Limited*. The Learned Single Judge, after referring to the self-same provisions of the Code and subordinate legislation made thereunder, held as follows:—

"93. The fact that post notice winding up petitions continue to be governed by the Companies Act, 1956, only means - that to those proceedings it will be the Companies Act, 1956 which will apply. It does not, however, mean that if, in a post-notice winding up petition a new proceeding is filed under IBC, and where orders are passed by NCLT, including under Section 14 of IBC, the consequences provided for under IBC will not apply to post notice proceeding,



whatever their stage may be.

xxx xxx xxx

98. Furthermore, this transitional provision cannot in any way affect the remedies available to a person under IBC, vis-a-vis the company against whom a winding up petition is filed and retained in the High Court, as the same would amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation. This is contrary to the plain language of IBC. If the contentions of petitioner were to be accepted, it would mean that in respect of companies, where a post notice winding up petition is admitted or a provisional liquidator appointed, provisions of IBC can never apply to such companies for all times to come.

xxx xxx xxx

100. The mere fact that post notice winding up proceedings are to be "dealt with" in accordance with the provisions of the Companies Act, 1956, does not bar the applicability of the provisions of IBC in general to proceedings validly instituted under IBC, [nor] does it mean that such proceeding can be suspended."

20. This judgment was upheld by a Division Bench of the Bombay High Court. We may hasten to add that the law declared by this judgment has our approval."

41. We also at this juncture refer to another judgment of the Hon'ble Supreme Court in ***Jaipur Metals and Electricals Employees Organisation Vs. Jaipur Metals and Electricals Limited***, reported in (2019) 4 SCC 227, wherein the issue as to whether Section 238 of the IBC would apply, even when the proceedings in respect of the same companies are pending before

the High Court or not, was considered. The Hon'ble Supreme Court noted the submission at paragraph no.7 and answered the same, at paragraph No.20 of the judgment, which are reproduced hereunder

"7. 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 to 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."

" 20. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule to 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 to 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 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 NCLT were without jurisdiction. On this score, therefore, the High Court judgment has

to be set aside. 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 [Jaipur Metals and Electricals Ltd., In re, 2018 SCC OnLine Raj 1472]"

42. The Supreme Court has therefore ultimately held that if there is any inconsistency between Section 434 of the Companies Act, as substituted and the provisions of IBC, the IBC must prevail.

43. Being confronted with the judgment of the Bombay High Court as upheld by the Hon'ble Supreme Court in *Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.*, reported in 2019 SCC Online SC 87 and the judgment of the Hon'ble Supreme Court in *Jaipur Metals and Electricals Employees Organisation Vs. Jaipur Metals and Electricals Limited*, reported in (2019) 4 SCC 227, which held that proceedings in IBC must prevail over proceedings under Companies Act, Mr.S.R.Rajagopal, learned Counsel for the applicant company submitted the as per the Companies (Removal of Difficulties) Fourth Order, 2016, which was brought out by S.O.3676(E) dated 7.12.2016 (quoted supra) under clause (c) to sub

Section (1) in Section 434 of Companies Act, 2013, a proviso was inserted which stated 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. It further provides that all proceedings under the Companies Act, 1956 other than those cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings or the proceedings relating to winding up of companies, which have not been transferred from the High Courts shall be dealt with in accordance with the provisions of Companies Act, 1956 and the Company (Court) Rules 1959. Thus, according to Mr.S.R.Rajagopal, learned Counsel for the applicant company, the case of winding up of M/s.Vasan Health Care Private Limited, has to be dealt with only under the provisions of Companies Act, 1956 and cannot be dealt with under IBC. He would contend that when matters have been retained by the High Court, then the winding up of the company shall be dealt with only in accordance with Companies Act, 1956 in accordance with the Companies (Removal of Difficulties) Fourth Order, 2016.

44. We cannot accept such contention. The Companies (Removal of Difficulties) Fourth Order, 2016, only deals with matters which are retained by the High Courts and the law has to be applied by the High Court while

dealing with such proceedings, which are pending in the High Court and which have not been transferred to the NCLT. This does not deal with a fresh petition filed in the NCLT by another financial / operational creditor. If a fresh petition is filed by the financial / operational creditor in case of a company which is yet not ordered to be wound up, the NCLT has jurisdiction to deal with such cases and NCLT has to proceed in the manner as laid in IBC. The NCLT cannot apply the provisions of Companies Act, 1956. It is governed by IBC.

45. Mr.S.R.Rajagopal, learned Counsel for the applicant company then argued that the Hon'ble Division Bench of the Bombay High Court, in paragraph no.45 had stated that if the NCLT fails to revive or successfully implement the resolution plan, then the Company Judge is seized of with the winding up petitions (saved petitions) would deal with the petition in accordance with law. The Hon'ble Division Bench was of the opinion that allowing both the forums, i.e.. Company Court and NCLT to go ahead with the liquidation proceedings / winding up proceedings, simultaneously would not serve any purpose. The Hon'ble Division Bench was therefore of the opinion that if the NCLT fails to revive the company then the Company Court would deal with the company sought to be wound up.

46. Mr.S.R.Rajagopal, learned Counsel for the applicant Company, therefore argued that if in any event the revival plan fails then the Company Court would have the jurisdiction to proceed in accordance with law. Learned counsel would submit that since the Company Court is trying to evolve a mechanism to pay back all the creditors, it would be in the interest of justice that NCLT holds its hand and the proceedings could be proceeded against in the Company Court so that a proper plan can be evolved and the company can ensure repayment of the creditors. This contention is not tenable in view of Section 238 of the IBC which reads as under.

"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."

47. As stated earlier, Hon'ble Supreme Court in *Jaipur Metals and Electricals Employees Organisation Vs. Jaipur Metals and Electricals Limited [cited supra]*, at paragraph No.20 has categorically held that the provisions of IBC would prevail over the Companies Act in case of any inconsistency. The Hon'ble Supreme Court has held that the proceeding which have been instituted under the IBC has to be taken to its logical end. If resolution plan fails or where the tribunal rejects the resolution plan framed by the insolvency resolution professional or resolution plan is

contravened by the corporate debtor, then the tribunal would initiate liquidation proceedings under the IBC and the winding up proceedings cannot be proceeded further in the High Court.

48. Mr.S.R.Rajagopal, learned Counsel next contended that the judgments of the Hon'ble Supreme Court or the Bombay High Court would not apply to the facts of this Court, because they are dealing with the provisions of Sick Industrial Companies (Special Provisions) Act, 1986 and not with the provisions of the Companies Act, 1956. According to Mr.S.R.Rajagopal, learned Counsel, companies which are dealt with under the provisions of Sick Industrial Companies (Special Provisions) Act, 1986 were governed under Section 5(2) of the Notification GSR.1119(E) dated 07.12.2016. He would submit that those judgments would not apply to a case, arising under Section 433(1) (e) of the Companies Act, 1956 dealing with the inability to repay.

49. According to Mr.S.R.Rajagopal, learned counsel on the repeal of SICA and as contemplated under Section 254 of the IBC, all the proceedings under SICA have to be dealt with under the IBC and the judgments of the Bombay High Court and the Hon'ble Supreme Court have to be considered only in that perspective. According to Mr.S.R.Rajagopal, learned counsel,

the present case arises under the Companies Act and therefore the judgments of Bombay High Court and Hon'ble Supreme Court are not applicable and therefore, is distinguishable.

50. We are afraid that such contention can be accepted. In view of paragraph Nos.93 to 98 of the learned Single Judge quoted supra and para 32 of the Hon'ble Division Bench quoted supra, the issue before the Bombay High Court was, as to whether the Company Court would injunct further proceedings under NCLT. While dealing with this, the Company Court was dealing with the provisions of the Companies Act, 1956 as amended in 2013 in relation to IBC. Neither the Bombay High Court nor the Hon'ble Supreme Court was restricting itself only to proceedings under SICA. Infact, reading of para 17 of the judgment in *Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.*, reported in 2019 SCC Online SC 87, the Hon'ble Supreme Court was dealing with the issue as to which of the matters pending in the High Courts on the ground of inability to pay debt will be transferred to NCLT. Para 10 to 17 reads as under.

10. When the Code was enacted with effect from 1.12.2016, two Notifications both dated 07.12.2015 were made. The first Notification, which was titled as the Companies (Transfer of Pending Proceedings) Rules, 2016 laid down in Rule 5 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.”

11. Simultaneously, on the same date, by the Companies (Removal of Difficulties) Fourth Order, 2016, it was made clear in sub-Clause 2 of the said Order as follows:—

“(2) In the Companies Act, 2013, in Section 434, in sub-section (1), in clause (c), after the proviso, the following provisos shall be inserted, namely:—

“Provided further that -

xxx xxx xxx

(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””

12. By a Notification dated 29.06.2017, titled the Companies (Transfer of Pending Proceedings) Second Amendment, Rules, 2017, Rule 5 was 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 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 upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions 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.”

13. Rules 26 and 27 of the Companies (Court) Rules, 1959 read as follows:

“Rule 26. Service of petition - Every petition shall be served on the respondent, if any, named in the petition and on such other persons as the Act or these rules may require or as the Judge or the Registrar may direct. Unless otherwise ordered, a copy of the petition shall be served along with the notice of the petition.

Rule 27. Notice of petition and time of service - Notice of every petition required to be served upon any person shall be in Form No. 6, and shall, unless otherwise ordered by Court or provided by these rules, be served not less than 14 days before the date of hearing.

Provided always that such notice when by the Act or under these Rules is required to be served on the Central Government, the same shall, unless otherwise ordered by the Court, be served not less than 28 clear days before the date of hearing.”

14. Form No. 6 appended to Rule 27 reads as under:

“FORM No. 6  
(See Rule 27)  
[Heading as in Form No. 1]  
Company Petition No..... of 19  
NOTICE OF PETITION

Take notice that a petition under Sec..... of the Companies Act, 1956, for ..... presented by ..... on the ..... day of ..... 19..... was admitted on the ..... day of ..... 19..... and that the said petition is fixed for hearing before the Company Judge on the ..... day of ..... 19..... If you desire to support or oppose the petition at the hearing, you should give me notice thereof in writing so as to reach me not later than..... days before the date fixed for the hearing of the petition, and appear at the hearing in person or by your advocate. If you wish to oppose the petition, the grounds of opposition or a copy of your affidavit should be furnished with your notice. A copy of the petition will be furnished to you if you require it on payment of the prescribed charges for the same/is enclosed herewith.

Dated..... (Sd/-)..... Name.....

(Advocate for petitioner)

Address:

[This notice should be served on or before the ..... day of ..... 19.....]

NOTE: Where the notice is to a respondent named in the petition, a copy of the petition should be served on him alongwith the notice.”

15. Shri Sen pointed out to us that there was a divergence of views in the interpretation of the aforesaid rules. The Bombay High Court in Ashok Commercial Enterprises v. Parekh Aluminex Limited, (2017) 4 Bom. CR 653, stated that the notice referred to in Rule 26 was a pre-admission notice and hence, held that all winding up petitions where pre-admission notices were issued and served on the respondent will be retained in the High Court. On the

other hand, the Madras High Court in *M.K. & Sons Engineering v. Eason Reyrolle Ltd.* in CP/364/2016 has held that the notice under Rule 26 is referable to a post-admission position of the winding up petition and accordingly held that only those petitions where a winding up order is already made can be retained in the High Court. For this purpose, the Madras High Court strongly relied upon Form No. 6 appended to Rule 27 and the expression “was admitted” occurring in the Notice of Petition contained in the said Form.

16. We are of the view that Rules 26 and 27 clearly refer to a pre-admission scenario as is clear from a plain reading of Rules 26 and 27, which make it clear that the notice contained in Form No. 6 has to be served in not less than 14 days before the date of hearing. Hence, the expression “was admitted” in Form No. 6 only means that notice has been issued in the winding up petition which is then “fixed for hearing before the Company Judge” on a certain day. Thus, the Madras High Court view is plainly incorrect whereas the Bombay High Court view is correct in law.

17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code. However, on a working of the Code, the Government realized that parallel proceedings in the High Courts as well as before the adjudicating authority in the Code would stultify the objective sought to be achieved by the Code, which is to resuscitate the corporate debtors who are in the red. In accordance with this objective, the Rules kept being amended, until finally Section 434 was itself substituted in 2018, in which a proviso was added by which even in winding up petitions where notice has been served and which are pending in the High Courts, any person could

apply for transfer of such petitions to the NCLT under the Code, which would then have to be transferred by the High Court to the adjudicating authority and treated as an insolvency petition under the Code. This statutory scheme has been referred to, albeit in the context of Section 20 of the SICA, in our judgment which is contained in Jaipur Metals & Electricals Employees Organization Through General Secretary Mr. Tej Ram Meena v. Jaipur Metals & Electricals Ltd. Through its Managing Director, being a judgment by a Division Bench of this Court dated 12.12.2018.

18. After referring to the statutory scheme, as aforesaid, this Court held:

“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.”

51. A reading of para 10 to 17 of the judgment in *Forech India Ltd.*

*Vs. Edelweiss Assets Reconstruction Co. Ltd.*, reported in 2019 SCC

Online SC 87, would show that the Hon'ble Supreme Court was dealing with applications relating to inability of a company to pay its debts and where winding up proceedings under Section 433 (1) (e) was being taken up by the High Court prior to the amendment to the Companies Act.

52. Judgment of the Courts had to be read as a whole. Therefore the Hon'ble Supreme Court in *Forech India Ltd. case* was dealing not only with cases which were pending under SICA, i.e., proceedings coming under clause 5(2) of the notification dated 07.12.2016, but also was dealing with the proceedings which would come under clause 5(1) of the notification dated 07.12.2016, which deals with petitions relating to winding up of companies on the ground of inability to pay its debts.

53. No distinction has been made by the Hon'ble Supreme Court while delivering the judgment, that it would be applicable only for such of those cases in which proceedings were pending before the BIFR under the various provisions of the SICA.

54. Mr. Murari, learned senior counsel appearing for the applicant M/s.Alcon Laboratories (India) Pvt. Limited, would rely on Sections 14, 63, 64(2), 231 and 238 of the Insolvency and Bankruptcy Code. They read as

under.

**14. Moratorium. :-** (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate



insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

**63. Civil court not to have jurisdiction:-** No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.

**64. Expeditious disposal of applications:-** (1)....

(2) No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the National Company Law Tribunal or the National Company Law Appellate Tribunal under this Code.

**231. Bar of jurisdiction:-** No civil court shall have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under, this Code to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by such Adjudicating Authority under this Code.

**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.

55. Section 14 of the IBC provides that the adjudication authority

shall by order declare moratorium for prohibiting all the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, tribunal, arbitration panel or other authority.

56. Section 63 of the IBC bars any Civil Court, to entertain any suit or proceedings in respect of matter on which the National Company Law Tribunal or the National Company Civil Court, has jurisdiction.

57. Section 64 of the IBC prohibits any Court, tribunal or authority to grant injunction, in respect of any action taken, or to be taken in pursuance of any power conferred on the NCLT or NCLAT under the IBC.

58. Section 231 of the IBC reads that no Civil Court will have jurisdiction in respect of any matter in which the Adjudicating Authority is empowered by, or under the IBC to pass any order and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken up in pursuance of the order passed by the NCLT under the IBC code.

59. Section 238 of the IBC provides that the provisions of IBC 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.

60. Mr.Murari, learned senior counsel appearing for M/s.Alcon Laboratories (India) Private Limited would contend that a combined reading of all the provisions would show that once the proceedings has been commenced under the NCLT, then NCLT only will have the jurisdiction to continue with the process and the High Court while dealing with winding up petitions under Section 433 (1)(e) of the Companies Act, which have not been transferred to NCLT, cannot proceed further. According to the learned senior counsel, any other interpretation would not be consistent with the legislative intent to bring out the IBC. We agree with the submission.

61. None of the contentions raised by Mr.S.R.Rajagopal, learned Counsel for the applicant company, are sustainable, in view of the decision of the Hon'ble Supreme Court in *Forech India Ltd. case [cited supra]* which has held that proceedings before NCLT will proceed ahead, if a fresh petition is filed under IBC even when matters are pending before the High Court. Further, Section 238 of the IBC provides that the provisions of IBC

will prevail over all other laws, inconsistent therewith. The resultant position is that once a petition under Sections 6, 7, 8 of the IBC filed by a financial creditor is admitted, then all the proceedings under the IBC must apply to that company. There cannot be two parallel proceedings, one under the IBC and the other under the Companies Act. The matters which are not transferred by the High Court will be proceeded with, under the Companies Act, 1956 but, if a fresh petition under Sections 6, 7 and 8 of the IBC is filed then the Company will have to be governed under the IBC. However, once a winding up order is passed by the High Court under the Companies Act and an official liquidator is appointed, who takes charge of the company's assets for the purpose of liquidation, then no proceedings can be filed under the IBC, for the reason that winding up order has been passed. Section 447 of the Companies Act, 1956 states that an order of winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if it has been made out on the joint petition of a creditor and of a contributory. In such a case, a financial creditor cannot file a petition under the IBC before the NCLT. This Court is of the opinion that till a winding up order, by which the Official Liquidator takes charge of all the assets is passed, the NCLT will have the jurisdiction to entertain an application under the IBC.

62. In the present case the appointment of a provisional liquidator has been stayed by the Court. NCLT can therefore, continue with the proceedings. The mere fact that the post notice winding up proceedings, have to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959, do not bar the NCLT to proceed ahead with the proceedings validly instituted under IBC, and such proceeding validly instituted before the NCLT, cannot be suspended. The process of liquidation of the company will be governed by the IBC. ***The reference is answered accordingly.*** Stay of the order dated 21.04.2017, passed by NCLT, Chennai in CA/1(IB)/CB/2017 granted in Comp.A.No.463 of 2017 in CP No.267 of 2015 dated 04.05.2017, stands vacated. All other applications are sent to the Company Court to be dealt with in accordance with law.

सत्यमेव जयते

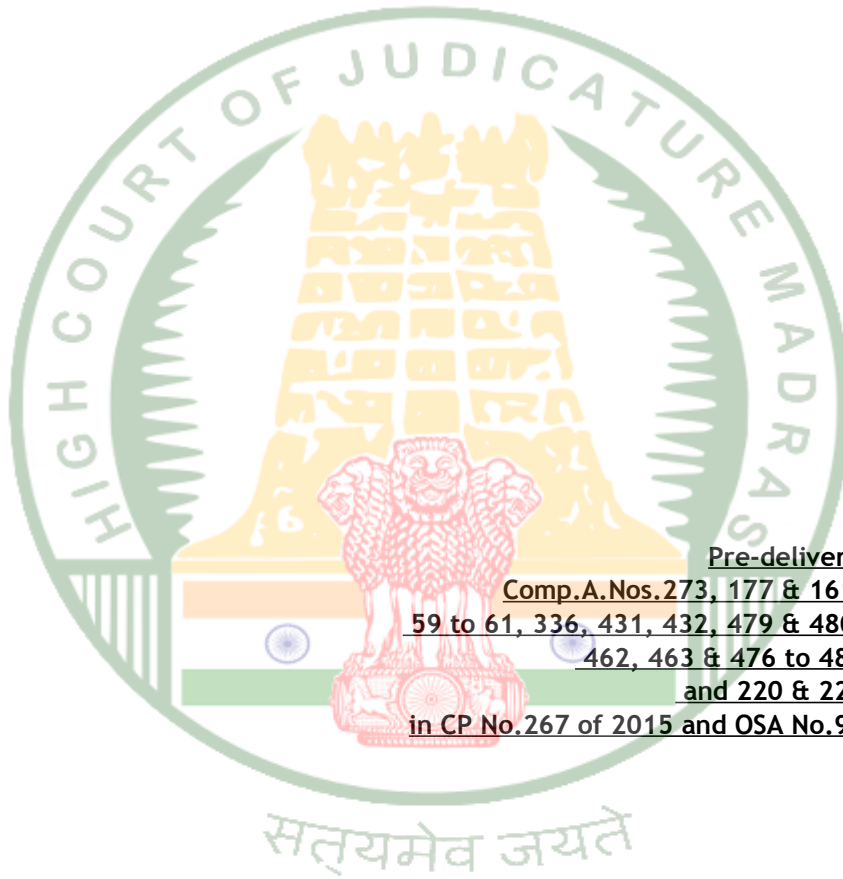
(S.M.K., J.) (S.P., J.)  
05.09.2019

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S.MANIKUMAR,J.  
AND  
SUBRAMONIUM PRASAD, J.

ars



Pre-delivery order in  
Comp.A.Nos.273, 177 & 161 of 2019,  
59 to 61, 336, 431, 432, 479 & 480 of 2018,  
462, 463 & 476 to 480 of 2017  
and 220 & 221 of 2016  
in CP No.267 of 2015 and OSA No.93 of 2019

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