



INSOLVENCY & BANKRUPTCY

No automatic transfer of winding up proceeding under SICA to NCLT

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In a recent judgment delivered by the Hon'ble Supreme Court presided by the division bench of R.F. Nariman J. And M.R. Shah J. dated 12th December 2018 in *Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd* in Civil Appeal No. 12023 of 2018 held that all proceedings under the Sick Industrial (Special Provisions) Act 1985 (“SICA”) 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 to National Company Law Tribunal (“NCLT”).

The matter related to a winding up proceeding of Jaipur Metals and Electrical Limited, which filed an application before BIFR for restructuring the company under SICA. BIFR was of the opinion that the company should be wound up and the same was forwarded to the High Court under Section 20 of SICA. Meanwhile, the workers of the company filed an application before High Court for realization of their due.

While the winding up proceeding were pending before the High Court, a financial creditor of the company filed an application under section 7 of the Insolvency and Bankruptcy Code 2016 (the “Code”) before NCLT to initiate corporate insolvency resolution against the Company. NCLT considering the fact that the debt was admitted by the company and that till date no liquidation order had been passed in the winding up proceedings pending before the High Court, admitted the application. Accordingly, a moratorium was declared in terms of Section 14 of the Code and an interim resolution professional was appointed. NCLT while admitting the application relied on section 238 of the Code, which is the non-obstante clause.

This order of the NCLT was set aside by the High Court on the ground that NCLT lacked jurisdiction and refused to transfer the winding up proceeding to NCLT. This order of the High Court is challenged before the Supreme Court.

The appellant before the Supreme Court referred to Eleventh Schedule of the Code and amendments made to the Companies Act, 2013, particularly to Section 434, which would show that all winding up proceedings pending before the High Court are to stand transferred to the NCLT at such stage as may be prescribed by the Central Government by rules made in this behalf. They then referred to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 (“Transfer Rules”) and in particular, to Rule 5(2) thereof, which was omitted with effect from 29th June 2017. Rule 5(2), before its omission, provided that proceedings initiated before High Court under Section 20 SICA will continue before the High Court itself. The main contention of the appellant was that since Rule 5(2) has been omitted from the Transfer Rules with effect from 29th June 2017, the proceedings cannot continue in the High Court and should be transferred to NCLT.

However, the Supreme Court refused to accept this contention. According to the Supreme Court, the effect of the omission of Rule 5(2) is not to automatically transfer all cases under Section 20 of the SICA to the NCLT. According to Supreme Court the real reason for omission of Rule 5(2) is the repeal of SICA, as there will be no new referral under SICA due to its repeal. Hence, no need to retain Rule 5 (2) under the Transfer Rules. However, all pending proceedings under Section 20 of the SICA would continue with High Court. The Supreme Court referred to an amendment to Section 434(1)(c) of the Companies Act and held that in order to transfer such proceedings to NCLT, an application has to be filed by a party to the High Court. The High Court may then transfer such proceeding to NCLT. The proceedings so transferred would then be dealt with by the NCLT as an application for initiation of the corporate insolvency resolution process under the Code.

However, the Supreme Court found error in the High Court's judgment, which set aside the NCLT order of admitting application under the Code on the ground of lack of jurisdiction. The Supreme Court observed that proceeding under the Code is an independent proceeding, which has nothing to do with the transfer of pending winding up proceedings before the High Court. It is open for an applicant at any time before a winding up order is passed against the corporate debtor to apply for resolution proceeding under the Code. It is supported by non-obstante clause of section 238 of the Code, which state as follows:

“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.”

The High Court held that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor. Hence, High Court cannot set aside the NCLT proceeding on the ground of lack of jurisdiction. On this ground, the Supreme Court set aside the High Court judgment and allowed the continuation of the NCLT proceedings.

