

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

<b>Reserved on</b>	<b>Delivered on</b>
25.09.2020	15.10.2020

**CORAM :****THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR****Application No.2826 of 2019**

M/s. Chennai Metro Rail Limited,  
 Represented by the Chief General Manager,  
 (Arbitration & Contract Management)  
 Admin Building, CMRL Depot,  
 Poonamallee High Road,  
 Koyambedu, Chennai 600107. ... Applicant

*versus*

1. M/s. Lanco Infratech Limited  
 Represented by the Liquidator  
 Lanco House, 4<sup>th</sup> Floor,  
 25, G.N.Chetty Road,  
 T.Nagar, Chennai 600017. ... 1<sup>st</sup> Respondent

2. Mr.K.D. Arcot,  
 Presiding Arbitrator,  
 House No.U-46, Plot No.4185,  
 Anna Nagar,  
 Chennai 600040.

3. Mr.A. Jagannathan  
 Member Arbitrator,  
 No.445, 4<sup>th</sup> B Cross, 7<sup>th</sup> Main Road,  
 RPC Layout (Hampi Nagar)  
 Bangalore – 560 104.

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4. Mr.G. Sivakumar  
Member Arbitrator  
W-672/2A, East Main Road,  
Anna Nagar West Extension,  
Chennai 600101.

... Respondents

**Prayer:** Application filed under Order XIV Rule 8 of Original Side Rules read with Section 9(1)(ii) (e) of the Arbitration and Conciliation Act, 1996, to grant a stay of further proceedings of the Arbitral Tribunal comprising of Second, Third and Fourth Respondents with regard to the dispute between M/s. Lanco Infratech Limited and M/s. Chennai Metro Rail Limited, as an interim measure of protection until leave is granted by the Hon'ble NCLT, Hyderabad under S.279 of the Companies Act, 2013 to proceed with the arbitration proceedings.

For Applicant : Mr. Arvind Pandian  
Senior Counsel for  
M/s. S. Arjun Suresh

For Respondents : Mr. Ameya Gokhale,  
Mr. Rishab Jaisani for  
Mr. Allwin Godwin and  
Ms. J. AkilaG.Ponnmbala Thiagarajan

**ORDER**

This application has been filed under section 9 of the Arbitration and Conciliation Act, for staying the further proceedings of the Arbitral Tribunal consisting of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents with regard to the dispute between the Applicant and the 1<sup>st</sup> Respondent until to obtain leave from NCLT, Hyderabad to proceed with the arbitration proceedings.

2. The brief facts leading to file this application is as follows:

2.a. The applicant and the 1<sup>st</sup> Respondent entered into contract dated 05.09.2011 for the Design and Construction of Elevated Station at Meenambakkam, Architectural Builders Works and Finishes (ABWF) and Building Services Work (BS) for Chennai Airport Station, Viaducts, Ramps and Cut-cover Tunner between Officers Training Academy Station and Chennai Air Port Station on corridor 1 and was termed as the ECV-07 package of the project (Subject Project).

2.(b) As the dispute arose between them, the matter has been referred to the Arbitrator. The 1<sup>st</sup> Respondent being the claimant claimed an aggregate sum of Rs.1,98,58,82,734/-. The Applicant being the respondent in the Arbitral Proceedings, has also made a counter claim for a sum of Rs.107 Crores. It is the further case of the Applicant that after evidence was over, the moratorium imposed on the 1<sup>st</sup> Respondent by National Company Law Board, Hyderabad vide order dated 07.08.2017 and subsequent to the moratorium period, by an order dated 27.08.2018 liquidation was ordered and consequently Liquidator was appointed. It is the contention of the Applicant that to continue

the proceedings, leave of the NCLT have to be obtained under Section 279 of the Companies Act, 2013. The 1<sup>st</sup> Respondent being the Liquidator took a stand that no leave is required to be sought under Section 279 of the Companies Act for continuance of the pending arbitral proceedings. A request was made before the Arbitral Tribunal with regard to the leave on the ground that failure to obtain leave from the NCLT. Any award passed in favour of the Applicant or the 1<sup>st</sup> Respondent would be held null and void. But the Arbitral Tribunal has held that leave is not required since the Companies Act is of the year 2013. Therefore, this application has been filed under section 9 (2)(e) of the Arbitration and Conciliation Act, seeking interim injunction to restrain the arbitral proceedings until the leave from the Hon'ble National Company Law Tribunal is obtained. The limited relief was sought till the leave is obtained.

3. It is the further case of the applicant that a writ petition also filed by the applicant before this Court and this court has held that writ is not maintainable. Since the writ petition is dismissed holding that application under Section 9 has to be filed. Hence this application filed under section 9 of the Arbitration and Conciliation Act, which is very well maintainable.

4. The Respondent Liquidator took a stand in his counter that the continuation of pending legal proceedings is not barred during liquidation as per the Insolvency and Bankruptcy Code (IBC). Section 33(5) of the IBC expressly include the obligation of the Liquidator to take permission for initiating new proceedings only, there is no room for interpreting the provision in any manner. It is the contention that the Companies Act would not have any applicability in the present case as the liquidation is being carried out under the provision of the Code. Further it is stated that Section 238 of the Insolvency and Bankruptcy Code would override the other laws. The Code being the special law and having been enacted later in time, shall be given primacy over any other conflicting provisions of law. Hence, prayed for dismissal of the application.

5. The following are not disputed. The Applicant raised claims, and Respondent raised counter claims in respect of the contract for Design and Construction of Elevated Station at Meenambakkam. Declaring Moratorium on the 1<sup>st</sup> Respondent by NCLT and thereafter 1<sup>st</sup> Respondent company liquidated is also not disputed.

6. Mr.P.H. Arvind Pandian, learned Senior Counsel for the Applicant submitted that the continuation of the Arbitration proceedings without leave of the NCLT under Section 279 of the Companies Act will lead to the situation that any award is passed in favour of any of the parties, the same will be challenged as unenforceable in the absence of leave obtained to continue the proceedings. Hence his contention is that Section 279 of the Companies Act which correspondent to Section 446 of the Companies Act 1956, has to be followed. The Insolvency and Bankruptcy Code does not delete or alter the Section nor override the provision of 279 of the Companies Act 2013. Both the provisions of Companies Act and Insolvency Bankruptcy Code ought to be read harmoniously. It is his contention that Eleventh Schedule viz., Section 225 of IBC was notified on 15.11.2016, wherein the Companies Act 2013 was amended in the manner specified in the Eleventh Schedule. Companies Act Section 279 was made effective from 15.12.2016. If the intention of the legislation not to give any effect to 279, particularly winding up proceedings under Section 279, the same would not have been made effective from 15.12.2016 much after the Eleventh Schedule was made effective from 15.11.2016. Hence his contention that Apex Court in the the Judgement of ***B.K. Educational Services Pvt. Ltd., v. Parag Gupta and Associates [(2019)***

**11 SCC 633]** wherein it is held that Section 433 of the Companies Act 2013 would apply to the Tribunal while deciding application under Sections 7 and 8. Hence his contention that the provisions of the Companies Act and IBC have to be read harmoniously.

7. Further, it is his contention that Section 270 of the Companies Act does not restrict applicability of Section 279 of the Companies Act to liquidation under the IBC. Section 2 Sub-Clause 94(A) inserted in the Eleventh Schedule indicate that the definition of the term “winding up” means “winding up under the Companies Act” or “liquidation under the Insolvency and Bankruptcy Code, 2016”. Consequently, the provisions under Sections 270 and 279 of the Companies Act, is applicable to winding up proceedings. Hence it is his contention that Section 33(5) of the IBC read with Section 238 of IBC does not override the requirement for leave under Section 279 of the Companies Act. Hence, there is no inconsistency between Section 33(5) of the IBC and Section 279 of the Companies Act. Therefore, Section 238 of the Code cannot be pressed into service.

8. The learned Arbitrator, the technical members have just followed the

opinion of the Liquidator and held that no leave is required. In fact, they recorded as if the Companies Act provisions came into force in the year 2013, much before the IBC came into force in the year 2016 which only prevail over the Companies Act. The above observation is without any basis and his further contention that Arbitrators cannot decide whether the leave is to be granted by the NCLT or not and it is only the NCLT has to decide. Similarly, the Liquidator cannot assume the role of the Tribunal, which is competent to decide whether or not leave is required. Therefore, unless the Tribunal proceedings are stayed with a direction to the Liquidator to obtain appropriate order from the Tribunal in this regard. The situation may arise if any Award passed in favour of the Applicant or Respondent the same may be put into challenge on the ground of violation of provisions of Companies Act in the later point. Such a situation may lead into making the award nullity. To avoid such situation leave has to be obtained. Hence his contention is that since the Arbitral Proceedings already commenced, this Court can exercise the jurisdiction under Section 9(1)(ii)(e) of the Act to grant interim order on the ground of just and convenient reasons.

9. In support of his submissions he has relied upon the following

judgments:

1. *B.K. Educational Services Pvt. Ltd., v. Parag Gupta and Associates [(2019) 11 SCC 633]*

2. *A. Kalaimani and Ors. v. State of Tamil Nadu and Ors. [2019 SCC Online Mad 4435]*

3. *Mrs. Vasangtha Raman vs. Official Liquidator and Others [2003 SCC Online Mad 997]*

4. *Babulal Vardharji Gurjar vs. Veer Gujar Aluminium Industries Pvt. Ltd., and Another [(2020) 6 MLJ 396 (SC)]*

10. Mr. Ameya Gokhale, learned Counsel appearing for the 1st Respondent/Liquidator in this matter mainly submitted that invoking jurisdiction under Section 9 of the Arbitration and Conciliation Act is misconceived. The Application filed under Section 9 of the Arbitration Conciliation Act mainly based on the writ orders passed by this Court. It is his contention that Order passed in the writ petition is ex-parte order. The conferment of the jurisdiction is a legislative function and jurisdiction cannot be conferred by any court. The Arbitral Tribunal has already concluded that

leave is not required. Objection of the applicant was rejected. Such order or objection would fall within the ambit of Section 16 or Section 19 of the Arbitration and Conciliation Act. The Application under section 9 is not maintainable. Any such order passed as to jurisdiction can be challenged only under Section 34 of the Arbitration Act. Further it is his contention that Section 5 of the Arbitration and Conciliation Act makes it very clear that Court shall not intervene the Arbitral Proceedings except where so provided in the Act. This Application is filed essentially calling upon the Court to exercise the appellate power to set aside the ruling passed by the Arbitral Tribunal which cannot be permissible under law. Hence, his contention is that the application is not maintainable.

11. It is his further contention that winding up under the Companies Act 2013 and the Insolvency and Bankruptcy Code operate for two different statutes in terms of Section 271 of the Companies Act 2013, certain pending category of petitions pertaining to winding up still continue to be wound up under the companies Act 2013. Under Section 270 of the Companies Act 2013 the applicability of Section 279 is restricted to provisions of winding up under the Companies Act 2013 in particular Part I of the Chapter XX. The

liquidation process is the distinct process under the Code. The company being liquidated under the IBC would be governed by the provision and regulation under IBC. Hence, submitted that winding up under the Companies Act 2013 and the Code operate for different purposes and different field. Therefore provision of Companies Act 2013 cannot be applied for liquidation process under the Code. Even a transfer of pending proceedings from 2016, certain pending category of petitions pertaining to winding up of a company filed under Section 433 of the Companies Act were sought to be transferred to NCLT. On such transfer such petitions were to be treated as under Section 7,8,9 of the Code, subject to the provision of the transfer rules. However, the pending petitions filed under Section 433 (a) and (f) (i.e., on ground other than on account of inability to pay debt) were to be transferred to the NCLT and be treated as petitions under Companies Act 2013, subject to the provisions of the Transfer Rules.

12. It is his further contention that under the provisions of the Code, the jurisdiction with respect to the liquidation process is vested with the Adjudicating Authority. Whereas winding under Part I of Chapter XX of Companies Act vested with NCLT. When there is conflict between the Code

and any other law the provisions of the Code shall have primacy, by virtue of Section 238 of the Code. Under Section 14 if Moratorium is ordered which *inter alia*, prohibits institution and continuation of pending suits or proceedings against the company undergoing CIR Process. There is however no bar on the Corporate Debtor to institute new or continue pending proceedings against another party. In the event, a company does not receive a resolution plan or the Adjudication Authority rejects a resolution plan, Adjudication Authority passes an order requiring a company to be liquidated in the manner as provided in liquidation process. It is his further contention that there is no bar on continuation of pending suits and legal proceedings by the Corporate Debtor during the period of liquidation as per Section 33(5) of the Code. Hence prayed for dismissal of the Application.

13. Before deciding the maintainability of Section 9 of the Arbitration and Conciliation Act, this Court is inclined to going to the submissions of both sides as to whether or not leave is required to continue the Arbitral Proceedings.

14. The fact that the Arbitral Proceedings was commenced by the

Respondents 2 to 4 is not in dispute. Similarly, the Applicant herein, being the Respondent in the Arbitral Proceedings is also made counter claim as against the Respondent to the tune of Rs.107 Crores. It is also not in dispute that now the respondent is under liquidation. Originally moratorium imposed and subsequently ordered for liquidation by NCLT, Hyderabad on 27.08.2018. This fact is also not in dispute. After the Company went on liquidation Liquidator was appointed.

15. In this case claims and counter claims are made *inter se* the Corporate debtor and the opposite party. The Apex court in ***Alchemist Asset Reconstruction Company Ltd. v Hotel Gaudavan Pvt. Ltd.*** [AIR 2017 SC 5124] held as follows:

"4. The mandate of the new Insolvency Code is that the moment an insolvency petition is admitted, the moratorium that comes into effect under s. 14(1)(a) expressly interdicts institution or continuation of pending suits or proceedings against Corporate Debtors."

5. This being the case, we are surprised that an arbitration proceeding has been purported to be started after the imposition of the said moratorium and appeals under

*Section 37 of the Arbitration Act are being entertained. Therefore, we set aside the order of the District Judge dated 06.07.2017 and further state the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law."*

16. Similarly, the Object of the IBC 2016 is to consolidate the laws relating to reorganisation and insolvency resolution of corporate persons, etc., As per Section 2 of the Code, same apply to any company incorporated under the Companies Act 2013 or under any provisions of Company Law. Section 14 of the Code reads as follows:

**14. Moratorium:**

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

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

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

*(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*

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

Section 14 makes it clear that once moratorium is declared, there is a bar for institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority. Above section makes it very clear that institution of suit or continuation of suit or other

proceedings against the is barred during the moratorium period.

17. Section 33(5) of the Code reads as follows:

*“33(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:*

*Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”*

Section 33(5) of IBC also indicate that when the liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against the corporate debtor.

18. However proviso provides for institution of the suit or other proceedings by Liquidator on behalf of the Corporate Debtor, with approval of Adjudicating Authority. In the entire Section 33(5) the word "Continuance of the Proceedings" absent.

19. Section 238 of the Code shall override anything inconsistent therewith contained in any other law for the time being in force. It is also relevant to note that Section 255 of the Insolvency and Bankruptcy Code notified on 15.11.2016 says that the Companies Act 2013 shall be amended in the manner specified in the Eleventh Schedule, which is extracted as follows:

20. Section 2 (23) of the Code reads as follows :

*"(23) "Company Liquidator" means a person appointed by the Tribunal as the Company Liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act;"*

Section (94A) reads as follows:

*"(94A) "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable."*

And 6A. In section 230 of the Code reads thus:

*"6A. In Section 230,— (a) in sub-section (1), after the word "liquidator", the words "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," shall be inserted; (b) in sub-section (6), after the word "on the liquidator", the words*

*"appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," shall be inserted;"*

21. A Careful reading of the above sections makes it very clear that though the Eleventh Schedule of IBC was amended, Section 279 of the Companies Act 2013, which is correspondent to Section 446 of the Companies Act, 1956 has not been deleted or amended. As per sub-Section 2 Clause (94A) the definition of the term "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable. The word "applicable" indicates that the Eleventh Schedule not confined to Insolvency and Bankruptcy alone and also applicable to winding up took place under the Companies Act. It is also relevant to be noted that as no amendment whatsoever made in Section 279 of the Companies Act, 2013 the said provision was made effective from 15.12.2016 much after the effective date of Eleventh Schedule i.e. 15.11.2016.

22. Originally the winding up or liquidation of companies were dealt with by the Companies Act. the Companies Act 2013 also dealt with the winding up exhaustively. However, the need to enact a separate Code which

would deal with not only the insolvency of corporate persons but also partnership firms and individuals, was seriously felt. Therefore whole law relating to insolvency irrespective of whether it related to corporate entities or firms or individuals were brought under one law, namely, the Insolvency and Bankruptcy Code, 2016. Therefore, the insolvency relatable to living persons, an association of living persons collectively known as firms and entity which has a juristic personality has been brought under one law. Such a law is special in nature. Section 238 of the Insolvency and Bankruptcy Code, 2016 states that *'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 provision is exhaustive. Thus, whenever a special law gives out a specific provision which is clear and unambiguous and on the same subject there is a different provision in the general law and there is an inconsistency between the two, the special law will prevail and the principles of harmonious construction will have no role to play.

23. Section 279 of the Companies Act, 2013 has to be read with Section 280 of the Companies Act. both these Sections apply only in cases of

winding up that are to be entertained under the Companies Act, 2013 and not under Insolvency and Bankruptcy Code, 2016. Section 279 deals with both pending suits and institution of new suits. This Section is inconsistent with Section 33(5) of the Insolvency and Bankruptcy Code, 2016. Section 33(5) shall override Section 279 of Companies Act, 2013, by virtue of Section 238 and also by the principle 'special law overrides general law'. It is useful to refer to the decision of the supreme court in ***Harshad Govardhan Somdagarv. International Assets Reconstruction Company Limited & Ors [2014 6 SCC 1]*** wherein, Section 13(13) of the SARFAESI Act was found in conflict with Section 65A of the Transfer of Property Act, and it was held that provisions of Section 13(13) will override the provisions of Section 65A of Transfer of Property Act, by virtue of Section 35 of the SARFAESI Act. Section 35 of the SARFAESI is as follows:

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*'The provisions of this Act 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.'*

24. This is exactly in *pari materia* of Section 238 of the Insolvency and Bankruptcy Code, 2016 and therefore Section 33(5) will override Section 279 of Companies Act, 2013. There is no need to harmonize such provisions.

25. Insolvency and Bankruptcy Code, 2016 deals with cases which are solely based on claim for money or money's worth. It takes into account the cases which fall under Section 433(e) of the Companies Act 1956, namely, on being unable to pay debts. Section 271 of Companies Act 2013 deals with winding up of Companies in cases of voluntary winding up and cases where the company can be wound up on just and equitable grounds. Section 279 and 280 of the 2013 Act is applicable only to the cases falling under Section 271 of the 2013 Act. Section 281 cannot be taken out of context and extrapolated in Section 33(5) of the 2016 Code.

26. The comparison between Companies Act 1956, Companies Act 2013 and Insolvency & Bankruptcy Code are tabled hereunder:

COMPANIES ACT, 1956	COMPANIES ACT, 2013
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SECTION 446	SECTION 279
<p><b>446. Suits Stayed On Winding Up Order</b></p> <p>(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.</p> <p>(2) The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of –</p> <p>(a) any suit or proceeding by or against the company ;</p> <p>(b) any claim made by or against the company (including claims by or against any of its branches in India) ;</p> <p>(c) any application made under section 391 by or in respect of the company ;</p> <p>(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company ; whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.</p> <p>(3) <i>Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court. Omitted by the Companies (Second Amendment) Act, 2002 (w.e.f. a date yet to be notified).</i></p> <p>(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a high Court.</p>	<p><b>279. Stay of suits, etc., on winding up order.</b>  <i>[Brought to force from 15th December, 2016 vide notification number S.O. 3677(E) dated 07th December, 2016.]</i></p> <p>(1) When a winding up order has been <b><u>passed or a provisional liquidator has been appointed</u></b>, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, <b><u>by or</u></b> against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:  <b><u>Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.</u></b></p> <p>(2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.</p> <p><b>280. Jurisdiction of Tribunal.</b>  <i>[Brought to force from 15th December, 2016 vide notification number S.O. 3677(E) dated 07th December, 2016.]</i></p> <p>The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,—</p> <p>(a) any suit or proceeding by or against the company;</p> <p>(b) any claim made by or against the company, including claims by or against any of its branches in India;</p> <p><b><u>(c) any application made under section 233;</u></b></p> <p>(d) any question of priorities or any other question whatsoever, whether of law or facts, <b><u>including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to</u></b> winding up of the company, whether such suit or proceeding has been instituted, or</p>

	is instituted, or such claim or question has arisen or arises or such application has been made or is made <u>or such scheme has been submitted, or is submitted</u> , before or after the order for the winding up of the company is made.]
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COMPANIES ACT, 1956 SECTION 433	COMPANIES ACT, 2013 SECTION 271
<p><b>433. Circumstances in which company may be wound up by tribunal</b> company may be wound up by the Tribunal, -</p> <p>(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal ;</p> <p>(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;</p> <p>(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;</p> <p>(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;</p> <p>(e) if the company is unable to pay its debts ;</p> <p>(f) if the Tribunal is of opinion that it is just and equitable that the company should be wound up ;</p> <p>(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years ;</p> <p>(h) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality ;</p> <p>(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G :</p> <p>Provided that the Tribunal shall make an order for winding up of a company under clause (h) on application made by the Central Government or a State Government.</p>	<p><b>271. Circumstances in which company may be wound up by Tribunal</b> A company may, on a petition under section 272, be wound up by the Tribunal,—</p> <p>(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;</p> <p>(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;</p> <p>(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;</p> <p>(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years;</p> <p>or</p> <p>(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.</p>
COMPANIES ACT, 2013	COMPANIES ACT, 2013

<p style="text-align: center;"><b>SECTION 271</b></p> <p><i>Substituted by Section 255 of the Insolvency and Bankruptcy Code, 2016 read with the clause(10) of the Eleventh Schedule thereto, with effect from 15th November, 2016 vide notification number S.O 3453(E) dated 15th November, 2016.</i></p> <p style="text-align: center;"><b>Prior to amendment</b></p>	<p style="text-align: center;"><b>SECTION 271</b></p> <p style="text-align: center;"><b>Subsequent to amendment</b></p>
<p><b>271. Circumstances in which company may be wound up by Tribunal</b></p> <p>(1) A company may, on a petition under section 272, be wound up by the Tribunal,—</p> <p><i>(a) if the company is unable to pay its debts;</i></p> <p>(b) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;</p> <p>(c) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;</p> <p><i>(d) if the Tribunal has ordered the winding up of the company under Chapter XIX;</i></p> <p>(e) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;</p> <p>(f) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or</p> <p>(g) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.</p> <p><i>(2) A company shall be deemed to be unable to pay its debts,—</i></p> <p><i>(a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has</i></p>	<p><b>271. Circumstances in which company may be wound up by Tribunal</b></p> <p>A company may, on a petition under section 272, be wound up by the Tribunal,—</p> <p>(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;</p> <p>(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;</p> <p>(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;</p> <p>(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or</p> <p>(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.</p>

failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;

(b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

COMPANIES ACT, 2013 SECTION 271	INSOLVENCY AND BANKRUPTCY CODE, 2016 SECTION 10
<p><b>271. Circumstances in which company may be woundup by Tribunal</b></p> <p>A company may, on a petition under section 272, be wound up by the Tribunal,—</p> <p><b><u>(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;</u></b></p> <p>(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;</p> <p>(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;</p> <p>(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or</p> <p>(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.</p>	<p><b>10. Initiation of corporate insolvency resolution process by corporate applicant. —</b></p> <p>(1) Where a corporate debtor <b><u>has committed a default</u></b>, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.</p> <p>...</p> <p><b>59. Voluntary liquidation of corporate persons.</b></p> <p>(1) A corporate person who intends to liquidate itself voluntarily and <b><u>has not committed any default</u></b> may initiate voluntary liquidation proceedings under the provisions of this Chapter.</p>

INSOLVENCY AND BANKRUPTCY CODE, 2016 SECTION 10	INSOLVENCY AND BANKRUPTCY CODE, 2016 SECTION 59
<p><b>Initiation of corporate insolvency resolution process by corporate applicant.</b></p> <p>(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.</p> <p>(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.</p> <p>(3) The corporate applicant shall, along with the application, furnish—</p> <p>(a) the information relating to its books of account and such other documents for such period as may be specified;</p> <p>(b) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and</p> <p>(c) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.</p> <p>(4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order-</p> <p>(a) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional]; or</p> <p>(b) reject the application, if it is incomplete or any disciplinary proceeding is pending against the proposed resolution professional];</p> <p>Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven</p>	<p><b>Voluntary liquidation of corporate persons.</b></p> <p>(1) A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of this Chapter.</p> <p>(2) The voluntary liquidation of a corporate person under sub-section (1) shall meet such conditions and procedural requirements as may be specified by the Board.</p> <p>(3) Without prejudice to sub-section (2), voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely: -</p> <p>(a) a declaration from majority of the directors of the company verified by an affidavit stating that –</p> <p>(i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and</p> <p>(ii) the company is not being liquidated to defraud any person;</p> <p>(b) the declaration under sub-clause (a) shall be accompanied with the following documents, namely: -</p> <p>(i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;</p> <p>(ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;</p> <p>(c) within four weeks of a declaration under sub-clause (a), there shall be -</p> <p>(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or</p> <p>(ii) a resolution of the members of the company in a</p>

days from the date of receipt of such notice from the Adjudicating Authority.

(5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

(4) The company shall notify the Registrar of Companies and the Board about the resolution under sub-section (3) to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

(5) Subject to approval of the creditors under sub-section (3), the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution under sub-clause (c) of sub-section (3).

(6) The provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary.

(7) Where the affairs of the corporate person have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person.

(8) The Adjudicating Authority shall on an application filed by the liquidator under sub-section (7), pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(9) A copy of an order under sub-section (8) shall within fourteen days from the date of such order, be forwarded to the authority with which the corporate person is registered.

**INSOLVENCY AND BANKRUPTCY CODE, 2016**  
**SECTION 25**

**INSOLVENCY AND BANKRUPTCY CODE, 2016**  
**SECTION 35**

<p><b>25. Duties of resolution professional.</b></p> <p>(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.</p> <p>(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -</p> <p>...</p> <p>(b) <b>represent and act</b> on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;</p> <p>...</p>	<p><b>35. Powers and duties of liquidator.</b></p> <p>(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely: -</p> <p>...</p> <p>(k) <b>to institute or defend</b> any suit, prosecution or other legal proceedings, civil or criminal, in the name of or behalf of the corporate debtor;</p> <p>...</p>
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<p><b>COMPANIES ACT, 2013 SECTION 279</b></p>	<p><b>INSOLVENCY AND BANKRUPTCY CODE, 2016 SECTION 33(5)</b></p>
<p><b>79. Stay of suits, etc., on winding up order.</b></p> <p>(1) When a winding up order has been passed or a provisional liquidator has been appointed, <u>no suit or other legal proceeding shall be <b>commenced, or if pending</b> at the date of the winding up order, <b>shall be proceeded with</b>, by or against the company, <b>except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:</b></u></p> <p>Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.</p> <p>(2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.</p>	<p><b>33. Initiation of liquidation. ...</b></p> <p>33(5) Subject to section 52, when a liquidation order has been passed, <u>no suit or other legal proceeding shall be <b>instituted</b> by or against the corporate debtor:</u></p> <p>Provided that a suit or other legal proceeding <u>may be <b>instituted</b> by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority</u></p> <p>...</p>

<p><b>COMPANIES ACT, 2013 SECTION 280</b></p>	<p><b>INSOLVENCY AND BANKRUPTCY CODE, 2016 SECTION 60(5)</b></p>
<p><b>280. Jurisdiction of Tribunal.</b></p>	<p><b>60. Adjudicating Authority for corporate persons.</b></p>

<p>The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,—</p> <p>(a) <u>any suit</u> or proceeding by or against the company;</p> <p>(b) any claim made by or against the company, including claims by or against any of its branches in India;</p> <p><b><u>(c) any application made under section 233;</u></b></p> <p>(d) any question of priorities or any other question whatsoever, whether of law or facts, <u>including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted,</u> before or after the order for the winding up of the company is made.</p>	<p>...</p> <p>(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -</p> <p>(a) <b><u>any application</u></b> or proceeding by or against the corporate debtor or corporate person; any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and</p> <p>(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.</p> <p>...</p>
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<p style="text-align: center;"><b>SECTION 468 COMPANIES ACT</b></p> <p style="text-align: center;"><b>PRIOR TO AMENDMENT</b></p>	<p style="text-align: center;"><b>SECTION 468 COMPANIES ACT – POST IBC</b></p> <p style="text-align: center;"><i>(Substituted by Section 255 of the Insolvency and Bankruptcy Code, 2016 read with the clause (35) of the Eleventh Schedule thereto, with effect from 15th November, 2016 vide notification number S.O 3453(E) dated 15th November, 2016.)</i></p> <p style="text-align: center;"><b>SUBSEQUENT TO AMENDMENT</b></p>
<p>(1) The Central Government shall, make rules consistent with the Code of Civil Procedure, 1908 (5 of 1908) providing for all matters relating to the winding up of companies, which by this Act, are to be prescribed, and may make rules providing for all such matters, as may be prescribed.</p> <p>(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—</p> <p>(i) as to the mode of proceedings to be held for</p>	<p>(1) The Central Government shall, make rules consistent with the Code of Civil Procedure, 1908 (5 of 1908) providing for all matters relating to the winding up of companies, which by this Act, are to be prescribed, and may make rules providing for all such matters, as may be prescribed.</p> <p>(2) <i>In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the</i></p>

<p>winding up of a company by the Tribunal;</p> <p><b><u>(ii) for the voluntary winding up of companies, whether by members or by creditors;</u></b></p> <p>(iii) for the holding of meetings of creditors and members in connection with proceedings under section 230;</p> <p>(iv) for giving effect to the provisions of this Act as to the reduction of the capital;</p> <p>(v) generally for all applications to be made to the Tribunal under the provisions of this Act;</p> <p>(vi) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;</p> <p>(vii) the settling of lists of contributories and the rectifying of the register of members where required, and collecting and applying the assets;</p> <p>(viii) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator;</p> <p>(ix) the making of calls; and</p> <p>(x) the fixing of a time within which debts and claims shall be proved.</p> <p>(3) All rules made by the Supreme Court on the matters referred to in this section as it stood immediately before the commencement of this Act and in force at such commencement, shall continue to be in force, till such time the rules are made by the Central Government and any reference to the High Court in relation to winding up of a company in such rules shall be construed as a reference to the Tribunal.</p>	<p>following matters,</p> <p>namely: —</p> <p>(i) as to the mode of proceedings to be held for winding up of a company by the Tribunal <b><u>under this Act;</u></b></p> <p>(ii) for the holding of meetings of creditors and members in connection with proceedings under section 230;</p> <p>(iii) for giving effect to the provisions of this Act as to the reduction of the capital;</p> <p>(iv) generally for all applications to be made to the Tribunal under the provisions of this Act;</p> <p>(v) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;</p> <p>(vi) the settling of lists of contributories and the rectifying of the register of members where required, and collecting and applying the assets;</p> <p>(vii) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator; (viii) the making of calls; and</p> <p>(ix) the fixing of a time within which debts and claims shall be proved.</p> <p>(3) All rules made by the Supreme Court on the matters referred to in this section as it stood immediately before the commencement of this Act and in force at such commencement, shall continue to be in force, till such time the rules are made by the Central Government and any reference to the High Court in relation to winding up of a company in such rules shall be construed as a reference to the Tribunal.</p>
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27. Section 446 of the Company Act 1956 Act prohibited the commencement of any suit or legal proceeding when a winding up order is made. It also applied for the pending proceeding and the leave was required. Section 279 of the Companies Act 2013 also deals with the word ‘pendency’

and this word is conspicuously absent in the main part of Section 33(5) and in the proviso of the IBC2016.

28. Comparison between Section 446 of the 2013 Act and 279 of 1956 Act. Seeking of leave under Section 33(5) for pending cases was obviously omitted as the case before the other authority might have progressed until the declaration of moratorium. In such circumstances, it would be imprudent to transfer the case to the file of the Adjudicating Authority and try from that stage. Whereas, in cases of fresh commencement, it could commence before the Adjudicating Authority without any delay. A power to grant leave also includes power to reject the same. A rejection of the leave necessarily entails in the authority taking over the case in conducting the same. The Legislature in its wisdom thought that in cases coming in respect of inability to pay debts and where the resolution plan has failed, there should be no further delay in the procedural aspects while dealing with the pending cases. That is why Section 33(5) omitted to consider the case of pending matters. Therefore, no analogy or support can be drawn from Section 279 in interpret Section 33(5) of the IBC2016.

29. Further, for the pending cases under Section 279 of 2013 Act, resolution plan is not even envisaged. The time frame in winding up on just and equitable grounds is not an important condition. The very object of introducing the IBC 2016 and restricting its operation to solvency of the Company alone and provision for revival of the company within time fixed and keeping the liquidation as last resort makes it clear that time frame is important under the Code while it is not so under Section 279 of the Companies 2013 Act.

30. It is also to be noted that as per Section 446 of the 1956 Act, whenever the company court adjudicating both monetary and nonmonetary claims, necessary law could be found in Rule 6, 9, 117, 118 of the Company Court Rules, 1959. Whereas under 2013 Act, Section 434 which indicate that principles of natural justice shall be followed, would not be sufficient to decide both monetary and non-monetary claims. An Adjudicating Authority that commences exercising of its power by entertaining a petition by a creditor on account of default by the Corporate Debtor enters into the sphere of resolution process which again deals with money and money alone ends up under liquidation. If there is a suit for title pending before the civil court.

Adjudicating Authority normally would not be able to reject the leave in such cases. It is to be noted that the tribunals of limited tribunals of limited jurisdiction do not have power to issue declaratory decrees. In ***Nahar Industrial Enterprises Ltd vs Hongkong & Shanghai Banking [Corp2009 8 SCC 646]*** also the Honourable Apex Court has held that the tribunal cannot grant a declaratory decree.

31. The definition of the word "claim" is found in Section 3(6), Section 3(11) defines "Debt", Section 3(12) defined "default" and Sections 3(13) to 3(18) of the Insolvency and Bankruptcy Code 2016 deals with financial aspects. Therefore the very word 'claim' is relatable to a right of payment. Such right of payment may arise on account of debt or on account of any breach of contract provided such breach gives right to a payment. In such circumstances the provisions of Companies Act which deals with cases of winding up generally cannot be read harmoniously with IBC which is a Special Law.

32. A similar situation arose before the division bench of this Court where the scope of Section 279 of the 2013 Act and admiralty suits had to be

considered. In *Pratibha Shipping Company Limited v. Praxis Enegery Agents SA and others*, [2019 ( 5) CTC] A suit was filed under the Admiralty Jurisdiction claiming compensation. A Writ Petition was also filed seeking inquiry on the incident and compensation. In the civil suit, the sale of the vessel was ordered and the proceeds were deposited in the Court several claim petitions were filed. Meanwhile a petition for winding up the company was filed before the Bombay High Court and a provisional liquidator was appointed. The Official Liquidator of the Bombay High Court contended that the civil suit or the claim petitions cannot be entertained without obtaining leave of the Company Court in Bombay under Section 446. The division bench of this Hon'ble Court relied on *Allahabad Bank v. Canara Bank* [2004 4 SCC 406]. The position of special law versus general law was discussed in detail in the said judgment. Applying the ratio the Division Bench considered the position of the Admiralty Act, 2017 and came to the conclusion that the adjudication of admiralty claims in admiralty jurisdiction, no leave was required. In Paragraph 29 of the judgment, it was held that Insolvency and Bankruptcy Code, 2016 is another special law in the sequence of RDB and SARFAESI, and finally held that leave under Section 279 of Companies Act not required.

33. In *B.K. Educational Services Pvt. Ltd., v. Parag Gupta and Associates [(2019) 11 SCC 633]* the Honourable Supreme Court has held as follows:

"17. It may also be noticed that under *Section 434(1)(c) of the Companies Act*, all proceedings under the *Companies Act*, including the proceedings relating to 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 they are transferred. This Section is also important in that it indicates that proceedings under the *Companies Act* relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, that were pending before the District Court or the High Court, may now be transferred to the Tribunal. Each of these proceedings would directly be governed by the *Limitation Act* as they are proceedings before Courts. Obviously, upon transfer of such proceedings to the Tribunal, it cannot be stated that because these proceedings are now before the Tribunal, the *Limitation Act* will cease to apply. Also, in fresh applications that are made after the Code comes into

force, it cannot be said that to such applications, the *Limitation Act* will not apply, but to applications that are transferred from the District Court or the High Court, the provisions of the *Limitation Act* will apply. In particular, winding up proceedings pending before a High Court are liable to be transferred to the NCLT for further decision by applying the Code and not the *Companies Act*.”

18. This becomes clear on a reading of Rule 5 of the *Companies (Transfer of Pending Proceedings) Rules, 2016*, which reads as follows:

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.—(1) All petitions relating to winding up of a company under clause (e) of section 433 of the Act (Rule 2(2) of the *Companies (Transfer of Pending Proceedings) Rules, 2016* defines the “Act” as meaning the *Companies Act, 1956*.) on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the *Companies (Court) Rules, 1959* shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the *Companies Act, 2013* exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

*Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July, 2017, failing which the petition shall stand abated:*

*Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:*

*Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15 th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”*

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Above judgment arising out of the transfer of pending proceedings of winding up on the ground of inability to pay debts. Therefore, the same is not applicable to the facts of the present case.

34. In ***Babulal Vardharji Gurjar's case*** (Supra) the Honourable Apex Court has held as follows:

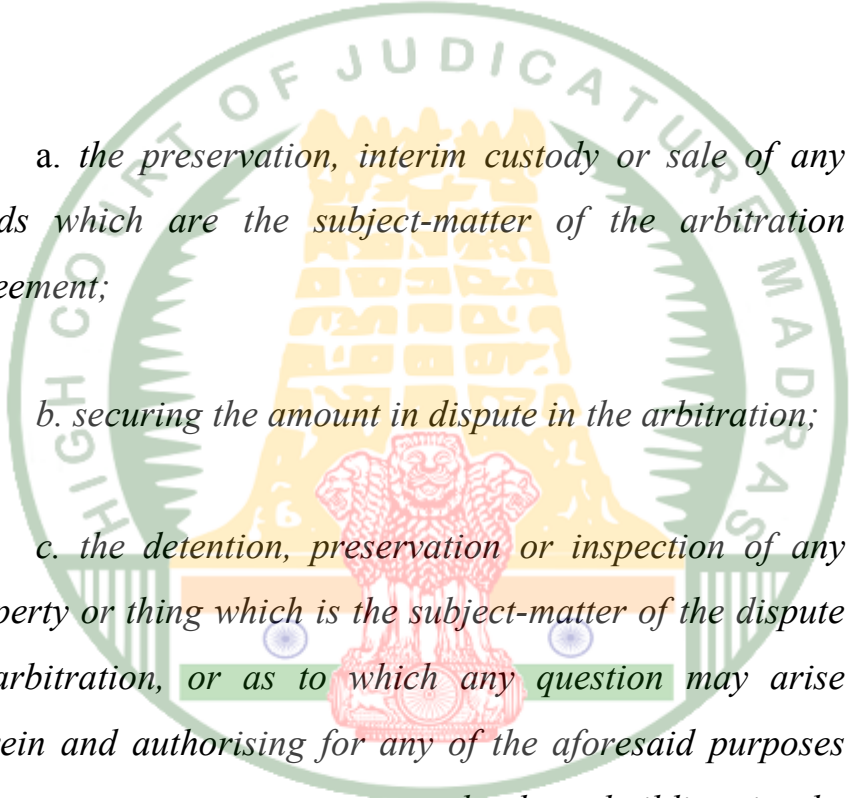
*"30. When Section 238-A of the Code is read with the above-noted consistent decisions of this Court in Innoventive Industries, B.K. Educational Services, Swiss Ribbons, K. Sashidhar, Jignesh Shah, Vashdeo R. Bhojwani, Gaurav Hargovindbhai Dave and Sagar Sharma respectively, the following basics undoubtedly come to the fore: (a) that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation; (b) that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor; (c) that intention of the Code is not to give a new lease of life to debts which are time-barred; (d) that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by [Article 137](#) of the [Limitation Act](#) and is, therefore, three years from the date when right to apply accrues; (e) that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default*

*occurs; (f) that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and (g) that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and (h) an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application."*

35. In *Innoventive Industries Limited vs. ICICI Bank and Another* [2018 (1) SCC 407], the Honourable Apex Court has held that Insolvency and Bankruptcy Code is an exhaustive code and bring the insolvency law in India under a single unified umbrella. In the above judgement the Apex Court considered the inconsistent between the Maharashtra Act and IBC and held that the Insolvency and Bankruptcy Code will prevail over the Maharashtra Act.

36. Therefore from the conspectus of various provisions referred above, I am of the view that Section 33(5) of the IBC Code has to be interpreted on its own language. Further, as discussed, when there is no inconsistency IBC

would prevail over. Such view of the fact no leave is required to continue of pending proceedings as discussed above. With regard to maintainability applicable under Section 9 of the Arbitration and Conciliation Act, Section 9 normally involves for interim measures for

- 
- a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
- b. securing the amount in dispute in the arbitration;*
- c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
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*d. interim injunction or the appointment of a receiver;*

*e. such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*

37. Normally, interim orders passed as measure of protection as may appear to the Court to be just and convenient. Any order passed under Section 9 of the Arbitration and Conciliation Act upsetting the view of the tribunal taken, amounts to sitting over the order of the Tribunal ruling same amount to its jurisdiction. The purpose of Section 9 of the Arbitration and Conciliation Act is not to upset any order passed by the Tribunal. When the Tribunal has passed an order rejecting the contention of the claimant questioning the jurisdiction to continue the proceedings. Such order is amenable to challenge under Section 34 of the Arbitration and Conciliation Act, 1996, while challenging the Award. Therefore, this Court is of the view that interim orders cannot be granted. The Court is also aware of the limitation to intervene the arbitral proceedings. Section 5 of the Arbitration and Conciliation Act also

indicated that no judicial authority shall intervene in the arbitral proceedings except where provided in this part.

38. In view of the forgoing discussions, the Application is dismissed.

**15.10.2020**

Index : yes  
internet : yes  
ggs

**15.10.2020 at 3.30 p.m.**

After pronouncing the Order, the learned Additional Advocate General submitted that since vacation intervenes he may not be in a position to file an appeal immediately. Therefore some protection can be granted till vacation so that he may file an appeal against this order.

2. Having regard to the fact that all these days interim order has been continuing in his favour, this Court is of the view that appeal is a statutory right. As holidays are intervening the learned Arbitrators are requested not to proceed with the proceedings till 04.11.2020. Before 04.11.2020 if appeal is not filed or if filed and no stay is granted, the learned Arbitrators are at liberty to proceed further.

**15.10.2020**

dpq

**N.SATHISH KUMAR, J.**

ggs



order in:

**Application No.2826 of 2019**

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**15.10.2020**