

DICHOTOMIES SURROUNDING THE “SAVED PETITIONS” AND THE STAGE OF THEIR TRANSFER TO THE NCLT

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016, in order to allow the transfer of certain proceedings appertaining to arrangements and reconstruction and winding up, pending before the District Court or High Court to the Tribunal, had amended Section 434 of the Companies Act, 2013 as well as introduced the Companies (Transfer of Pending Proceedings) Rules, 2016 which created a separate class of company petitions, referred to as “*Saved Petitions*”.

The research paper attempts to enunciate the encompassing ambiguities and the potential complications which may arise in cases of such *Saved Petitions*, by tracing the trajectory of amendments in the concerned legislations and the underlying objective of the liquidation under the Companies Act, 1956 *vis-à-vis* the corporate insolvency resolution process under IBC, more so in the context of the recent IBC (Amendment) Act, 2020 which has expanded the scope of the moratorium and also extended protection to the resolution applicants and their property.

I. INTRODUCTION

The Insolvency and Bankruptcy Code introduced the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) amidst the low recovery rates, and on account of the lack of powers in the hands of the creditors when default takes place. Accordingly, the IBC provides for the formation of the committee of creditors which provides the creditors with voting rights and evaluation of the possibilities of a resolution plan, which is akin to a revival plan, failing which the defaulting firm undergoes liquidation.²

The IBC amended Section 434 of the Companies Act, 2013, to allow the transfer of certain proceedings, including proceedings relating to arrangements and reconstruction and winding up, pending before the District Court or High Court to be transferred to the Tribunal which may deal with such proceedings from the stage before their transfer.³ Subsequently, the Ministry of Corporate Affairs (MCA) notified the provisions of Chapter XX of the Companies Act, 2013 with effect of December 15, 2016,⁴ along with

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² *The Report of the Bankruptcy Law Reforms Committee*, Volume I: Rationale and Design, Page 2 and 13 (November 2015)

³ Section 255 which amended the Companies Act, 2013 was notified *vide* the Notification S.O. 3453(E). dated 15th November 2016 issued by the Ministry of Corporate Affairs

⁴ Notification No. S.O. 3677(E) dated 07.12.2016 issued by the Ministry of Corporate Affairs

the Companies (Transfer of Pending Proceedings) Rules, 2016 which, *inter alia*, created a separate class of company petitions filed before the High Court under Section 433(e) of the Act of 1956, which have been referred to “**Saved Petitions**” in legal parlance.⁵ These *Saved Petitions* have been a subject matter of much contention, given the distinctive objectives the insolvency process under the IBC and the liquidation proceedings under the Companies Act, 1956, endeavor to achieve.

II. OVERVIEW OF THE SUBSISTING RULES AND THE AMENDMENTS

The MCA *vide* its notification dated 30.12.2016 notified the provisions pertaining to the Corporate Insolvency Resolution Process under the IBC.⁶ The MCA notified the provisions of the Chapter XX of the Companies Act, 2013 along with the Companies (Transfer of Pending Proceedings) Rules, 2016 (Transfer Rules), with effect from December 15, 2016.⁷

Consequently, all the proceedings, under the Companies Act, 2013 and 1956, other than proceedings relating to winding up stood transferred to the National Company Law Tribunal.⁸ However, all the petitions in relation to winding up under Section 433(e) on grounds of inability to pay debts pending before a High Court, and where the petition had not been served on the Respondent, as required under Rule 26 of the Companies (Court) Rules, 1959 stood transferred to the NCLT, wherein such applications would be treated as applications under Section 7,8 or 9 of the IBC, as the case may be.⁹

Subsequently, Rule 4 of the Transfer Rules was amended to ensure that where a petition relating to the winding up of a company under Rule 4 has not been transferred to the NCLT and where there is another petition pending under Section 433(e) for winding up against the company, as on 15th December 2016, the petition does not stand transferred to the NCLT and the proceedings continue in the High Court.¹⁰

Thereafter, another amendment under Section 434 of the Companies Act, 2013, was made effective from 17.08.2018, to allow the parties to any proceedings relating to the winding up of the company pending before the commencement of the IBC (Amendment) Ordinance, 2018, to file an application for transfer of such proceedings to the NCLT and the proceedings so transferred to be dealt by the NCLT as an application for the initiation of CIRP process.¹¹

III. EVOLVING LEGAL POSITION THROUGH JUDICIAL PRECEDENTS

⁵ As referred to, in the case of *Jotun India Private Limited v. PSL Limited*, (2018) 2 AIR Bom R 350

⁶ Ministry of Corporate Affairs, *Notification S.O. 3594(E)*, dated 30th November 2016;

⁷ *Notification No. S.O. 3677(E)* dated 07.12.2016 issued by the Ministry of Corporate Affairs; G.S.R. 119(E) dated 07.12.2016 issued by the Ministry of Corporate Affairs

⁸ Rule 3, *Companies (Transfer of Pending Proceedings) Rules, 2016*

⁹ Rule 5, *Companies (Transfer of Pending Proceedings) Rules, 2016* (As notified *vide* the notification No. G.S.R. 119(E) dated 07.12.2016

¹⁰ Substituted by the *Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017* *vide* Notification No. GSR732(E) dated 29.06.2017

¹¹ Inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 dated 17.08.2018

The Bombay High Court in a rather noteworthy judgment in the case of *Jotun India Private Ltd. Vs. PSL Ltd.*¹², while dealing with an application made against the order of the Company Court staying proceedings initiated by the Corporate Debtor before the NCLT in light of a pending winding up petition against the Corporate Debtor in the said Company Court, had occasion to rule on two legal issues:

- (i) Whether an application under the IBC can be made even in cases where a winding up petition has been admitted and is pending before a Company Court?
- (ii) Whether such an admission of a winding up petition allows the Company Court to injunct proceedings before the NCLT?

The Bombay High Court, after taking into consideration the underlying objective of IBC basis the relevant provisions and the report of the Bankruptcy Law Reforms Committee, held that IBC has supremacy over other general laws (Companies Act) and held that there is no bar on NCLT from proceeding with an insolvency petition even in cases of *Saved Petitions*, post the stage of issuance of notice. Further, it was held that the Company Court while dealing with the “*Saved Petitions*” shall have no jurisdiction to stay the proceedings in respect of revival or resolution issues. The Court further went on to clarify that allowing both the Company Court and the NCLT to proceed simultaneously would not serve any purpose and therefore, in case the efforts of revival by NCLT fail, then the Company Judge shall exercise jurisdiction in the saved petitions.

However, the Madras High Court, while dealing with a case wherein the constitutionality of the provisions of the Rule 2(a) and Rule 5 of the Transfer Rules had been challenged has stayed the proceedings in NCLT while there was a winding up petition pending before the High Court.¹³

The Apex Court in a case where the Operational Creditor had filed a winding-up petition under Section 433(e) of the Companies Act, 1956 before the Delhi High Court against the Corporate Debtor and in the meanwhile, a Financial Creditor filed an insolvency petition against the Corporate Debtor under Section 7 of the IBC which was admitted by the NCLT, New Delhi and upheld by NCLAT, New Delhi, enunciated that serving of the notice under Rule 26 and 27 refers to a pre-admission scenario of the winding up petition. The Court referred to the final notification dated 17.08.2018 thereby stating that even if there is a pending winding up petition in the High Court, any one could apply for transfer of such petition to the NCLT under the IBC and same may be treated as an insolvency petition, thereby upholding their earlier decision in *Jaipur Metals & Electricals Employees organization v. Jaipur Metals & Electricals Ltd. and Ors.*,¹⁴ The Court also upheld the judgment passed by the Bombay High Court in *Jotun India*, and stated that there is no bar as to a transfer application even if the winding up petition is pending and notice has been served.

¹² *Jotun India Private Ltd. Vs. PSL Ltd.* [2019] 213 Comp Cas 61(Bom)

¹³ *SRL Advisors LLP vs. Renault Nissan Automotive India Pvt. Ltd.* W.P.Nos.2333, 2334 & 25373 of 2018 and WMP.Nos.2863 to 2866, 29520 & 29522 of 2018, Order dated 27.11.2018. The matter pending before the NCLT has now, however, been withdrawn pursuant to the mutual settlement amongst the parties.

¹⁴ *Jaipur Metals & Electricals Employees organization v. Jaipur Metals & Electricals Ltd. and Ors.*, (2019) 4 SCC 227

In a similar case¹⁵, several winding up petitions were filed in the High Court of Calcutta and a petition under Section 7, IBC was registered in the NCLT Kolkata. The NCLT, by taking reference of the *Forech India Lts. v. Edelweiss Asset Reconstruction Co. Ltd.*¹⁶ and *Jaipur metals*¹⁷, stated that a Petition under Section 7 or a Section 9, is an independent proceeding from winding up petitions in the High Court and *ipso facto* does not debar the Tribunal from proceeding with the application of the creditor. The only exception to that is, the event wherein winding up order of the company has been passed and the Official Liquidator has been appointed pursuant to the same, then the Tribunal cannot proceed with such an application due to S. 11 of the IBC.

IV. STAGE OF LIQUIDATION WHERE THE COMPANY JUDGE EXERCISES JURISDICTION

Rather interestingly, the NCLT was adjudicating upon a case where a company petition was admitted by the High Court of Delhi and the official liquidator had already been appointed and was directed to take over all the assets, books of accounts and records of the Respondent Company, and therefore, it was asserted that since most of the properties belonging to the company had already been sold and the amounts procured from the sale had been duly appropriated, the Petition ought not to be admitted. The NCLT, however relying on the judgment in *Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd. And Ors.*¹⁸, held that the winding up proceedings could be initiated at any time before a winding up order and has construed the winding up order to be akin to the final dissolution order.¹⁹ The NCLAT upheld while relying upon *Edelweiss*²⁰ upheld the order passed by the NCLT.²¹

In another judgment of the NCLT, Mumbai Bench in the matter of *Bank of Baroda v. Topworth Pipes & Tubes Private Limited*,²² wherein a provisional liquidator had been appointed by the Hon'ble Bombay High Court, the NCLT has arguably, while relying and quoting the written submission put forth by the Petitioner which stated that an order of winding up or liquidation in no manner means a culmination of the proceedings and it is only once an order under Section 481 of the Companies Act is passed for "*dissolution of the company*"²³ that the proceedings culminate, has admitted the Insolvency Petition under Section 7 of the IBC.

¹⁵ *State bank of India vs. M/s Tantia Constructions Ltd.* CP (IB) No. 148/KB/2018, Order dated 13.03.2019.

¹⁶ *Forech India Lts. v. Edelweiss Asset Reconstruction Co. Ltd.*, 2019 (2) SCALE 142

¹⁷ *Supra* Footnote 13

¹⁸ *Supra* Footnote 13

¹⁹ *Punjab National Bank v. M/s. Hanung Toys and Textiles Limited*, CP No. (IB)- 953 (PB)/2018, Para 25

²⁰ *Supra* Footnote 15

²¹ *Ashok Kumar Bansal v. Punjab National Bank*, Company Appeal (AT) (Insolvency) No. 465 of 2019 judgment dated 25.11.2019

²² *Bank of Baroda v. Topworth Pipes & Tubes Private Limited*, Order dated 11.12.2018, CP 1239/I&B/NCLT/MAH/2018

²³ *Ibid* at Para 8 Sub Para 23.

Much recently, there have been two contradictory decisions of the Madras and Delhi High Court. The Delhi High Court in the case of *Action Ispat*²⁴ whereby the official liquidator had been appointed pursuant to the winding up order, held that the Court not only has the power to recall the winding up, but can also transfer the proceedings up from the stage of liquidation and held that when an order of winding up is passed, the proceedings not having reached an advanced stage, would further mandate that proceedings be transferred to NCLT. The Special Leave Petition apropos the said judgment is presently pending adjudication before the Apex Court.²⁵

The Madras High Court on the other hand, in the case of *Vasan Health Care*²⁶ has held that once a winding up order has been passed under the Companies Act and an official liquidator has been appointed who takes the charge of the company's assets for the purposes of liquidation, then no proceeding under the IBC can be filed.

V. SHOULD BOTH THE WINDING UP PROCEEDING AND THE INSOLVENCY PROCEEDING CONTINUE AT THEIR RESPECTIVE ADJUDICATORY AUTHORITIES AT THE SAME TIME?

As per the case of *Jotun India Pvt. Ltd. Vs. PSL Ltd.*²⁷, as the continuation of both the winding up and insolvency proceeding simultaneously will frustrate the objective behind the said laws, therefore if the insolvency proceeding does not provide any fruitful result, then the High Court has the jurisdiction to continue with the winding up proceeding.

A. MODUS OPERANDI FOR THE PETITION FOR WINDING UP, UNDER THE COMPANIES ACT, 1956

Under the Companies Act, 1956 read with the Companies (Court) Rules, 1959, any petition for winding up, is to be published at least fourteen days prior to the date fixed for hearing on admission.²⁸ After the presentation of the winding up petition and before the passing of the winding up order, the Court may appoint a provisional liquidator.²⁹ It is usually post this stage, that the order of the winding up is passed, and the provisional liquidator may be appointed as official liquidator of the company.³⁰ Subsequently, an advertisement of the order of the winding up is published in the newspaper.³¹

It is apposite to mention that the liquidator, after the order of winding up has been passed, may take into his custody all the property, books and papers of the company and actionable claims to which the

²⁴ *Action Ispat & Power Private Limited v. Shyam Metalics & Energy Limited*, Co. App 11/2019 & C.M. No. 31047/2019, C.M. No. 34726/2019, Judgment dated 10.10.2019

²⁵ *Action Ispat & Power Private Limited v. Shyam Metalics & Energy Limited*, SLP (C) No. 026415/2019

²⁶ *Ganesh Lal Jain & Ors. v. Vasan Health Care Private Limited & Ors.*, 2019 (5) LW 35

²⁷ *Supra* Footnote 11

²⁸ Rules 24, 25 read with Rule 96, *Companies (Court) Rules*, 1959

²⁹ Section 450(1), *Companies Act*, 1956 read with Rule 106, *Companies (Court) Rules*, 1959

³⁰ Section 450(4) *Companies Act*, 1956.

³¹ Rule 113, *Companies (Court) Rules*, 1959

company is entitled.³² The suits that have been already instituted shall be stayed.³³ The official liquidator after the preparation of the preliminary report,³⁴ proceeds to sell the assets of the company.³⁵ It is thereafter, that the Official Liquidator collates all the claims of the list of creditors, workmen and contributories and submits a certificate in Form 71 containing the stipulations.³⁶

When all the payments as aforesaid have been made and all the claims have been settled or all the assets of the company have been applied to settle the claims and the Official Liquidator cannot proceed further with the winding up, then the Court shall pass an order for dissolution of the company.³⁷

B. CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE IBC

Under the IBC, since the ultimate objective to be achieved is the swift revival of the defaulting company (Corporate Debtor), the CIRP may be initiated by a financial creditor, an operational creditor or the corporate debtor itself.³⁸ The adjudicating authority, shall after the admission of the application for the initiation of CIRP, declare a moratorium under Section 14 of the IBC, cause a public announcement of the initiation of the CIRP, call for the submission of claims and appoint an Interim Resolution Professional (IRP).³⁹ Thereafter, the IRP so appointed shall take over the management of the affairs of the Corporate Debtor and shall manage the operations of the Corporate Debtor as a going concern.⁴⁰

It is usually at this stage that the IRP collects the receives and collates all the claims submitted by the creditors, pursuant to the public announcement made under Section 13 and 15 of the IBC,⁴¹ and constitutes a Committee of Creditors (COC). The COC in their first meeting appoint the Resolution professional who shall conduct the CIRP and invite the prospective resolution plans which shall be approved by the COC.⁴² The NCLT, is it is satisfied that the resolution plan meets all the requirements, as stipulated under Section 30(2), IBC, may approve or reject the resolution plan⁴³ and subsequently, the moratorium imposed upon the Corporate Debtor ceases to have effect.⁴⁴ In the event the NCLT

³² Section 456(1), *Companies Act, 1956* read with Rule 114 *Companies (Court) Rules, 1959*

³³ Section 446(1), *Companies act, 1956*

³⁴ Section 455(1), *Companies Act, 1956* read with Rule 135, *Companies (Court) Rules, 1959*

³⁵ Rules 272 and 273, *Companies (Court) Rules, 1959*

³⁶ In accordance with Rule 167, a certificate in Form 71 contains the details of the list of creditors who have submitted their claims, the amount of debt for which such claims have been made and list of claims, including the ones that have been admitted or rejected, whether in part of full.

³⁷ Section 481, *Companies Act, 1956*

³⁸ Section 6-9, *Insolvency and Bankruptcy Code, 2016*

³⁹ Section 14-16, *Insolvency and Bankruptcy Code, 2016*

⁴⁰ Section 17 and 20, *Insolvency and Bankruptcy Code, 2016*

⁴¹ Section 18(b), *Insolvency and Bankruptcy Code, 2016*

⁴² Sections 24-30, *Insolvency and Bankruptcy Code, 2016*

⁴³ Section 31(1) and (2), *Insolvency and Bankruptcy Code, 2016*

⁴⁴ Section 31(3)(a), *Insolvency and Bankruptcy Code, 2016*

does not receive the resolution plan within the prescribed time limit,⁴⁵ or the resolution plan stands rejected, the NCLT shall pass an order requiring the Corporate Debtor to be liquidated.⁴⁶

VI. INSERTION OF SECTION 32A VIDE IBC (AMENDMENT) ACT, 2020

It is rather intriguing to observe that the IBC (Amendment) Act, 2020⁴⁷ received the assent of the President on 13.03.2020. The Statement of Object and reasons⁴⁸ states that

*“A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency... **to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions**, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016”*

(Emphasis Supplied)

The newly inserted Section 32A(1) provides that the liability of a Corporate Debtor for an offence committed prior to the commencement of the CIRP shall cease and the Corporate Debtor shall not be prosecuted for such an offence from the date on which the resolution plan has been approved under Section 31 of the IBC. Section 32A(2) forbids any action including the attachment, seizure, retention or confiscation of such property, in relation to an offence committed prior to the commencement of the CIRP of the Corporate Debtor, where such property is covered under a resolution plan approved under Section 31 of the IBC.

VII. UNANSWERED DICHOTOMIES AND POSSIBLE RECONCILIATION

Considering the functions and powers of the liquidators and the functions performed by the liquidator under the Companies Act, 1956 and the underlying objective of the possible reconciliation, as has been specified in the *Jotun India Pvt. Ltd.*⁴⁹, the order of the winding up of the company, would be at the stage of the passing of the winding up order as stipulated under Section 450(4) of the Companies Act, 1956.

It is at this stage that the provisional liquidator may be appointed as the official liquidator. An advertisement of the order of the winding up may be published in the newspaper and thereafter, the

⁴⁵ The time limit, as prescribed under Section 12 for completion of the CIRP is 180 days, from the date of the admission of the application to initiate the CIRP. The time limit for the competition of Fastrack insolvency, as prescribed under Section 56, is 90 days from the insolvency commencement date.

⁴⁶ Section 33, *Insolvency and Bankruptcy Code, 2016*

⁴⁷ Act No. 1 of 2020 (w.e.f. from 28.12.2019)

⁴⁸ Statement of Object and Reasons, *The Insolvency and Bankruptcy Code (Amendment) Bill, 2019*, Para 2

⁴⁹ *Supra* Footnote 11

liquidator may take into his custody all the property, books and papers of the company and actionable claims to which the company is entitled.

Therefore, the Petitions for the initiation of the Corporate Insolvency Resolution Process should be admitted only till the time being the order of winding up, as stipulated under Section 450(4) of the Companies Act, 1956, has not been passed.

However, such an order of winding up cannot be construed to be the final dissolution order which may be passed by the Court under Section 481 of the Companies Act, 1956 after the assets of the company are sold and the proceeds have been distributed amongst the creditors, workmen and contributories.

The non-admission of the insolvency petitions in such cases where the winding up order under Section 450(4) of the Companies Act, 1956, and not the final dissolution order as stipulated under Section 481 of the Companies Act, 1956, has been passed, would prevent the overlapping of the functions in respect of the valuation of the assets, collation of the claims and the subsequent sale thereof, which are provided under both the IBC and the Companies Act, 1956. This would further be in consonance with the underlying legislative intent and would also, arguably, result in prompter recovery.

However, read in the light of the subsequent precedents, the judgments passed by the Hon'ble NCLT in the cases of the *Hanung Toys*⁵⁰ and *Topworth Pipes & Tubes*⁵¹ may not hold ground to the extent it has been stated that the winding up order is construed to be akin to the final dissolution order.

The judgment of the Delhi High Court in *Action Ispat*⁵² although stands in tandem with the earlier precedents of the Supreme Court, it states that since the liquidation was at its initial stage and the Liquidator '*had not proceeded to take any effective or irreversible steps towards the liquidation of the assets*', therefore, the proceedings may be transferred to the NCLT.

As to what amounts to such "*effective or irreversible steps*" is a subject matter which still remains unanswered. The explication of the legal position in respect of the same may also explicate the contradictory view taken in *Vasan Health Care*⁵³.

What is rather intriguing to note at this stage is that although the newly inserted Section 32A(2), forbids any action including the attachment, seizure, retention or confiscation of such property, in relation to an offence committed prior to the commencement of the CIRP of the Corporate Debtor, the property which may already have been attached by the official liquidator pursuant to the liquidation proceedings in the High Court, have not been accounted for.

⁵⁰ *Supra* Footnote 14

⁵¹ *Supra* Footnote 16

⁵² *Supra* Footnote 23

⁵³ *Ganesh Lal Jain & Ors. v. Vasan Health Care Private Limited & Ors.*, 2019 (5) LW 35

VIII. SUMMARIZING OBSERVATIONS

The non-admission of the insolvency petitions in such cases where the winding up order under Section 450(4) of the Companies Act, 1956, and not the final dissolution order as stipulated under Section 481 of the Companies Act, 1956, has been passed, may be in consonance with the underlying legislative intent and may lead to recovery much more swiftly.

There are several ambiguities, surrounding the interpretation of “*Saved Petitions*”, as stipulated hereinabove. More so, there exists a contradiction in the views of the Delhi High Court in *Action Ispat*⁵⁴ and that of the Madras High Court in *Vasan Health Care*⁵⁵, and consequentially, it will be interesting to see how the Supreme Court interprets these provisions, while adjudicating the Special Leave Petition⁵⁶ apropos the judgment of *Action Ispat*⁵⁷.

Moreover, it remains to be seen as to whether the property under Section 32A(2) would also encapsulate the property which may already have been attached by the official liquidator pursuant during the liquidation proceedings, or perhaps, an explanation to that effect, which may grant the liberty to the adjudicating authority to deal with such property in the manner as it may deem fit, may be given.

⁵⁴ *Supra* Footnote 23

⁵⁵ *Supra* Footnote 53

⁵⁶ *Supra* Footnote 25

⁵⁷ *Supra* Footnote 23