

\$~J

\*

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

***Judgment Reserved on: 10.05.2019***  
***Judgment Pronounced on: 30.09.2019***

- + CO.PET. 518/2013, CA. Nos.1415/2018 & 1416/2018  
1. SICOM LTD. .... Petitioner  
  versus  
      HANUNG TOYS & TEXTILES LTD. .... Respondent
- + CO.PET. 987/2015, CA. Nos. 718/2018 & 1444/2018  
2. CFSIT, INC .... Petitioner  
  versus  
      SHAKTI BHOG FOODS LIMITED .... Respondent
- + CO.PET. 668/2014, CA. Nos.1366, 1047 & 1048/2018  
3. ABHINANDAN KUMAR JAIN .... Petitioner  
  versus  
      MVL LIMITED .... Respondent
- + CO.PET. 814/2016, CA. Nos.826, 980 & 984/2018  
4. BRIJESH GUPTA & ANR. .... Petitioners  
  versus  
      PREMIA PROJECTS LTD. .... Respondent

**Present:** Mr.Nikhilesh Kumar, Adv. for the petitioner in CP 668/2014.  
Mr.Sanjeev Anand, Mr.Sjresh Khadav and Mr.Varun K.Bala, Adv.  
for applicant in CP 668/2014.  
Ms.Abha Sinha, Adv. in CA No. 444/2019 in CP 668/2014.  
Mr.Anil Kumar Airi, Sr.Adv. with Mr.Abhinav Mishra, Mr.Siddhant  
Tripathi, Ms.Nivedita Chauhan, Mr.Karan Nagpal, Adv. for  
applicant/Intervener in CA 121/2019 in CP 668/2014.  
Mr.Vivek Kohli, Mr.Sandeep Bhuraria, Mr.Sunil Tyagi, Mr,Nalin  
K.Talwar, Ms.Prerna Kohli, Ms.Yeshi Rinchen and Mr.Mudit Gupta,  
Adv. for Ex.Management/Director of MVL Ltd.  
Mr.Rachit Deygun and Mr.Seemant K. Garg, Adv. for SEBI.  
Mr.Rajesh Rattan, Adv. for PNB in CA Nos. 1415-16/2018 & CA  
No. 365/2019 in CP. No.518/2013 and for Dena Bank in CA No.  
1047-48/2018 in CP No. 668/2014.  
Mr.Kunal Sabharwal, Adv. for applicant in CP 668/2014.

Ms.Ruchi Sindhwani, Sr.Standing Counsel, Mr.Rishi Manchanda, Mr.Deepak Anand and Mr.D.Bhattacharyra, Standing Counsels with Mr.Amish Tandon & Ms.Megha Bharara, Advs. for the Official Liquidator.

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J.**

1. By this judgment I will dispose of all the applications filed by various parties/applicants for transfer of the present winding up petitions to National Company Law Tribunal (*hereinafter referred to as the 'NCLT'*). The details of the applications/ petitions are stated as follows:

i) Co.Pet. No.518/2013, CA. Nos.1415/2018 & 1416/2018 (Hanung Toys & Textiles Ltd.)

In this case on 12.07.2018, this court admitted the present petition and appointed the Official Liquidator as the Liquidator (*hereinafter referred to as 'OL'*). The Official Liquidator was directed to take all necessary steps including to take over all the assets, books of accounts and records of the respondent Company forthwith. The Official Liquidator was also directed to prepare a complete inventory of all the assets of the company when the same are taken over.

Punjab National Bank being the applicant, has filed two applications in this petition, bearing C.A. No.1415/2018 which seeks for impleadment in the present petition and C.A. No. 1416/2018 which is for transfer of the present proceedings before the NCLT. Proceedings were initiated under section 7 of IBC before the NCLT by the aforesaid applicant. The NCLT vide order dated 28.03.2019, had appointed an IRP. This order was

however stayed by the NCLAT vide order dated 30.04.2019.

ii) Co.Pet. No.987/2015,CA. Nos.718 & 1444/2018 (Shakti Bhog Foods Ltd.)

In this case the court admitted the present petition, vide order dated 18.01.2018 and appointed the Official Liquidator as the liquidator. The Official Liquidator was directed to take all necessary steps including to take into possession, all the assets, books of accounts, documents, records and other papers of the respondent company.

The State Bank of India has filed two applications being CA No. 718/2018 for intervention in the present petition and CA No. 1444/2018 for transfer of present proceedings before NCLT. No application for impleadment has been filed by SBI. Proceedings were initiated, under section 7 of the IBC by the applicant before the NCLT. The NCLT vide order dated 08.02.2018, dismissed the petition filed by the applicant, stating that the OL had already been appointed by this court and that hence an IRP cannot be appointed where a corporate debtor is already undergoing liquidation process. NCLAT also dismissed the appeal of the applicant, vide order dated 12.03.2018.

The applicant has filed an appeal in the Supreme Court of India which is still pending.

iii) Co.Pet.668/2014,CA. Nos.1366, 1047 & 1048/2018(MVL Ltd.)

On 05.07.2018, this court admitted the present petition and appointed the Official Liquidator as the Provisional Liquidator. The Official Liquidator was directed to take all necessary steps including to take over all the assets, books of accounts and records of the respondent Company forthwith. The Official Liquidator was also directed to prepare a complete

inventory of all the assets of the company when the same are taken over. It is stated that the ex-management has filed an application for recall of the said order dated 05.07.2018, being CA No. 759/2018.

Dena Bank being the applicant has preferred two applications, being C.A. No.1047 seeking for impleadment in the present petition and C.A. No. 1048/2018 for transfer of the present proceedings before the NCLT. It is also stated by the petitioner by filing application C.A. No. 1366/2018, that he is supporting the application, namely, C.A. No.1048/2018 for transfer of the present proceedings before NCLT.

Before NCLT, proceedings were initiated under section 7 of IBC by the said applicant. The NCLT vide order dated 25.09.2018, dismissed the petition filed by the applicant stating that the Provisional Liquidator has already been appointed by the company court.

iv) Co.Pet.814/2016, CA. Nos.826, 980 & 984/2018(Premia Projects Ltd.)

On 12.03.2018, this court admitted the present petition and appointed the official liquidator as the provisional liquidator. Further, the official liquidator was directed to take all necessary steps including to take over all the assets, books of accounts, documents and records forthwith. The official liquidator was also directed, to make a complete inventory of all the assets of the company when the same are taken over and the premises in which they are shall be sealed.

Mr. Rahul Joshi, being an allottee of a flat in the respondent's project has filed an application bearing CA No. 984/2018, seeking transfer of the present proceedings before the NCLT. Similar applications have also been filed by other allottees, being CA No. 980/2018 filed by Mr. Ganesh Prasad

and CA No. 826/2018 filed by Mr. Tek Chand, for transfer of the present proceedings before the NCLT. It may be noted that no impleadment applications have been filed by any of the applicants and they are not party to the said petition.

Proceedings were initiated under section 7 of the IBC, by Mr. Tek Chand before the NCLT. The NCLT vide order dated 30.05.2018 admitted the said petition and appointed an IRP. Subsequently the NCLT vide order dated 12.07.2018 ordered the IRP and other applicants to approach this court for the transfer of the petition to the NCLT. The NCLT vide order dated 30.01.2019 dismissed the petition as Provisional Liquidator had already been appointed by this court but the NCLT recalled its order and vide order dated 11.3.2019 again appointed the IRP.

2. The applicants essentially plead that in terms of the powers vested in this court under proviso to section 434(c) of the Companies Act, 2013, it is mandatory for this court to transfer these petitions to NCLT.

3. The Official Liquidator, some of the creditors of the respondent companies and the ex-management of the respondent company have opposed the transfer of these petitions before NCLT. They have objected saying that where the OL has been appointed as provisional liquidator or liquidator, such matters cannot be transferred to NCLT. However, where the OL has not been appointed as provisional liquidator or liquidator, it is stated that this court has discretion to transfer such matters to NCLT under the proviso to section 434(c) of the Companies Act, 2013.

4. In the light of the above controversy, I have heard submissions of the learned counsel for the parties. Some of the parties have also filed their written submissions.

5. Learned counsel appearing for the applicant/State Bank of India in Co.Pet 987/2015 pertaining to the respondent Shakti Bhog Foods. Ltd. has submitted as follows:

- i) The objective of the provisions in Insolvency & Bankruptcy Code, 2016 (*hereinafter referred to as the 'IBC'*) is to give powers to the financial creditors to determine the manner of recovery of monies from corporate debtors. It is stated that intention of the legislature was to enact a Code where creditors themselves would have vested powers to determine the manner of recovery of monies from debtor company. It is the objective of IBC to revive that company at the first instance through Corporate Insolvency Resolution Process. Winding up procedure would be directed only in the event of failure of Corporate Insolvency Resolution Process. Reliance is placed on the judgment of the Supreme Court in the case of *Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Ors., 2019 4 SCC 17*.
- ii) It is also pleaded that the judgment of the Supreme Court makes it clear that under proviso to section 434(c) of the Companies Act, this Court has to mandatorily transfer pending winding up petitions to NCLT. Reliance is placed on the judgment of the Supreme court in the case of *Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd., 2019 SCC OnLine 87*. Reliance is also placed on the judgment of the Supreme Court in the case of *Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd.,( 2019) 4 SCC 227*.
- iii) It is reiterated that this court has to transfer the matter where such an application is filed for transfer even if an order for winding up of the respondent company has been passed. It is stated that this would follow in view of the judgment of the learned Single Judge of the Bombay High

Court in *Jotun India Private Limited & Ors. v. PSL Limited.*, (2018) 2 *Comp LJ 222 (Bom)*. It is reiterated that since the objective of the IBC is to provide the financial creditors with powers to determine the manner of recovery of monies, if this case is not transferred, the court would be preventing such creditors from exercising their rights.

6. It may be noted that somewhat similar submissions have been made by the learned counsel appearing for Dena Bank in Co.Pet. No.668/2014 and learned counsel appearing for Punjab National Bank in Co.Pet. 518/2013. It is reiterated that special law prevail over general laws and in terms of section 238 of IBC, IBC would prevail over all other statutory provisions. Submissions made by learned counsel for SBI have been broadly reiterated.

7. Learned Senior Standing counsel appearing for the OL has however opposed the present applications. She has pleaded as follows:

i) She has stated that none of the judgments relied upon by the learned counsel for the financial creditors dealt with a case where the OL had been appointed as provisional liquidator or liquidator. It is stated that in the judgments of the Supreme Court relied upon by the financial creditors, namely, *Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd.*(supra), *Jaipur Metals & Electricals Employees Organisation v. Jaipur Metals & Electricals Ltd.*(supra) and judgment of the learned Single Judge of the Bombay High Court in *Jotun India Private Limited & Ors. v. PSL Limited.*(supra), no appointment of the OL as provisional liquidator or liquidator had been done. The aforementioned judgments deal with different factual situations. The dicta of the said judgments would not apply to the

facts of the present cases in question.

ii) It is further pleaded that the rules in question, namely, Companies (Transfer of Pending Proceedings) Rules, 2016 have been notified in exercise of powers under Companies Act, 2013 as well as IBC, 2016. Hence, they are part of IBC, 2016 itself.

iii) It is further stated that there is no distinction between powers of provisional liquidator and official liquidator. Reliance is placed on section 450 of the Companies Act, 1956 and the judgment of the Supreme Court in the case of *Bakemans Industries Pvt. Ltd. v. New Cawnpore flour Mills & Ors.*, (2008) 15 SCC 1 and judgment of the Division Bench of this court in Co.App. No.21/2018, decided on 18.03.2009, titled, '*Reinz Talbros Ltd. & Anr. vs Kostub Investment Ltd. & Ors.*' in support of the above plea. Reliance is also placed on the judgment of the Supreme Court in the case of *Meghal Homes (P) Ltd. v. Shree Niwas Girni K.K.Samiti & Ors.*, (2007) 7 SCC 753.

iv) It is further stated that the power to transfer such matters under proviso to section 434(1)(c) of the Companies Act, 2013 is purely discretionary. Reliance is also placed on the judgment of the Supreme Court in the case of *Jaipur Metals & Electricals Employees Organisation v. Jaipur Metals & Electricals Ltd.*(supra) to contend that the Supreme Court did not transfer the winding up petitions from the High Court.

v) It is further pleaded that none of the applicants who have moved these applications for transfer are parties to the present proceedings. Hence, the matter cannot be transferred at their request.



8. Learned counsel for the Ex.Directors of the respondent company, namely, Shakti Bhog Foods Limited in Co.Pet. No.987/2015 have also opposed the present applications seeking transfer of the proceedings. It has been pleaded as follows:-

(i) It is pleaded that a mere perusal of section 434 of the Companies Act, 2013 would show that an application for transfer of the said winding up petition can be filed by any party to the proceeding. It is stated that the applicant SBI is not a party to these proceedings and has merely filed an application for intervention and hence the application is liable to be dismissed.

(ii) It is further pleaded that in this case the OL was appointed on 18.1.2018 more than 1½ years ago. The OL has taken over management and control of the respondent and also has possession of the assets and accounts of the company and has incurred huge expenses. The OL has also received claims for several creditors of the respondent company. Further both NCLT and National Company Law Appellate Tribunal (NCLAT) have dismissed the corporate insolvency applications of the applicant. Nothing is pending adjudication before the Tribunals.

(iii) It is further pleaded that the reliance of learned counsel for the applicant/SBI on *Jotun India Private Limited & Ors. vs. PSL Limited* (supra) of the Bombay High Court and judgments of the Supreme Court in *Forech India Ltd. vs. Edelweiss Assets Reconstruction Co.Ltd.* (supra) and *Jaipur Metals & Electricals Employees Organisation vs. Jaipur Metals & Electricals Ltd.* (supra) is misplaced. In these judgments the OL was not appointed by the High Court. On the other hand the petition of the concerned financial creditors of the company had been admitted by NCLT.

In the present case winding up order has been passed way back on 18.1.2018 and the OL has taken over the management and control of the respondent company. Moreover, insolvency proceedings filed by the applicants have been dismissed by NCLT and NCLAT and the appeal is pending in the Supreme Court.

(iv) It is further stated that if the plea of the applicant is accepted for transfer of the proceedings to NCLT it would lead to absurdity as it would mean that all winding up proceedings where OL has been appointed irrespective of the steps taken in furtherance of winding up orders by the OL or by this court have to be transferred at the instance of any person who seeks intervention in the proceedings. Had this been the intention of the Legislature it would have made appropriate provision for transfer of all the proceedings of winding up pending before the Company Court in the High Court to NCLT. However, no such provision has been made by the Legislature either in The Companies Act, 2013 or in the Code. Hence the High Court while exercising powers under proviso to Section 434(i)(c) of the Companies Act has discretion to transfer or retain the proceedings before itself.

(v) It is further stated that if the order of appointment of OL is withdrawn the management and assets of the respondent company will go back to the Ex.Management till the time an IRP is appointed by the NCLT. There may be a situation where NCLT may refuse appointment of IRP leading to anomaly. This could not have been the intention of the Legislature.

9. Learned senior counsel appearing for MVL Customers Association has also opposed the transfer application filed in Co.Pet. 668/2014 where

the respondent company is MVL Limited. The transfer application is filed being CA 1048/2018 by Dena Bank. Apart from repeating the contentions raised by learned counsel appearing for the Ex.Management of Shakti Bhog Foods Limited learned senior counsel has submitted as follows:-

(i) Dena Bank is not a party to the petition and hence cannot file the petition.

(ii) Under the proviso to section 434 of the Companies Act the word 'may' shows that the intention of the Legislature was to give discretionary powers to the Company Court to exercise its judicial mind and than exercise discretionary power to transfer such pending winding up proceedings depending on the facts and circumstances of the case.

(iii) It is stated that the reliance of the applicant Dena Bank on the judgment of the Supreme Court in the case of *Forech India Ltd. vs. Edelweiss Assets Reconstruction Co.Ltd.* (supra) is misplaced. It is pleaded that use of the words 'have to be' as spelt out in the said judgment read in consonance of the discretionary power vested in the High Court under the proviso to section 434(i)(c) by use of the word 'may' shows that the intention of the Legislature was to vest the High Court with discretionary power to apply its judicial mind.

Reliance is placed on the judgment of Supreme Court in the case of *Hamdard (Wakf) Laboratories v. Dy.Labour Commisioner & Ors., (2007) 5 SCC 281* to plead that a judgment has to be construed in such a manner so as not to offend the provisions of any statute. Reliance is also placed on the judgment of the Supreme Court in the case of *Gajraj Singh & Ors. v. State of U.P. & Ors., (2001) 5 SCC 762* where the court held that it has to be assumed that the judgment was delivered consistently keeping in view the

provisions of law and therefore, a course or procedure in departure from or not in conformity with statutory provisions cannot be said to have been intended or laid down by the court unless it has been so stated specifically. It is pleaded that where statement/part of the judgment leads to two contradictory views, it should be assumed that the view consistent with the statute has been laid down as a law by the court. Therefore, the use of the word 'have to be' by the Supreme Court in its judgment does not mean that it has stripped the High Court of the discretionary powers vested by the statute itself.

(iv) It is further stated that this petition is pending since 2014. By transferring the present proceedings it would render *hiatus* to the entire proceedings since 2014 and the application of judicial mind by this court in passing the order for admission of the Company Petition and appointment of the Provisional Liquidator. If the present petition is transferred to NCLT treating it as fresh application under section 7 or 9 of The IBC such proceedings will begin *de novo* and the entire effort of High Court of four years would be wasted. It is further stated that the infrastructure of the projects of the respondent company are more or less ready and some finishing work is left to be done. It would be in the interest of the company and its flat buyers that this court entrusts the Ex. Management with this task under strict supervision by appointment of Court Commissioner including preferably a Retired High Court Judge to supervise the whole affair.

10. The basic issue here is whether in exercise of powers under the proviso to Section 434 of the Companies Act, 2013, this court should transfer the present proceedings to NCLT.

11. Section 434 of the Companies Act, 2013 as amended (2019) reads as

follows:-

“Section 434 of the Companies Act, 2013 reads 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 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 the winding up of companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (Order 6 of 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)**

**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.”

12. I may note that the highlighted proviso (added in 2018) to section 434(c) of the Companies Act, 2013 was dealt with by this court in the judgment of *Tata Capital Financial Services Ltd. v. Shree Shyam Pulp & Board Mills Ltd., 2018 SCC Online Del 11365*. In that case the OL had been appointed as a provisional liquidator. This court held that a reading of the said proviso to Section 434(c) of the Companies Act, 2013 shows that the proviso is discretionary and it gives discretion to this court to transfer the matters. It further held that once the OL has been appointed as provisional liquidator, normally the matter would not be transferred to NCLT. This court held as follows:-

“10. As per the proviso any party or parties to the proceedings relating to the winding up of companies may file an application for transfer of such proceedings to the NCLT which will be dealt with by the Tribunal under Insolvency & Bankruptcy Code, 2016. The proviso further adds that this court may by an order transfer the winding up proceedings to the NCLT. It is clear from a reading of the proviso to Section 434 of the Companies Act, 2013 that the proviso is discretionary and it gives discretion to this court to transfer the matters. However, in my opinion, once an Official Liquidator has been appointed as Provisional Liquidator, normally the matter would not be transferred to NCLT.

11. However, the present winding up petition is at an initial stage. This court on 15.05.2018 had revived the order appointing the OL as the provisional liquidator. The order appointing the OL was originally passed on 07.08.2015 which had been put in abeyance on account of settlement between the petitioner and, the respondent. Pursuant to this order of revival passed on

15.05.2018 the OL has taken steps and sealed the head office, as per ROC records, which is located at A-257, Road No.6, Mahipalpur, New Delhi-110037. Regarding the Factory premises, the possession of the same has already been taken over by the UCO Bank under the SARFAESI Act, 2002. Clearly the proceedings for winding up of the respondent company are at an initial stage.

12. The other factor which is admitted by learned counsel for the parties is that other than the factory and land at District Rudrapur, Uttarakhand, there is no immovable or worthwhile movable asset of the respondent company. The registered office at Mahipalpur, New Delhi is a tenanted property which has been sealed by the OL. The landlord of the premises is seeking desealing of the suit premises.

13. In my opinion in the facts and circumstances of this case, it would be in the interest of the creditors that the proceedings are transferred to NCLT and an attempt is made for initiation of corporate insolvency resolution. In case the same is successful, the same would be in the interest of creditors.”

13. The Division Bench of this Court upheld the aforesaid judgment in the appeal titled *Shree Shyam Pulp & Board Mills Ltd. v. Tata Capital Financial Services Ltd. & Ors.*, 2018 SCC OnLine Del 12777. The Division Bench held as follows:

“27. The above submissions have been considered. The proviso to Section 434(1)(c) of the Act has already been reproduced hereinbefore. Although, Ms. Luthra may be technically right in contending that UCO Bank was not a party to any proceedings relating to the winding up which were pending in any Court, the fact remains that the OL was a party to the winding up proceedings. The OL had initially not opposed the prayer of UCO Bank. The OL's attempt to withdraw its consent to the transfer was negative by the Company Court. The OL has accepted the order of the Company Court in that regard.



28. ..

29. The fact of the matter is that despite pendency of the winding up petition for more than four years, no money has been able to be recovered by any of the creditors. At this juncture it is necessary for this Court to clarify that it is not expressing any view on the plea of the Appellant regarding the conduct of Respondent No. 1 since that is not the subject matter of the present appeal. That will have to be pursued separately by the Appellant in accordance with law.

30. In the circumstances, this Court concurs with the Company Court that it was in the best interest of all the creditors that the matter should be transferred to NCLT. Consequently, the Court finds no reason to interfere with the impugned order of the Company Court.”

14. Against the aforesaid order of the Division Bench, an SLP was filed before the Supreme Court being SLP(C) No.45524/2018. This SLP was dismissed on 14.12.2018.

15. However, subsequent to the aforesaid judgment of the Division Bench of this court, there have been some judgments of the Supreme Court where observations have been made which have a material bearing on the issue which is being dealt with by the present judgment. I may look at these judgments.

16. The first such judgment is in the case of *Jaipur Metals & Electricals Employees Organisation vs. Jaipur Metals & Electricals Ltd.*(supra). That was a case in which a reference was made to BIFR under the Sick Industrial Companies Act. The BIFR was prima facie of the opinion that the Company ought to be wound up. This opinion was forwarded to the High Court. The High Court registered the case as a company petition

accordingly. In the meantime, one of the Workers' Union filed a writ petition. The High Court in the writ petition directed the Official Liquidator to be provisionally attached to that court and join the evaluation of the value of the goods and materials lying in the factory premises of the Company so that the dues of the workmen could be paid. In the meantime, an application under Section 7 of the Insolvency & Bankruptcy Code was filed before NCLT. Considering the fact that the debt was admitted by the Company and till date no liquidation order had been passed in the winding up proceeding that were pending, NCLT admitted the application and a moratorium was declared under Section 14 of the Code. An IRP was appointed. The High Court thereafter passed the impugned order and set aside order of NCLT stating that it had been passed without jurisdiction. In those facts, the Supreme Court on the issue of transfer of petitions from the High Court to NCLT held as follows:-

“17. However, though the language of Rule 5(2) is plain enough, it has been argued before us that Rule 5 was substituted on 29-6-2017, as a result of which, Rule 5(2) has been omitted. The effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SIC Act to NCLT, as otherwise, a specific rule would have to be framed transferring such cases to NCLT, as has been done in Rule 5(1). The real reason for omission of Rule 5(2) in the substituted Rule 5 is because it is necessary to state, only once, on the repeal of the SIC Act, that proceedings under Section 20 of the SIC Act shall continue to be dealt with by the High Court. It was unnecessary to continue Rule 5(2) even after 29-6-2017 as on 15-12-2016, all pending cases under Section 20 of the SIC Act were to continue to be dealt with by the High Court before which such cases were pending. Since there could be no opinion by the BIFR under Section 20 of the SIC Act after 1-12-2016, when the SIC Act was repealed, it was unnecessary to continue Rule 5(2) as, on

15-12-2016, all pending proceedings under Section 20 of the SIC Act were to continue with the High Court and would continue even thereafter. This is further made clear by the amendment to Section 434(1)(c), with effect from 17-8-2018, where any party to a winding-up proceeding pending before a court immediately before this date may file an application for transfer of such proceedings, and the Court, at that stage, may, by order, transfer such proceedings to NCLT. The proceedings so transferred would then be dealt with by NCLT as an application for initiation of the corporate insolvency resolution process under the Code. It is thus clear that under the scheme of Section 434 (as amended) and Rule 5 of the 2016 Transfer Rules, all proceedings under Section 20 of the SIC Act pending before the High Court are to continue as such until a party files an application before the High Court for transfer of such proceedings post 17-8-2018. Once this is done, the High Court must transfer such proceedings to NCLT which will then deal with such proceedings as an application for initiation of the corporate insolvency resolution process under the Code.(emphasis added)

XXXXXXX

19. However, this does not end the matter. It is clear that Respondent 3 has filed a Section 7 application under the Code on 11-1-2018, on which an order has been passed admitting such application by NCLT on 13-4-2018. 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 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: (emphasis added)

**“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.”

17. Hence, in para 19 of the above judgment, the Supreme Court held that it is open to the respondent therein to any time before a winding up order is passed to apply under section 7 of the Code.

18. Reference may also be had to the judgment of the Supreme Court in the case of *Forech India ltd. vs. Edelweiss Assets Reconstruction Co. ltd.*, (*supra*). That was a case wherein a winding up petition was filed before the High Court on 20.01.2014. Notice on that petition was served. Respondent No. 1 Company being a financial creditor moved the NCLT under Section 7 of the Insolvency & Bankruptcy Code in 2017. In May - June, 2017 the said petition was admitted. Against the said order, an appeal was filed by the appellant before NCLAT i.e. the Appellate Tribunal. It was held by NCLAT that since there was no winding up order passed by the High Court, the financial creditor's petition would be maintainable. As a result the appeal was dismissed. This order of NCLAT was impugned in the Supreme Court. The relevant submission of the appellant was that the winding up proceedings before the High Court should continue and not proceedings filed by the other creditors under the Code. The Supreme Court in those facts held as follows: -

“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. (*emphasis added*)

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.”

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.”

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.”

19. The Supreme Court in the above case approved the judgment of the Bombay High Court in the case of *PLS Ltd. vs. Jotun India Pvt. Ltd.*, 2019 ( 213) Co. Cases 61 and accepted the law declared by the said judgment stating “the same has our approval.” In *Jotun India Private Limited v. PSL Limited*.(supra), the issue that arose for consideration in the said petition was whether the company court had jurisdiction to stay the proceedings

filed by a corporate debtor in NCLT where there is a previously instituted company petition in the High Court by a corporate debtor which may have been admitted but where a provisional liquidator has not been appointed. In that case in March, 2017 the winding up petition was admitted but the OL was not appointed as provisional liquidator. In May, 2017 an application was filed in NCLT, Ahmedabad under section 10 of the IBC. NCLT reserved the matter for orders. On the same date, the petitioner before the High Court filed an application seeking appointment of a provisional liquidator. The company court in Bombay High Court passed orders restraining NCLT from continuing with the IBC application. In those facts, the Single Bench of the Bombay High Court held as follows:

“70. 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).

71. 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.”

Having held as above, the court held that there is no bar on NCLT to proceed with the application.



20. In the appeal against the order of the learned Single Judge, the Division Bench in the said case in *Jotun India Private Limited v. PSL Limited.*, MANU/MH/2319/2018, while upholding the judgment of the learned Single Bench held as follows:

“**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.(emphasis added)

**46.** We find that the learned Single Judge approached the issue in its proper perspective and harmoniously considered various provisions of the relevant enactments keeping in view the object behind the special statutes. We do not find any error or perversity in the view adopted by the learned Single Judge.”

21. Hence, the Supreme Court has in the case of *Jaipur Metals & Electricals Employees Organisation vs. Jaipur Metals & Electricals Ltd.* (supra), stated, that it was open to a financial creditor to any time before a winding up order is passed to apply under section 7 of the Code. It is further noted in the said judgment that once an application for transfer is filed, the High Court must transfer such proceedings to NCLT which will then deal

with the same as an application for initiation of corporate insolvency resolution process. This view was reiterated by the Supreme Court in the case of *Forech India Ltd. vs. Edelweiss Assets Reconstruction Co. Ltd.*(supra). In the case of *Jotun India Private Limited vs. PSL Limited*(surpa), the judgment of which case was approved by the Supreme Court, the Division Bench of the Bombay High Court noted the likelihood of conflict and confusion in case both the forums, namely, the Company Court and NCLT are allowed to go ahead with the liquidation proceedings. In those circumstances, the Division Bench held that in a case where the NCLT fails to revive the company using the resolution plan, the Company Court which was seized of the winding up proceedings would then exercise appropriate jurisdiction and deal with the petition, as per law.

22. For completeness, reference may also be had to some of the judgments of the other High Courts on this aspect. The Calcutta High Court in the case of *New Central Jute Mills Shramik Sangh & Ors. v. Shalimar Industries Ltd. & Ors.*, [2019] 213 Comp Cas 158 (Cal), held as follows:

“17. Thus, for the purpose of the issue that has been raised herein, it is evident, on a reading of Section 434(1)(c) of the Act of 2013 with clause 5(1) of the Notification of December 7, 2016 that it is only where a petition for winding-up instituted under Section 433 (e) of the Act of 1956 has not been served on the company, will such winding-up petition stand transferred to the relevant Bench of the Tribunal.

18. In the present case, the creditor's winding-up petition resulted in an order of winding-up being passed on June 14, 2016. Thus, as at December 7, 2016, there was no question of transfer of the winding-up proceedings to any Tribunal.”

23. The Allahabad High Court in *Reserve Bank of India vs. Sahara*

*India Financial Corporation Ltd., 2019(3) ADJ 540* court held as follows:-

“57. Coming to the second leg of submission for transfer, that, the second proviso to Section 434 (1)(c) provides that any party to winding up proceedings, pending before any Court immediately before the commencement of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 (the said proviso has come into force w.e.f. 06.06.2018), may file an application for transfer of such proceedings and the Court may transfer all such proceedings to the Tribunal. The prayer is made by SIFCL, in the aforesaid application bearing Application No. 99993 of 2018, for transferring the present proceedings to NCLT.

58. There is no reason given in the entire application as to why the present winding up proceedings should be transferred. It is no doubt correct that power under this second proviso is given to the Court to transfer any winding up proceedings which remains pending before High Court on 06.06.2018. The proviso would no doubt be applicable to such proceedings which are not transferred under the Transfer Rules, 2016. However, the proviso does not say that these proceedings would automatically stand transferred. Rather it leaves the discretion with the Court, where the winding up proceedings are pending, to transfer the same or not to transfer the same. There have to be reasons to exercise such power. In the present case, entire application is silent as to why power to transfer the winding up petition should be exercised by the Court and the winding up petition should be transferred. I find that this Court has heard this matter at great length. In fact, both the parties before filing of the present application completed nearly all the arguments on merits of the case. The Court had also placed all its queries to counsels for both the parties. Therefore, I do not find the request made at this stage to be a bona fide request. Having argued the matter at length and having faced the queries, it is most inappropriate on part of the respondents to move such an application, that too without any reasons, what to say of strong reasons. Such application or request could have been made any time after 06.06.2018, when the proviso came in

force, till the times the arguments in the case were initiated. Such a request also could have been made before initiating the arguments as a preliminary request. To raise such a request, after the conclusion of arguments on merits, cannot be called bona fide. Further, since nothing is said in the application, I find no reason to allow the application. The request of SIFCL for transfer of case under the second proviso is rejected.

24. The above judgment of the Allahabad High Court was also noted by the Karnataka High Court in the case of *Milestone Real Estate Fund vs. Prisha Properties India Pvt. Ltd.*, MANU/KA/5616/2019 while interpreting the proviso to Section 434 of the Companies Act regarding the transfer of winding up proceedings to NCLT. The court noted as follows:-

“16. In Reserve Bank of India vs. Sahara India Financial Corporation Ltd., the Hon'ble High Court of Allahabad has held that it is no doubt correct that the power under the second proviso to Section 434 is given to the Court to transfer any winding up proceedings which is pending before the High Court on 06.06.2018. The proviso no doubt be applicable to such proceedings which are not transferred under the Transfer Rules 2016. However, the proviso does not say that these proceedings would automatically stand transferred. Rather it leaves the discretion with the Court, where the winding up proceedings are pending, to transfer the same or not to transfer the same. For want of reasons, the Hon'ble Court negated the request for transfer moved by the respondents through an application.

XXXXX

22. .... The resultant position, therefore, is that the company petitions not transferred to NCLT under Section 434-(1)(C) not falling under the first proviso thereof shall be proceeded with, in accordance with the provisions of Companies Act 1956. Cases falling under second proviso to 434-(1)(C) cannot be transferred automatically unless the party/parties to the proceedings makes an application. Neither the petitioner nor the respondent has made any such application for transfer. Rule 2(16) of the NCLT Rules, 2016

cannot be imported to the Companies Act, 2013 to interpret the phrase 'party' or 'parties' employed in the proviso to Section 434(1)(C) of the Act, 2013 unless the Legislature specifies so. Neither by reference nor by incorporation, the definition clause of other enactment could be borrowed to interpret the words under the Act, 2013. Hence, the arguments of the learned Senior counsel for the applicant has to be negated.....”

25. What would follow from the two judgments of the Supreme court, namely, in the case of *Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd.*(supra) and *Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd.*(supra) and the judgment of the Division Bench of the Bombay High Court in the case of *Jotun India Private Limited & Ors. v. PSL Limited* (supra) read with the relevant proviso to Section 434 (1) (c) of the Companies Act is that a discretion has been granted to the High Court to transfer matters at the request of any party to the NCLT. Where the Official Liquidator has not been appointed as the Liquidator, the Company Court would transfer such matters to the NCLT on receipt of an appropriate request by a party. However, where a Liquidator has been appointed, such matters would normally not be transferred to NCLT.

26. I am fortified by the above conclusion based on the provisions of the Companies Act, 1956 which deal with dissolution of a Company and also by the observations of the Division Bench of the Bombay High Court in the case of *Jotun India Private Limited & Ors. v. PSL Limited*(supra) which judgment was approved by the Supreme Court in *Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd.*(supra).

27. I may have a look at some of the provisions regarding the liquidator

under the Companies Act, 1956. The functions and powers of the Official Liquidator are described in section 448 to section 481 of the Companies Act, 1956. Some relevant provisions read as follows:

“448. Appointment of Official Liquidator:-

(1) For the purposes of this Act, so far as it relates to the winding up of a company by the court, there shall be an Official Liquidator who:-

(a) may be appointed from a panel of professional firms of chartered accountants, advocates, company secretaries, costs and works accountants or firms having a combination of these professions, which the Central Government shall constitute for the Tribunal; or

(b) may be a body corporate consisting of such professionals as may be approved by the Central Government from time to time; or

(c) may be a whole-time or a part-time officer appointed by the Central Government :

Provided that, before appointing the Official Liquidator, the court may give due regard to the views or opinion of the secured creditors and workmen.

449. Official Liquidator to be liquidator:

On a winding up order being made in respect of a company, the Official Liquidator shall, by virtue of his office, become the liquidator of the company.

457. Powers of liquidator.

(1) The liquidator in a winding up by the Tribunal shall have power, with the sanction of the Tribunal-

(a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be

necessary for the beneficial winding up of the company;

- (c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels;
- (ca) to sell whole to the undertaking of the company as a going concern.
- (d) to raise on the security of the assets of the company any money requisite;
- (e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(2) The liquidator in a winding up by the Court shall have power-

- (i) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company' s seal;
- (ia) to inspect the records and returns of the company on the files of the Registrar without payment of any fee;
- (ii) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the Insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;
- (iii) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;
- (iv) to take out, in his official name, letters of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself:

Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General;

(v) to appoint an agent to do any business which the liquidator is unable to do himself.

(2A) The liquidator shall –

(a) appoint security guards to protect the property of the company taken into his custody and to make out an inventory of the assets in consultation with secured creditors after giving them notice ;

(b) appoint, as the case may be, valuer, chartered surveyors or chartered accountant to assess the value the company's assets within fifteen days after taking into custody of property, assets referred to in sub-clause (a) and effects or actionable claims subject to such terms and conditions as may be specified by the Tribunal ;

(c) give an advertisement, inviting bids for sale of the assets of the company, within fifteen days from the date of receiving valuation report from the valuer, chartered surveyors or chartered accountants referred to in clause (b), as the case may be.

XXXXX

(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any of the powers conferred by this section."

28. Section 481 of the Companies Act, 1956 reads as follows:

“481. Dissolution of company.

(1) When the affairs of a company have been completely wound up or when the court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets or for any other reason whatsoever and it is



just and reasonable in the circumstances of the case that an order of dissolution of the company should be made, the Tribunal shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) A copy of the order shall, within thirty days from the date thereof, be forwarded by the liquidator the Registrar who shall make in his books a minute of the dissolution of the company.

(3) If the liquidator makes default in forwarding a copy as aforesaid, he shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.”

29. In *Meghal Homes (P) Ltd. v. Shree Niwas Girni K.K.Samiti & Ors.*(supra), the Supreme Court stated as follows:

“31. Now to recapitulate, the Company was ordered to be wound up on 25.7.1984 and the Official Liquidator was directed to take possession of the assets of the Company. Once an order of liquidation had been passed on an application under Section 433 of the Companies Act, the winding up has to be either stayed altogether or for a limited time, on such terms and conditions as the court thinks fit in terms of Section 466 of the Act. If no such stay is granted, the proceedings have to go on and the court has to finally pass an order under Section 481 of the Act dissolving the Company. In other words, when the affairs of the Company had been completely wound up or the court finds that the Official Liquidator cannot proceed with the winding up of the Company for want of funds or for any other reason, the court can make an order dissolving the Company from the date of that order. This puts an end to the winding up process.

XXXXXXXXXX

47. When a Company is ordered to be wound up, the assets of it, are put in possession of the Official Liquidator. The assets become custodia legis. The follow up, in the absence of a revival of the Company, is the realization of the assets of the

company by the Official Liquidator and distribution of the proceeds to the creditors, workers, and contributories of the company ultimately resulting in the death of the company by an order under Section 481 of the Act, being passed. But, nothing stands in the way of the Company Court, before the ultimate step is taken or before the assets are disposed of, to accept a scheme or proposal for revival of the Company. In that context, the Court has necessarily to see whether the Scheme contemplates revival of the business of the company, makes provisions for paying off creditors or for satisfying their claims as agreed to by them and for meeting the liability of the workers in terms of Section 529 and Section 529A of the Act. Of course, the Court has to see to the bona fides of the scheme and to ensure that what is put forward is not a ruse to dispose of the assets of the Company in liquidation.”

30. Similarly, in *CESC Limited v. Bharat Iron & Steel Industries & Shalimar Mineral Products Pvt. Ltd.*, 1995 (6) SCALE 417, the Supreme Court made an order for winding up of the respondent company. No appeal was filed against the winding up order. OL took possession of the assets of the respondent company thereafter the company court directed the OL not to take possession of the assets of the company. In those circumstances, the Supreme Court held as follows:

“4. There can be no dispute that the winding order dated 14.12.1993 not being challenged, it had to be acted upon and in terms thereof the Official Liquidator had already taken possession of the assets of the company on 10.01.1994. This being so, factually there was no occasion for S.K.Sen, J. to make the order dated 31.03.1994 restraining the Official Liquidator from taking possession of the assets of the company. That apart, the learned Company Judge, after the making of the winding up order could have made an order of stay only in exercise of the power under section 466 of the Companies Act. Admittedly, the Company under liquidation

could not invoke that provision and no prayer for stay under section 466 was made by any of the persons empowered by that section. The order dated 31.03.1994 by S.K.Sen, J. had therefore to be set aside in appeal for this reason alone by the Division Bench. The question for granting any further relief and that too in the appeal filed by the CESE Limited, did not arise.”

31. Under IBC, liquidation process is stated in Chapter IV. The power and duty of the Liquidator is given in section 35 which reads as follows:

“35. Powers and duties of liquidator.—(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

(a) to verify claims of all the creditors;

(b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;

(c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;

(f) subject to Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.]

(g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;

(h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

(i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;

(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;

(l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

(m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and

(o) to perform such other functions as may be specified by the Board.

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under Section 53:

Provided that any such consultation shall not be binding on the liquidator:

Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.”

32. It is manifest that two functionaries, namely, OL under the Companies Act, 1956 and Liquidator under IBC cannot concurrently carry out their functions. Such a proposition would create a needless confusion. Once a liquidator is appointed by the company court in saved matters, the process of liquidation commences. Ordinarily, the liquidator takes time and efforts to consolidate the assets of the respondent company, to evaluate the same and put them for auction. He seeks to take other steps to dissolve the company. Once this process has started, no purpose is served by handing over the same to another liquidator who would also perform a similar function all over again. This would set the entire effort of the Official Liquidator at naught which would not have been intended. Further the matter at that stage mostly comprises of matters where there is no prospect of Insolvency Resolution Process. Hence, once this court has appointed the Official Liquidator as the liquidator, normally such petition would not be

transferred to NCLT.

33. I may hasten to add that the issue as to whether an application under Section 7 or Section 9 of IBC can be initiated before NCLT once the OL is appointed as a Liquidator by the Company Court is an issue that is said to be pending before the Supreme Court in the case of *State Bank of India v. Shakti Bhog Foods Ltd.* being Civil Appeal No.4536/2018.

34. I may only note that the learned senior standing counsel appearing for the OL has vehemently argued that there is no material distinction between appointment of a provisional liquidator and the official liquidator. She has relied upon section 450 of the Companies Act. She has also relied upon judgment of the Supreme Court in the court of *Bakemans Industries Pvt. Ltd. v. New Cawnpore flour Mills & Ors.*(supra). She pleads that even where the Official Liquidator is appointed as provisional liquidator this court should not transfer such matters to NCLT.

35. Section 450 of the Companies Act reads as follows:

“450. Appointment and powers of provisional liquidator.

(1) At any time after the presentation of a winding up petition and before the making of a winding up order, the Court may appoint the Official Liquidator to be liquidator provisionally.

(2) Before appointing a provisional liquidator, the Court shall give notice to the company and give a reasonable opportunity to it to make its representations, if any, unless, for special reasons to be recorded in writing, the Court thinks fit to dispense with such notice.

(3) Where a provisional liquidator is appointed by the Court, the Court may limit and restrict his powers by the order appointing him or by a subsequent order; but otherwise he shall have the same powers as a liquidator.

(4) The Official Liquidator shall cease to hold office as provisional liquidator, and shall become the liquidator, of the company, on a winding up order being made.”

36. The Supreme Court in *Bakemans Industries Pvt. Ltd. v. New Cawnpore flour Mills & Ors.*(supra) held as follows:

“63. The Courts in India have to keep in mind different considerations. The concept of right of property which was existing in 19<sup>th</sup> Century in England would not stand the test of the act and the interpretation it deserves keeping in view the object and purport of the 1956 Act. In India, the company courts have a statutory duty to protect the rights of workmen keeping in view the parri passu charge created in their favour in terms of section 529A of the Act. Power and functions of a provisional liquidator subject to the limitations imposed by the court are the same as that of an official liquidator.” (emphasis added)

37. However, keeping in view the observations of the Supreme Court in the case of *Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd.* (supra) where the judgment of the Bombay High Court in the case of *Jotun India Private Limited & Ors. v. PSL Limited* (supra) was approved, this contention of the learned senior standing counsel for the Official Liquidator cannot be accepted. Further, in my opinion, once an Official Liquidator is appointed as a Provisional Liquidator, normally the whole exercise would still be at an initial stage. In these circumstances, normally, this court would transfer the matter to NCLT. This would also give an opportunity to try and revive the company by the Insolvency Resolution Process. There may be exceptional circumstances where the Liquidator has made much progress and the chances of Insolvency Resolution Process are very bleak then, in that eventuality this court may exercise its discretion and not transfer such a matter.

38. Based on the above findings, I will now deal with the various

applications filed for impleadment/transfer to NCLT.

**Co. Pet. 518/2013 (Hanung Toys & Textiles Ltd.) and CA Nos. 1415/2018 (for impleadment) & 1416/2018 (for transfer to NCLT)**

39. In this case, the respondent is Hanung Toys & Textiles Ltd. The OL was appointed as a Liquidator on 12.07.2018. PNB has exercised powers under the SARFAESI ACT and taken possession of the mortgaged immovable properties and hypothecated stock of the respondent company after issuing a demand notice on 12.10.2015. These properties as per the application of PNB have been sold. Symbolic possession was also taken of the factory and industrial plant at Roorkee. Thereafter, in 2018 PNB has filed a petition under section 7 of the Insolvency and Bankruptcy Code before NCLT. PNB has now filed an application for transfer of this petition to NCLT. On 28.03.2019, an IRP was appointed by NCLT. However, the order appointing the IRP has been stayed by NCLAT on 30.04.2019 as the Liquidator has already been appointed by this court.

In view of the above it follows that the Official Liquidator has been appointed liquidator. Further, no proceedings are pending before NCLT. In my opinion, no grounds are made out to transfer this petition to NCLT. CA Nos. 1415/2018 and 1416/2018 are dismissed.

**Co. Pet. 987/2015 (Shakti Bhog Foods Ltd.) and CA Nos. 718/2014 (for intervention) and 1444/2018 (for transfer to NCLT)**

This petition pertains to the respondent-Shakti Bhog Foods Ltd. The OL was appointed as a Liquidator on 18.01.2018. CA Nos. 718/2018 and 1444/2018 have been filed by SBI for intervention and transfer of these proceedings to NCLT respectively.

Phoenix ARC Pvt. Ltd. filed CA No.680/2018 stating that they have



taken measures under the SARFEASI Act, 2002 and have opted to stay outside the winding up proceedings. They have further stated that they have not given up their security/charged assets. ICICI bank had moved an application stating that they seek to remain outside the winding up process. This court on 31.10.2018 directed that possession of the properties and the moveable assets hypothecated/mortgaged with the bank to be handed over to the bank subject to the terms and conditions stated therein. The assets include the properties lying at Village Samana Bahu, Tensil Nilokheri, District Karnal, Haryana and Village Samani Tehsil Thaneswar, District Kurukshetra, Haryana.

I may note that the proceedings were initiated under Section 7 of the IBC by SBI before NCLT. NCLT vide order dated 08.02.2018 dismissed the said petition as the OL had already been appointed by this court. NCLAT also dismissed the appeal vide order dated 12.03.2018. As noted above, an appeal is filed in the Supreme Court being CA No.4536/2018 and is pending consideration.

The application for appointment of IRP filed by SBI has already been rejected by NCLT. Further the OL has been appointed by this court as the Liquidator. There are no reasons to transfer these proceedings to NCLT. CA Nos. 718/2018 and 1444/2018 are accordingly dismissed.

**Co. Pet. 668/2014 (MVL Ltd.) and CA Nos. 1047/2018 (for impleadment) and 1048/2018 & 1366/2018 (for transfer to NCLT)**

40. In the present petition, the respondent is MVL Ltd. In this case, the petition was admitted and the OL was appointed as the Provisional Liquidator on 05.07.2018.

CA Nos. 1047/2018 and 1048/2018 have been filed by Dena Bank for

impleadment and transfer of these proceedings to NCLT respectively. The petitioner in this matter is also supporting the plea of Dena Bank for transfer of proceedings to NCLT and has filed an application being CA No. 1366/2018 in this regard. In this case the proceedings initiated by Dena Bank under Section 7 of the IBC were dismissed on 25.09.2018 as this court had appointed the provisional liquidator. As per written submissions submitted by the OL, there is presently no proceeding pending before NCLT filed by the applicants before this court.

It becomes clear that the applicant Dena Bank seeks to undo the order of NCLT dismissing its application under section 7 of the IBC by moving this court for transfer of these proceedings to NCLT. That apart, in my opinion, it has not been submitted by any of the parties that NCLT has appointed an IRP. If this court were to recall its order appointing the OL as a PL and transfer the matters to NCLT under the said proviso of Section 434 of the Companies Act, 2013 the proceedings before the Tribunal will be treated as an application for initiation of corporate insolvency resolution process under the IBC. Till the NCLT appoints an IRP the Ex.Management would again come in control of the assets of the respondent company. This may not be in the interest of the creditors of the respondent company. Hence, there is no merit in these applications.

CA No. 1047/2018 is accordingly dismissed. CA No. 1048/2018 and CA No. 1366/2018 seeking transfer to NCLT are also dismissed.

**Co. Pet. 814/2016 (Premia Projects Ltd.) and CA Nos. 826/2018, 980/2018 and 984/2018 (seeking transfer to NCLT)**

41. In this petition, the respondent in Premia Projects Ltd. On 12.03.2018, this court was pleased to admit the present petition and

appointed the OL as a Provisional Liquidator. Mr. Rahul Joshi, an allottee of a plot in the respondent's project filed an application being CA No. 984/2018 seeking transfer of the present proceedings to NCLT. Similar applications have been filed by other allottees being CA Nos. 980/2018 filed by Mr.Ganesh Prasad and 826/2018 filed by Mr.Tek Chand. I may note that on 21.01.2019 the petitioner opposed the transfer of these petitions stating that SFIO has initiated an inquiry against the respondent company on account of various frauds done by the Ex.Management.

42. As per written submissions submitted by the OL, NCLT vide order dated 30.05.2018 appointed an IRP on a petition of an allottee as a financial creditor. This petition however, was dismissed on 30.01.2019 noting that the provisional liquidator has been appointed by this court. Thereafter, on 11.03.2019 NCLT has recalled the order dated 30.01.2019 and again appointed the IRP.

43. It is clear that the proceedings before the Provisional Liquidator are at an initial stage. Winding up process has not progressed much after the Provisional Liquidator was appointed. In these circumstances, in my opinion, it would be in the interest of the respondent Company and its creditors that an attempt is made to revive the company.

44. Accordingly, I implead the said three allottees as parties in the present petition and transfer this petition to NCLT.

45. The OL who is appointed as the PL may hand over the assets, books of accounts and all other material of the respondent company in its possession to the IRP subject to the IRP paying to the OL the expenses incurred by the OL since its appointment as a Provisional Liquidator on 12.3.2018.

46. The Registry will take all consequential steps.
47. With the above, the present applications stand disposed of.

**CO.PET. Nos.518/2013, 987/2015, 668/2014 and 814/2016**

List for direction before the Roster Bench on 16.10.2019 along with all connected petitions.

**SEPTEMBER 30, 2019**  
rb/n/v

**JAYANT NATH, J**

