

**IN THE HIGH COURT AT
CALCUTTA**

**ORIGINAL JURISDICTION
ORIGINAL SIDE**

Present:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE

CA No.92 of 2019

(CA No.24 of 2019)

In

CP 1 of 2016

IN THE MATTER OF:

AVANI PROJECTS & INFRASTRUCTURES LIMITED.

AND

IN THE MATTER OF:

ORNATE TRADCOM PVT. LTD.

IN THE MATTER OF:

AJAY KUMAR AGARWAL, acting as the Interim Resolution Professional

..... Petitioner/Applicant

Vs.

The Official Liquidator, High Court, Calcutta

..... Respondent / Applicant

in CA 92 of 2019

Appearances

: Mr. Yash Vardhan Deora.....Advocate
.....For the applicant
Mr. Saunak Mitra,
Mr. Aritra Basu Advocates
..... for Devi Trading & Creditors
supporting Devi Trading.
Mr. Ratnanko Banerjee, Sr. Adv.
Mr. Reetobroto Mitra,
Mr. Sankesan Sarkar,
Mr. A. Kanodia Advocates
..... for Reliance Commercial
Finance Ltd. & Reliance Home
Finance Ltd.
Mr. Jishnu Saha, Sr. Adv.
Mr. Aniruddha Mitra Advocates
..... for the Company.

Ms. Noelle Banerjee....Advocate
.....For the Arihant Talcom Pvt. Ltd.
Mr. Dipanjan Dey,
Mr. Dipak Dey.... Advocates
..... for Petitioning Creditor.
Mr. B. M. Sharma,
Mr. Pranav Sharma....Advocates
.....For the Dalkom Infocom Pvt. Ltd.
Mr. Anupam Dasadhikari
.....For Official Liquidator
Mr. D. Datta,
Mr. G. P. Shaw,
Mr. G. Kumar,
Mr. Bhaskar Ghosh,
Mrs. Debdooti Dutta,
Mr. Ajay Sankar Sanyal,
Ms. Shreyasi Sanyal,
Mr. Sanket Sarawgi,
Mr. A. K. Upadhyay,
Ms. Anuradha Sengupta,
Ms. U. Chakraborty,
Mr. Chayan Gupta,
Mr. Soumyajyoti Nandy,
Ms. Shreeradha Ghosh,
Mr. Sajjan Kumar Kasera.... Advocates
..... For other applicants

Heard on : 10.04.2019, 16.04.2019, 18.04.2019,
14.06.2019, 21.06.2019, 28.06.2019 &
14.11.2019

Judgment on : 12.12.2019

Arindam Mukherjee, J. :

1) C.P 1 of 2016 is a creditor's winding up petition (hereinafter referred to as the said petition) made under the provisions of section 433(e) of the Companies Act, 1956 (in short "Act of 1956"). The said petition was filed on or about 4th January, 2016 and was directed to be served by an order dated 14th

January, 2016. By an order dated 24th February, 2016, the direction for exchange of affidavits in the said petition was given.

2) The said petition was admitted for a sum of Rs.73,95,617/- by an order dated 1st December, 2017 against Avani Projects & Infrastructure Ltd. (hereinafter referred to as the said Company). Three weeks' time from the date of the said order was granted to the said Company to pay off the amount for which the petition was admitted failing which the petition was directed to be advertised. The Company failed to pay the said sum of Rs.73,95,617/- or any part thereof within the time provided and as such the petition was advertised on 16th January, 2018.

3) At the post advertisement stage several other creditors joined the winding up proceedings and the said company was granted liberty to file an affidavit to demonstrate as to why it should not be wound up. Two of the past advertisement creditors jointly made an application under the provisions of section 450 of the Act of 1956 being C.A 224 of 2018 inter alia seeking appointment of Provisional Liquidator. In the said application by an order dated 7th September, 2018, the Official Liquidator was appointed as the Provisional Liquidator to make an inventory and prepare a list of the assets of the Company and to be in symbolic possession thereof. The Company was also restrained from dealing with its assets.

4) After appointment of the Provisional Liquidator, the hearing of the main winding up petition could not proceed much as several applications were made

from time to time by persons who intended to purchase flats from the said Company. Some of them after having paid the entire consideration money were put into possession of such flats but conveyance in their favour yet to be executed. Some were mere agreement holders and alleged to have paid the entire consideration money pursuant to which allotment letter have been issued but were not put into actual physical possession. In such applications, the intending purchasers have either prayed for being put into possession and for execution of the conveyance or only for execution of conveyance allowing their respective cases. There is also an application seeking leave to proceed with the suit filed before the Alipore Court after appointment of provisional liquidator.

5) At this stage, Devi Trading & Holding Private Limited (hereafter referred to as Devi Trading) a financial creditor of the said Company obtained an order on 13th March, 2019 from the National Company Law Tribunal (in short NCLT), Kolkata Bench, Kolkata in C.P (IB) No.370/KB/2018 (M/s Devi Trading and Holding Pvt. Ltd. Vs. M/s Avani Projects & Infrastructure Ltd.) being an application filed under the provisions of section 7 of the Insolvency and Bankruptcy Code, 2016 (in short referred as IBC) by which an Interim Resolution Professional (in short IRP) was appointed for ascertaining particulars of creditors and convening a committee for creditors for evolving a resolution plan.

6) It appears that the said application was filed on 14th March, 2018 and the order was passed after a year when Section 7(4) of IBC provides for appointment of IRP within 14 days from the date of receipt of an application under Section 7(2) of IBC. The said order was also passed by NCLT at such delayed stage with the specific knowledge of appointment of Provisional Liquidator by this Court at least 6 months before. The relevant portion of the said order is set out hereunder:-

“3. The Corporate Debtor appeared in this proceeding through one of its directors Mr. Bhaskar Biswas. He filed affidavit-in-reply. The main defence raised is that Hon’ble Calcutta High Court by order dated 14.01.2016, admitted the Petition of winding up of the Corporate Debtor filed by one of its other creditors. Hon’ble Calcutta High Court also appointed Provisional Liquidator. The Corporate Debtor is restrained from dealing in any manner with any of its assets. Hence, this application under Section 7 of Insolvency and Bankruptcy Code is not maintainable.”

The application being C.A No.92 of 2019 (hereinafter referred to as the said application) is an application filed by the IRP praying for the following relief:-

“The Hon’ble Court may direct the Official Liquidator attached to this Hon’ble Court acting as the Provisional Liquidator be released with respect to the respondent company, and to hand over physical possession of its records and the assets to the petitioner, being the Interim Resolution Professional of the respondent Company.

And such further and/or other order and orders, as this Hon’ble Court may deem fit and necessary”.

7) On behalf of Devi Trading by citing the provisions of section 238 of IBC it is submitted that in view of the wordings of section 238 of IBC, the said Code has an overriding effect over other laws operating in the field. It is further submitted that IBC is a latter enactment in consideration to the Act of 2013 which in turn has repealed the Act of 1956 and as such the provisions of IBC will prevail over the provisions of the Act of 2013 as also the Act of 1956. That apart and in any event there is no embargo in filing an application under section 7 of the IBC even during the pendency of a winding up proceeding until the Company is wound up. In the instant case the Company has not been wound up, only the Provisional Liquidator has been appointed, thus, the application filed by Devi Trading before NCLT under the provisions of section 7 of IBC is maintainable and the order passed on 13th March, 2019 is a valid order and should be complied with. The application of the IRP should be allowed. Moreover, it is submitted that the application under the provisions of section 7 of IBC before the NCLT is an independent application and has to be brought to a logical conclusion. Till such time, a logical conclusion is arrived at before the NCLT, all proceedings in respect of the said petition and/or connected thereto should remained stayed. In the alternative, the said petition along with all connected applications should be transferred to the NCLT for being further proceeded with thereat. Two Supreme Court judgments passed respectively in **Civil Appeal No.12023 of 2018 (Jaipur Metal & Electrical**

Employees Organization through General Secretary, Mr. Tej Ram Nike Vs. Jaipur Metal & Electrical Ltd. through its Managing Director and Ors.) and **Civil Appeal No.818 of 2018 (Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.)** and respectively reported in **[2019] 213 Company Cases 25 (SC)** and **[2019] 213 Company Cases 121 (SC)** are relied on to support the maintainability of their application before NCLT. Relying upon those two judgments, it is further submitted that this Court cannot stay the implementation of the order passed by the NCLT and the said petition cannot be proceeded with any further in view of the provision of section 238 of IBC. The proceedings before the NCLT should continue. It is further submitted that until a liquidation order has been made against the said Company, an insolvency petition maybe filed under section 7 of the IBC which being an independent proceedings must be decided in accordance with the provisions of IBC. It will be more beneficial if, the winding up proceedings pending before this Court be transferred to the NCLT, which can be treated as proceedings under section 9 of IBC and further proceeded with before the NCLT, instead of keeping the same stayed and retained in this Court.

8) After adopting the submissions made on behalf of Devi Trading, it is submitted on behalf of some of the creditor supporting the action of Devi Trading that the winding up petition cannot be proceeded with any further after the passing of an order by NCLT under the provisions of section 7 of IBC, it is no more *res integra*. That the provisions of the latter Act will prevail over

the provisions of the Act prior in time. Even if, the clear and specific overriding effect of section 238 of IBC is ignored then also in view of the ratio laid down in the judgment reported in **2000 (4) SCC 406 (Allahabad Bank vs. Canara Bank & Anr.)** (reliance placed on paragraph 13, 30 to 24 and 50) and **2005 (8) SCC 190 (Rajasthan State Financial Corpn. & Anr. vs. Official Liquidator & Anr.)**, the provision of IBC will have an overriding effect on Act of 1956. Moreover, an application under section 7 of IBC is an independent application which requires to be brought to a logical conclusion following the provisions of IBC. The winding up proceedings pending before this Court should either remain stayed until NCLT disposes of the application or in the alternative, the said petition and other connected applications be transferred to the NCLT for being heard along with the application made by Devi Trading. To support the submission as to transfer of the winding up petitions with all connected applications from this Court to NCLT, the said creditors relied upon a Division Bench judgment of this Court passed in the case of **Impex Ferro Tech Limited Vs. Auroma Coke Ltd. (APO No.273 of 2018)** dated 17.12.2018. The relevant portion so relied upon is set out hereunder :-

“Once the proceedings under the IBC have been admitted, the company Court should yield to the more modern mechanism under the IBC in view of the obvious legislative intent apparent. It was because the liquidation proceedings envisaged by the 1956 Act were found to be less than ideal, that an entirely different scheme has been put in place by the IBC in 2016. Thus, once proceedings pertaining to a company have been admitted by the IBC and the merits of such proceedings are to be gone into for the purpose of the preparation of a resolution plan, the

proceedings pending before the company Court should ordinarily be transferred to the tribunal or adjudicating authority. It is true that such transfer, according to the appellant herein, makes no difference since the company Court would already have lost its jurisdiction, by virtue of the moratorium envisaged in the IBC, to adjudicate on the creditor's claim; but the company Court would be well within its rights to decline a transfer till the proceedings before the adjudicating authority under the IBC stand admitted."

9) On behalf of State Bank of India, a secured creditor of the said Company, who has initiated action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act) in respect to one of the projects of the said Company, submits that the application of Devi Trading under the provisions of section 7 of IBC was filed on 14th March, 2018 that is much prior to 7th September, 2018 when the Provisional Liquidator was appointed. In that view of the matter, the provisions of section 446 of the Act of 1956 has no manner of application in the instant case. No leave was required to be obtained from this Court under the provisions of section 446 of the Act of 1956 prior filing of the application under section 7 of IBC. The order dated 13th March, 2019 passed by the NCLT is, therefore, a valid order and should be honoured. Furthermore, paragraph 19, 20, 21 and 22 of the judgment in **Forech India Ltd.(supra)** is relied on for the proposition that the proceedings under section 7 of IBC is an independent proceedings, which has to be brought to a logical conclusion upon applying the provisions of IBC. The NCLT proceedings should continue and the winding up proceedings now pending before this Court should be either

directed to remain stayed or in the alternative transferred to NCLT for being heard by applying the provisions of section 9 of IBC.

10) On behalf of some of the creditors, who are opposing the action of Devi Trading taken before the NCLT and the order dated 13th March, 2019 passed therein, it is submitted that the said petition falls under the category of cases mentioned either in Rule 5(1) or Rule 6 of 2016 Transfer Rules (hereinafter for the sake of convenience referred to as “saved petition”) and were not required to be transferred to NCLT following the provisions of Rule 3 of the 2016 Transfer Rules since the winding up petition was filed much prior to 7th December, 2016 and directions for filing of affidavits were also given prior to that date. Reliance is then placed on, the second proviso to section 465(1) of the Act of 2013 and submitted that the provisions of the Act of 1956 shall continue to apply to the proceedings which have not been transferred from this Court to NCLT. It is further submitted that on a conjoint reading of section 465 and 434(1) (c) of the Act of 2013, it is clear that applicable provisions in respect of the instant winding up proceeding is in the Act of 1956. It is further submitted that this Court, therefore, retained jurisdiction over the winding up proceedings and have passed orders therein including appointment of Provisional Liquidator in terms of the provisions of the Act of 1956. The provisions of section 447 of the Act of 1956 is then relied upon and the effect of winding up order is being shown to the Court. The provisions of section 481 of the Act of 1956 is also relied upon to submit that winding up order, as mentioned in section 443(1)(d)

of the Act of 1956 is not the same as contemplated under section 481. It is then submitted that propriety demands that the Provisional Liquidator already appointed should continue and the application by IRP to be dismissed. The order dated 13th March, 2019 passed by NCLT is required to be stayed otherwise there will be a conflict between the functioning of the Provisional Liquidator and IRP. Official Liquidator being the Provisional Liquidator is more experienced and has the infrastructure to deal with the post winding up situation.

11) To counter the arguments made on behalf of the Devi Trading and the creditors supporting Devi Trading, it is submitted by the other set of creditors opposing Devi Trading that the Division Bench judgment of this Court in **Impex Ferro Tech Limited (supra)** while hearing an appeal from rejection of an application seeking transfer of winding up petition to the NCLT clearly held that a case analysis on the grounds of balance and convenience and the like to be undertaken by the Company Court before directing or refusing to direct the transfer of any pending proceedings. The Company Court is also required to be satisfied that the proceedings under IBC are firmly in place before transferring a pending creditor's or like petition under Clauses (a) and (f) of Section 433 of the Act of 1956 to the Tribunal in terms of the second proviso to Section 434(1)(c) of the Act of 2013. It is submitted that Devi Trading after filing the said application has, in fact, applied under IBC before NCLT for withdrawal of its petition. It is at the instance of a creditor who opposed the withdrawal of the

said application, the said application is kept pending under IBC before the NCLT. This in itself will show that the case under IBC initiated by Devi Trading, on which the order dated 13th March, 2019 has been passed, is not firmly in place. In that view of the matter, there is no question of the Company Court transferring the pending winding up proceedings to the NCLT. It is submitted that **Impex Ferro Tech Ltd. (supra)** did not ultimately allow the transfer of the winding up proceedings to NCLT. It is further submitted by the said creditors that in terms of Section 7(6) of the IBC, the insolvency resolution process shall commence from the date of admission of the application under Section 7(5). In the instant case, the petition though was filed on or about 14th March, 2018, had been admitted on 13th March, 2019, and, as such, the proceedings commenced from such day. In view of the provisions of Section 12, such corporate insolvency resolution process was required to be completed within a period of 180 days from the date of admission of the application by which the process was initiated. The said 180 days have expired in September, 2019, but no committee of creditors had been formed till such date. As to the winding up of the company to be proceeded under the Act of 1956 or under IBC, the said creditors relied upon the judgments rendered in the case of **Rajni Anand vs. Cosmic Structures Ltd. (2018 SCC On Line Del 12107)**; **Arise India Limited vs. TCI Freight (2018 SCC OnLine NCLAT 223)** and **[2019] 213 Comp Cas 61 (Bom) (Jotun India P. Ltd. vs. PSL Ltd.)**. It appears from the judgment of **Arise India Limited (supra)** that the NCLAT finding that the provisional liquidator having been appointed by the Company Court rejected the initiation

of proceedings under IBC. Relying upon such judgments, the said creditors submitted that assuming without admitting the winding up proceeding pending before this Court is required to be stayed to allow the NCLT to make an endeavour to revive the said company then also on the failure of revival efforts by NCLT, this Court in exercise of its company jurisdiction should proceed with the pending winding up proceedings in accordance with the provisions of 1956 Act. The said creditors while dealing with the two judgments **Jaipur Metal (supra)** and **Forech India Ltd. (supra)** submits that in **Forech India Ltd. (supra)** the case considered was a winding up proceeding initiated by the Company Court in view of the recommendation of Board for Industrial and Financial Reconstruction (in short BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 (in short SICA) and it was not a creditors winding up petition, the savings of the two types of petitions are under two different rules of the 2016 Rules. Rule 5(2) of the 2016 Rules relating to initiation of winding up on recommendation of BIFR has been subsequently repealed, however, Rule 5(1) and 6 of the 2016 Rules in respect of creditor's winding up petition is still retained. The ratio decidendi of **Forech India Ltd. (supra)** cannot be applied to the instant case as there has been no focused argument and consequent discussions regarding creditor's winding up petition in **Forech India Ltd. (supra)**. They rely upon the judgment reported in **(2018) 2 SCC 39 (Union of India & Anr. vs. Pfizer Limited & Ors.)** and in particular paragraph 18 thereof. In respect of **Jaipur Metals (supra)** the said creditors submit that the background under which the winding up petition was initiated was again

the recommendation of BIFR and in a workers' writ petition the provisional liquidator was appointed to value the assets of the Company. The ratio of the said judgment is also not applicable to the instant case. With regard to the judgments **Allahabad Bank (supra)** and **Rajasthan State Financial Corpn. (supra)** the said creditors submit that the object of the Act of 1956 and the Act of 2013 are different from IBC. The Acts are not operative in the same field and particularly in view of the facts and circumstances of the instant case, these two judgments have no application.

12) The Company opposes the prayer of the IRP and the action of Devi Trading by submitting that the order of the NCLT passed on 13th March, 2019 is an order without jurisdiction and a nullity. The said order is required to be stayed till the winding up proceedings pending before this Court is finally decided. In order to elucidate the points urged. The Company refers to clause (ii) of the proviso to section 434(1)(c) and submits that the instant winding up proceedings is one, which falls in the category of cases to be retained in this Court and, therefore, shall be decided in accordance with the provisions of the Act of 1956 and the 1959 Rules. In view of the provisions of the Act of 1956 having been made applicable to the winding up petition like the instant case a winding up petition on being admitted assumes a representative character. All creditors of the said Company are thereafter required to join such proceedings unless express leave has been obtained under the provisions of section 446 of the Act of 1956. Having not done so, Devi Trading could not have proceeded

with its application before the NCLT to obtain the order dated 13th March, 2019 particularly when the application was filed long back and moved after about one year from the date of filing. It was also known that the Provisional Liquidator has been appointed which in fact had been specifically brought to the notice of the NCLT by the said Company. In that view of the matter, the order dated 13th March, 2019 is an order without jurisdiction and a nullity which can be challenged even in collateral proceedings. This Court should stay the order dated 13th March, 2019 and proceed with the winding up petition to bring the same to a logical conclusion. It is also submitted that the fact situation in the background whereof the two Supreme Court judgments were delivered, which have been cited by Devi Trading are completely different to the fact situation in hand. In neither of the two cases before the Hon'ble Supreme Court, the Provisional Liquidator had been appointed and as such the rigours of the provisions of section 446 were not present in those two cases. In the instant case, in view of the provisions of section 446 of the Act of 1956, it is mandatory for any creditor to either file or to continue with any legal proceedings to obtain leave from this Court in terms of the said provision. A proceeding under section 7 of IBC may be an independent proceeding but for the want of leave under the provisions of section 446 of the Act of 1956, no order could have been obtained or passed in an application under the IBC. There is as such no scope of the winding up petition to be stayed or transferred before NCLT. No question as to the discharge of the Provisional Liquidator also arise in the facts of the instant case. With regard to the applications filed by

intending purchasers or the application for leave to proceed with the suit, it is submitted that NCLT in any event, does not possess the jurisdiction and competence to receive, entertain and try such applications.

13) The creditors supporting Devi Trading in reply submitted that the insolvency proceedings before the NCLT is firmly placed. One Bhaskar Biswas (one of the directors) claiming to have settled the matter on behalf of the corporate debtor (the said Company) with Devi Trading prior to constituting the committee of creditors, filed an application under Rule 11 of the NCLT Rules, 2016. The said application was rejected by an order dated 5th July, 2019. Bhaskar Biswas carried the said order dated 5th July, 2019 in appeal before the NCLAT. By an order dated 29th August, 2019, NCLAT had rejected the appeal and made it clear that the corporate insolvency resolution process was not stayed and the resolution professional as well the committee of the creditors are required to proceed in accordance with law. IRP was also directed to ensure that the company (corporate debtor) remains a going concern. Further orders were passed by the NCLT directing the Provisional Liquidator appointed by this Court to hand over all accounts, books of accounts and release all assets in favour of IRP on the basis of its order and the matter was directed to appear on 24th October, 2019. On 24th October, 2019, a further order was passed directing the Provisional Liquidator appointed by this Court to be personally present before the NCLT on 13th December, 2019. The said creditors also submitted that from the judgment of **Jaipur Metal (supra)**, it is clear that the

orders of NCLT cannot be interfered with by this Court while exercising Company jurisdiction. It is also submitted that on a conjoint reading of **Jaipur Metal (supra)** and **Forech (supra)**, this Court cannot proceed with the winding up petition any further until insolvency proceedings is brought to a logical conclusion before the NCLT. Moreover, a moratorium under Section 14 of IBC has been passed and as such no further steps in the winding up proceedings can be taken by this Court. With regard to the issue of ratio decidendi laid down in a judgment it is submitted that there has been discussion in details with reference to the course of action to be followed when insolvency proceedings under IBC is initiated and a creditor's winding up petition is pending before the High Court being a saved petition. The judgment in **Pfizer (supra)** cited by the other set of creditors, therefore, has no manner of application. They also submit that after the judgment of **Jaipur Metal (supra)** and **Forech (supra)**, the other judgments cited by the creditors opposing Devi Trading has no manner of application to the instant case. The winding up proceedings should either be transferred to NCLT or the same should remain stayed till the insolvency proceedings is brought to a logical conclusion before the NCLT as held in **Forech (supra)**.

14) Before I proceed to deal with the relief claimed in the said application, I shall indicate the changes brought in to the legal field in the recent times which are apt mentioning:-

- i. The Act of 1956 was enacted to consolidate the law relating to companies and certain associations subsequently, the Act of 1956 was amended from time to time to keep pace with time. With the passage of time, due to changes in national and international economic environment, expansion and growth of economy of our country it was found difficult to retain the Act of 1956 by making amendments thereto. It was thus required to be replaced. The Act of 2013 is such replacement. The object of the Act of 2013 is the same that of the Act of 1956.
- ii. The Act of 1956 has been repealed by Section 465 of the Act of 2013. The proviso to Section 465 of the Act of 2013, however, provide that until a date is notified by the Central Government under Section 434 (1), transfer of all matters, proceeding of cases to the Tribunal, the provisions of the Act of 1956 in regard to jurisdiction, powers, authority and functions of the Company Law Board (hereinafter referred to as CLB) and Court shall continue to apply as if the Act of 1956, has not been repealed.
- iii. Before the said petition was filed, the Companies Act, 2013 (hereinafter referred to as the Act of 2013) had, however, been enacted but not with all the sections coming into force

on a single date. It was initially published in the Gazette of India on 30th August, 2013 and corrected by a corrigendum dated 1st January, 2014. Different sections of the said Act have, however, been made operational, subsequently, on various dates. This Court in exercise of its company jurisdiction, however, continued to hear winding up petitions as Sections 270 and 271 of the Act of 2013 dealing with winding up of a company by the Tribunal (i.e. Company Law Board – in short CLB) came into operation with effect from 15th November, 2016.

- iv. The transfer of winding up proceedings from the High Court to the NCLT is provided under Section 434 (1)(c) of the Act of 2013. The said Section originally provided that the winding up of companies pending in the High Court immediately before such date shall stand transferred to the Tribunal (NCLT) and NCLT may proceed to deal with such proceedings from the stage before their transfer. The Section was substituted with effect from 15th November, 2016. In the substituted Section 434(1)(c), a proviso was introduced which says that only such proceedings relating to winding up of companies shall be transferred to NCLT that are at a stage as may be prescribed by the Central

Government. The substituted Section 434 (1)(c) further provide that the proceedings relating to winding up of companies which have not been transferred from the High Courts shall be dealt with in accordance with provisions of the Act of 1956 and the Companies (Court) Rules, 1959 (hereinafter referred to as the 1959 Rules).

- v. On a comparative analysis of the provisions of the Act of 1956 and the Act of 2013, so far as it relates to winding up of companies, it is noticed that the creditor's winding up petition which was allowed under the provisions of Section 433 (e) of the Act of 1956 was removed from the provisions of Section 271 of the Act of 2013 by substituting the original provisions of Section 271 of the Act of 2013 by a new one with effect from 15th November, 2016. The creditor's winding up was provided in the original Section 271(2) which is no more there in the substituted Section 271 of the Act of 2013. Though just an equitable ground provided in Section 434 (f) of the Act of 1956 has been retained as Section 271(e) but by specifying the persons who are entitled to file a winding up before the Tribunal, the creditors of the company have been eliminated from coming within that domain.

- vi. On 28th May, 2016, the IBC came into operation. However, all the provisions of IBC were not made operational on and from 28th May, 2016. They were made operational subsequently in phasewise manner. The object of IBC is to consolidate and amend the laws relating to insolvency and bankruptcy. Its main aim is reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons to promote entrepreneurship, availability of credit and balance the interest of shareholders including alteration of priority of payment of Government dues and to establish an insolvency and bankruptcy fund. Prior to promulgation of IBC, there was several forums dealing with insolvency and bankruptcy of the companies. IBC also aims in reorganising things so that a single forum can deal with the issue of insolvency and bankruptcy.
- vii. IBC repealed several provisions of the Act of 2013 and also brought in amendments relating to issues involving insolvency and bankruptcy.
- viii. Taking into consideration the provisions of the Act of 2013 as also IBC, the Companies (Transfer of Pending Proceedings)

Rules, 2016 (hereinafter referred to as the 2016 Rules) was brought into operation with effect from 7th December, 2016. The provisions of Rules 5 and 6 of the 2016 Rules are relevant for our purpose. The said rules as it stood at the time of enactment is set out hereinbelow :-

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts. – (1) All petitions relating to winding up under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under Rule 26 of the Companies (Court Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

(2) All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act.

6. Transfer of pending proceedings of winding up matters on the grounds other than inability to pay debts. – All petitions filed under clauses (a) and (f) of Section 433 of the Companies Act 1956 pending before a High Court and where the petition has not been served on the respondent as required under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal exercising territorial jurisdiction and such petitions shall be treated as petitions under the provisions of the Companies Act, 2013 (18 of 2013)”.

By an amendment dated 29.06.2017, Rule 5 was then substituted as follows:-

“5. Transfer of pending proceedings of winding up on the ground of inability to pay debts. – (1) All petitions relating to winding up under clause (e) of Section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent under Rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction and such petitions shall be treated as applications under Sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

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

Provided further that any party or parties to the petition shall, after the 15th day of July, 2017, be eligible to file fresh applications under Sections 7 or 8

or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

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

15) At the hearing of the said application several provisions of the Act of 1956, 1959 Rules, the Act of 2013, 2016 Transfer Rules and the IBC have been referred. The provisions so referred to are set out hereunder for convenience:-

Sections 433, 446, 447 and 481 of the Companies Act of 1956:-

“[433. Circumstances in which company may be wound up by Tribunal. – A company may be wound up by the Tribunal, -

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(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;

(e) if the company is unable to pay its debts;

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up;

(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;

(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;

(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G:

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].

At the time when Act of 2013 repealed the Act of 1956, "Tribunal" referred to in the Act of 1956 meant Company Law Board (in short CLB) subsequently, the CLB gave away to NCLT constituted in terms of the Act of 2013.

446. Suits stayed on winding up order. – (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.*

(2) [The Tribunal] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of –

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company;

(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 (65 of 1960)].

447. Effect of winding up order. – *An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made out on the joint petition of a creditor and of a contributory.*

481. Dissolution of company. – *(1) When the affairs of a company have been completely wound-up [or when the [Tribunal] is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution of the company should be made], the [Tribunal] shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly”.*

Companies (Court) Rules, 1959.

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

R. 28. Service on company. – *(1) Where a petition is presented against a company, it shall be accompanied by a notice of the petition in the prescribed form together with a copy of the petition for*

service on the company and an envelope addressed to the company at its registered office or its principal place of business and sufficiently stamped for being sent by registered post for acknowledgment. The Registrar shall immediately on the admission of the petition send the notice together with the copy of the petition to the company by registered post.

(2) Every petition and, save as otherwise provided by these rules or by an order of Court, every application, shall unless presented by the company, be served on the company at its registered office, or if there is no registered office, at its principal or last known principal place of business, by leaving a copy thereof with an officer or employee of the company, and in case no such person is available, in such manner, as the Judge or registrar may direct, or, by sending a copy thereof by prepaid registered post addressed to the company at its registered office, or, if there is no registered office, at its principal or last known principal place of business, or to such person and at such address as the Judge or registrar may direct.

Where the company is being wound-up the petition or application shall also be served on the liquidator, if any, appointed for the purpose of winding-up the affairs of the company.

R. 29. Petitioner to effect service. – *Save as otherwise provided by these rules and subject to any directions of the Judge or Registrar, the petitioner, applicant or any other person having the conduct of proceedings in Court, shall be responsible for the service of all notices, summons and other processes and for the advertisement and publication of notice, required to be effected by these rules or by order of Court.*

R. 34. Notice to be given by persons intending to appear at the hearing of petition. – *Every person, who intends to appear at the hearing of a petition, whether to support or oppose the petition, shall serve on the petitioner or his advocate, notice of his intention at the address given in the advertisement. The notice shall contain the address of such person, and be signed by him or his advocate, and save as*

otherwise provided by these rules shall be served (or if sent by post, shall be posted in such time as to reach the addressee) not later than two days previous to the day of hearing, and in the case of a petition for winding-up not later than five days previous to the day of hearing. Such notice shall be in Form No.9, with such variations as the circumstances may require, and where such person intends to oppose the petition, the grounds of his opposition, or a copy of his affidavit, if any, shall be furnished along with the notice. Any person who has failed to comply with this rule shall not except with the leave of the Judge, be allowed to appear at the hearing of the petition”.

Sections 434 and 465 of the Companies Act of 2013 (in short the Act of 2013):-

“[434. Transfer of certain pending proceedings. –
(1) On such date as may be notified by the Central Government in this behalf, -

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10-E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

(c) all proceedings under the Companies Act, 1956 (1 of 1956), including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government:

[Provided further that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal]:

[Provided also that -]

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts, shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959:]

[Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.]

(2) The Central Government may make rules consistent with the provisions of the this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.]”

“465. Repeal of certain enactments and savings.

– (1) The Companies Act, 1956 (1 of 1956) and the Registration of Companies (Sikkim) Act, 1961 (Sikkim Act 8 of 1961) (hereafter in this section referred to as the repealed enactments) shall stand repealed:

Provided that the provisions of Part IX-A of the Companies Act, 1956 (1 of 1956) shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies:

Provided further that until a date of notified by the Central Government under sub-section (1) of section 434 for transfer of all matters, proceedings or cases to the Tribunal, the provisions of the Companies Act, 1956 (1 of 1956) in regard to the jurisdiction, powers, authority and functions of the Board of Company Law Administration and Court shall continue to apply as if the Companies Act, 1956 (1 of 1956) has not been repealed:

Provided also that provisions of the Companies Act, 1956 (1 of 1956) referred in the notification issued under section 67 of the Limited Liability Partnership Act, 2008 (6 of 2009) shall, until the relevant notification under such section applying relevant corresponding provisions of this Act to limited liability partnerships is issued, continue to apply as if the Companies Act, 1956 (1 of 1956) has not been repealed”.

Sections 238 and 255 of the Insolvency and Bankruptcy Code, 2016:-

“238. Provisions of this Code to override other laws. – *The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*

255. Amendments of Act 18 of 2013. – *The Companies Act, 2013 shall be amended in the manner specified in the Eleventh Schedule”.*

16) After hearing the parties, considering the materials on record and the provisions of law referred to by them, the following questions arise which needs to be answered for complete adjudication of the said application though the

prayer in the said application is for release of the Official Liquidator appointed as Provisional Liquidator and handing over of the assets and books of the said Company to the IRP:-

- i) Does this Court retain jurisdiction to hear the winding up petition being CP 1 of 2016 and the connected applications thereto? If so, what are the provisions of law applicable to adjudicate the said petition?
- ii) Should the Provisional Liquidator be released/discharged and directed to make over possession of the properties and assets, books of accounts of the said Company in his possession to the IRP appointed by NCLT?
- iii) Should further hearing of the winding up petition (C.P 1 of 2016) along with all connected applications be stayed?
- iv) Should the winding up petition along with all connected applications be transferred to NCLT to be further heard by it? Does NCLT have the jurisdiction to hear out the petitions filed by the intending purchasers?
- v) Are the provisions of IBC applicable to the instant winding up petition when the same has been filed on 4th January, 2016 i.e. much prior to IBC coming into operation?

- vi) Whether the order dated 13th March, 2019 could have been obtained from NCLT without first obtaining leave of this Court under the provisions of section 446 of the Act of 1956?
- vii) Is the order of NCLT dated 13th March, 2019 in the absence of leave under section 446 of the Act, 1956 or is otherwise an order without jurisdiction and a nullity?

17) On jurisdiction of this Court and applicable provisions of law as in issue

(i) the answer is as follows:-

- a) The winding up petition was filed on or about 4th January, 2016 and was served between 14 January, 2016 and 24 February, 2016. This service is in terms of Rule 26 of the Act of 1959 and was made prior to 28th May, 2016 when IBC came into operation. The service of the said petition was also effected much before 7th December, 2016 when the 2016 Transfer Rules came into operation. Direction for filing of affidavits was issued and affidavits were exchanged prior to 7th December, 2016. The said petition, therefore, fell in the category of winding up petitions which were not required to be transferred to the NCLT since the service was effected and even affidavits were exchanged before 7th December, 2016 or the cut off date declared by the Central Government in terms of section 434(1) of the Act of 2013. This Court, therefore, retains jurisdiction to hear the winding up petition. On conjoint reading of section 434 of the Act of 2013

and Rule 5 and 6 of the 2016 Transfer Rules, it is clear that the Act of 1956 and the 1959 Rules are applicable for the purpose of adjudicating the said petition and/or connected applications.

- b) Even after promulgation of IBC, none of the creditors of the said Company filed any application between 28th May, 2016 and 14th March, 2018 when the application of Devi Trading under the provisions of section 7 of IBC was filed before NCLT. Even after the amendment brought to section 434 of the 2013 Act on 7th August, 2018 none of the parties to the winding up proceedings made any application for transfer of winding up proceedings to NCLT which they could have made and the Company Court could have decided such application by either allowing it or rejecting the same. This, not being the case, this Court thus retains the jurisdiction to hear out the said petition and on 1st December, 2017 with the admission of the said petition coupled with advertisement thereof the same assumed a representative capacity.
- c) Having considered the judgments in **Jaipur Metal (supra)**, I find that the winding up proceedings being the subject matter in the said judgment was initiated under the recommendation BIFR. It does not relate to a creditor's winding up petition. **Forech (supra)** deals with a case where an "Operational Creditor" filed a winding up petition before the Company Court which was a saved petition. Subsequently another creditor filed an application under section 9 of the IBC which was later on withdrawn.

Thereafter an application under section 7 of IBC was filed before NCLT. In the context of the saved petition and section 7 application under IBC it was held that proceedings before NCLT under IBC is an independent proceeding and has to be brought to a logical conclusion and till such time the winding up petition should not be proceeded with. Neither of these judgments say that the High Court does not have jurisdiction to deal with saved petitions. The legislative intent is also very clear from the Act of 2013 and the Transfer Rules of 2016 by allowing the High Court to retain jurisdiction over the saved petitions. As to the transfer of a creditor's winding up petitions from the High Court to the Tribunal, on the Tribunal being approached under IBC is concerned, the issue has been discussed in a Division Bench judgment of this Court reported in **2019(1) WBLR (Cal) 192 [New Central Jute Mills Shramik Sangh & Anr. Vs. Shalimar Industries Ltd. & Ors.]**. In the said judgment it has been categorically held that there is no question of this Court losing jurisdiction as to the saved petitions. In **Impex Ferro Tech Limited (supra)** though it has been commented that one should yield to the new mechanism meaning thereby IBC proceedings should be given preference and NCLT is better equipped in view of the new mechanism but at the end transfer of the saved petition has been refused by upholding the order of the Learned Single Judge.

- d) The creditor's winding up petition always stood on a different platform than one initiated at the recommendation of BIFR. BIFR after considering a reference to it under the provisions of SICA from all concerns on finding that the company is sick, used to make recommendation before the High Court having jurisdiction over the registered office of such company under section 20 of SICA to initiate winding up proceedings. This was done as there was no mechanism to wound up a company. With the repealing of SICA, there is no act of like nature except the provisions of IBC to consider the fate of a company, which has become insolvent or bankrupt. The definition of sick company under SICA may not be the same to that of an insolvent or bankrupt company under the IBC but in essence the IBC deals with such sick company under a new format.
- e) Even after the introduction of IBC which took away the creditors' power to institute a winding up proceeding initially available under section 271(2) of the Act of 2013 due to specific provision for retaining of creditor's winding up petition of a particular type as aforesaid, there is no change as the saved petitions. Considering these aspects, it can be said that the ratio laid down in **Jaipur Metal (supra)** is applicable to the facts of the instant case. **Forech (supra)** does not take away the jurisdiction of the Company Court as to saved petitions but holds that IBC proceedings being independent and should be brought to a logical

conclusion. If “logical conclusion” is interpreted as to the liquidation of a company on failure of a resolution plan then retention of a saved petition before Company Court becomes inconsequential. This cannot also be the legislative intent otherwise there was no need to create a separate category of winding up petitions like the saved petition. Considering the said judgment and the legal provisions, my interpretation as to bring a logical conclusion will mean up to the stage of either acceptance or rejection of the resolution plan. This view is supported by the fact that unlike IBC, the Act of 1956 in itself does not contain any provision for revival of the company being a default in paying its debts. Courts have devised the mechanism of approving a scheme for its operation and revival. IBC has a separate chapter for making an attempt to revive the company at the first instance before sending it to liquidation.

- f) **Jotun India (supra)** on the other hand deals with a creditor’s winding up petition and discusses issues more similar to those which are subject matter of the instant case. The view of NCLAT also appears to vacillate with regard to situations where Provisional Liquidator has been appointed by the High Court in a creditor’s winding up being a saved petition visa-vis IBC proceedings initiated by a creditor. In **Arise India (supra)** NCLAT did not entertain the appeal on finding that the Provisional Liquidator has been appointed but in the instant case,

NCLAT directed the company insolvency process to continue as will appear from the order dated 29th August, 2019.

- g) **Canara Bank (supra)** is an authority for the proposition that the special law dealing with a particular subject will prevail over the general law also touching such subjects. Consideration therein was with regard to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short RDB Act) and the Companies Act, 1956 where RDB Act was considered to be a special law whereas Companies Act, 1956 as the general law. It was also held that between two Special Laws the latter will normally prevail over the former if there is a provision in the latter Special Act which gives it an over-riding effect. RDB Act in section 34 provides such over-riding effect and as such the said Act will prevail over the Act of 1956 to the extent that there is anything inconsistent between the said two Acts. In the said judgment the question of jurisdiction of the Debts Recovery Tribunal under the RDB Act, vis-a-vis the Company Court also arose for a decision. The Hon'ble Supreme Court held that even where a winding-up petition is pending, or a winding-up order has been passed against the debtor company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions, are respectively within the exclusive jurisdiction of the Debts Recovery Tribunal and the Recovery Officer under the RDB Act and in such a case, the Company Court's jurisdiction under Sections

442, 537 and 446 of the Companies Act stood ousted. Hence, no leave of the Company Court was necessary for initiating proceedings under the RDB Act. Even the priorities among various creditors, could only be decided by the Debts Recovery Tribunal in accordance with Section 19(19) of the RDB Act read with Section 529-A of the Act of 1956 and in no other manner.

h) **Rajasthan State Financial Corporation (supra)** has held that once a winding up proceeding has commenced and the Liquidator is put in-charge of assets of the Company being wound up, the distribution of proceeds of sale of the assets, held at the instance of the Financial Institutions coming under the RDB Act or the State Financial Corporation Act (in short SFC Act) can only be with the association of the Official Liquidator and under the supervision of Company Court. In paragraph-18 of the said report, the Hon'ble Supreme Court has summarised the legal position.

“(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission

from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation”.

- i) The IBC in section 238 has a similar over-riding effect like that in section 34 of the RDB Act but such provision will not affect the instant case in view of the specific retention power given under section 434 of the Act of 2013 read with the provisions of Rule 5(1) and 6 of the 2016 Transfer Rules in respect of the saved petitions. Even if it is held that NCLT under IBC has the exclusive jurisdiction as to the insolvency and bankruptcy of the said Company as held in **Canara Bank (supra)** for IBC being a Special Act and the Act of 1956, a general law, then also in view of the specific retention power the Company Judge of this Court does not lose the jurisdiction over the saved petitions. On the contrary in view of the ratio laid down in **Rajasthan State Financial Corp. (supra)** and **Jotun India P. Ltd. (supra)**, I am of the view that NCLT may be permitted to proceed upto the level of revival of the said Company. If the revival effort fails, the Company Judge of this Court shall proceed with the winding up proceedings and distribute the sale proceeds received by selling its assets amongst the creditors under the provisions of the Act of 1956 even if the

said company has not yet being wound up. This procedure should be also adhered to for the following reasons:-

(a) Under the IBC, “Corporate Insolvency Resolution Process” and the “Liquidation Process” are in two different chapters respectively being chapter-II and chapter-III. Chapter-II being the first amongst them deals with the mechanism to find out as to whether a Company against whom insolvency proceedings has commenced can be revived through a resolution plan. A time frame is also provided for conclusion of the insolvency resolution process under chapter-II. A moratorium as provided in section 14 of IBC may also be declared to enable the IRP appointed by NCLT to work out the resolution plan. In the event, the resolution plan fails or is rejected, the liquidation process is initiated under chapter-III. The resolution professional is appointed as liquidator and the liquidation process is set to motion for being continued under the various provisions of chapter-III, to end with the dissolution of the corporate debtor. The Act of 1956 in the event of a Company being wound up also provides for dissolution of the Company (in liquidation) after distribution of the sale proceeds available by selling the assets and properties of the Company (in liquidation). The procedure to be followed by the Liquidator of the Company (in liquidation) may be different from that under chapter-III of IBC, to be followed by the resolution professional but the main goal under the Act of 1956 and IBC appears to be same. The Act of 1956, however, in case of a Company being wound up at the instance of a creditor does not have any specific provision for revival though

Courts have worked out certain modes like approving a scheme for paying the debts as per priority including payment of creditors. The IBC on the other hand as discussed hereinabove has a specific provision for revival of the Company through a resolution plan which has to be statutorily followed before the Company is liquidated. Thus, the revival part which is a time framed one under the IBC should be left to the NCLT and the liquidation part should be done by the Company Court. If the matter is viewed from another angle one may find that the jurisdiction in respect of the saved petition can be usurped by the NCLT at the instance of a financial creditor, even after a creditor's winding up petition is admitted by the Company Court and assumes a representative capacity pursuant to the advertisement by filing an application under section 7 without joining the winding up proceedings which all creditors of the said Company are required to do, under the provisions of the Act of 1956 and the 1959 Rules. This in effect will render the legislative intent in retaining a particular category of creditor's winding up (saved petitions) with the Company Court, otiose this cannot also be permitted.

(b) By allowing NCLT to proceed up to the stage of revival, we also bring a logical conclusion to the first part of section 7 petition under IBC which ends with the approval of the revival plan or rejection thereof. The Official Liquidator being an officer appointed by the Central Government will be more accountable and responsible than a resolution professional for the purpose of carrying out the liquidation process.

After considering all the judgments cited by the parties and for the reasons aforesaid, I am of the view that the Company Judge of this Court retains the jurisdiction to try the aforesaid winding up petition falling in the category of saved petition, even if an insolvency proceeding is initiated against the same company before the NCLT under the provisions of IBC by another creditor, like Devi Trading. The applicable law for the said petition to try out by the Company Court will be the Act of 1956 and Rules of 1959.

18) Issue Nos.(ii), (iii) and (iv) are taken up together and answered in the following manner :-

Since I have held that the Company Judge of this Court retains the jurisdiction in respect of the said petition (CP 1 of 2016) there is no question of the Provisional Liquidator from being released or discharged as prayed for by the IRP in the instant application being CA 92 of 2019. There is also no need in the facts and circumstances of the instant case to direct the Provisional Liquidator to make over possession of the property and assets, books of accounts of the said company presently in possession of the IRP appointed by the NCLT. As I have held that the proceedings under Section 7 of the IBC now pending before NCLT should be proceeded until the stage of the resolution plan being either accepted or rejected, the said petition (CP 1 of 2016) shall not be proceeded with till this

stage is arrived at before the NCLT. Once the resolution plan is accepted, further orders may be sought for regarding the discharge of the Provisional Liquidator depending upon the provisions of the resolution plan. There may also be a situation where a Provisional Liquidator may be allowed to carry out the resolution plan that may be approved by the NCLT. In the event, the resolution plan to be prepared and submitted before the NCLT is not approved or an appeal from such non-approval is dismissed and such order rejecting the resolution plan achieves finality, the winding up of the said company be proceeded with by the Company Judge of this Court when the Provisional Liquidator will act in terms of the subsequent orders that may be passed by the Company Judge. In view of the fact that the Company Judge retains the jurisdiction, the question of transfer of the said petition or of the applications connected thereto in the facts and circumstances of the case does not arise. In any event, the applications filed by the intending purchasers of the flats / units developed by the said company cannot be decided by the NCLT, it requires declaratory orders to be passed with regard to civil rights of the parties as also direction for execution of conveyance and making over possession. The NCLT does not possess the jurisdiction under IBC for passing of such orders.

The IRP, however, will be free to approach the Provisional Liquidator and take inspection and obtain copies of the documents and information as required by it for preparing the resolution plan to be submitted before the NCLT. The Provisional Liquidator under no circumstances shall make over the originals of the book and the possession of the assets of the said Company to the IRP. If the IRP has to inspect any asset of the said Company for the preparation of the Resolution Plan he should approach the Provisional Liquidator who will render necessary assistance and cooperation.

19) Issue No.(v) is answered as follows :-

The winding up petition (CP 1 of 2016) was filed on or about 4th January, 2016 and, as such, it is an admitted position that the same was filed prior to the IBC coming into operation. IBC, according to me, like all other statutes has a prospective effect since it has not been specifically made operational retrospectively. However, in view of the provisions of a winding up petition which is a saved petition being transferred to NCLT for being heard before it like a petition under Section 9 of the IBC, it cannot be said that the provisions of IBC has not been made applicable to the saved petitions like the said petition, even if, the same has been filed prior to IBC coming into force.

20) Issue nos. (vi) and (vii) are answered in the following manner :-

The Section 7 application under IBC made by Devi Trading before NCLT appears to have been filed on 14th February, 2018 which is prior to the date of appointment of Provisional Liquidator. It is though surprising that the said application of Devi Trading remained dormant for about an year despite there being a clear mandate under the IBC for hearing of the same within 14 days from the date of filing of the same. It cannot be, however, outrightly said that NCLT could not have passed the order dated 13th March, 2019, since the application was stillborn in view of leave under Section 446 of the Act of 1956 having not been obtained prior to instituting such application, inasmuch as the winding up order has not been made in the said petition till now and the Provisional Liquidator having not been appointed on 14th March, 2018. The NCLT was well within its competence to entertain such application despite prior leave under the provisions of Section 446 of the Act of 1956 having not been obtained. The NCLT, however, should have been cautious before passing the order dated 13th March, 2019 at the instance of a creditor (Devi Trading) when the fact that the Provisional Liquidator had been appointed in a saved petition by the Company Judge was

brought to its notice particularly when the application appears to have been moved about an year after filing. The NCLT should have also considered the effect of a winding up petition being advertised after having been admitted which assumes a representative character when all creditor like Devi Trading become obliged to join in the winding up proceedings pending before this Court to either support or oppose the winding up order. Since I am not the Appellate Authority as to the order dated 13th March, 2019, passed by NCLT, I refrain to comment any further with regard to the said order while adjudicating the application being CA 92 of 2019.

21) Before parting, I should say that NCLT while exercising its jurisdiction under IBC ought to have been more cautious while passing orders directing the Provisional Liquidator to hand over the books, documents and assets of the company knowing that the Provisional Liquidator was appointed by the Company Judge of this Court in a saved petition and further on being informed that the Company Judge is considering an application of the IRP for discharge of the Provisional Liquidator. Propriety also demanded that NCLT should not have passed mandatory directions on the Provisional Liquidator to hand over the books, documents and assets to the IRP or directed personal presence of the Provisional Liquidator while hearing an application under Section 7 of the

IBC when it knew that the Provisional Liquidator has been appointed by the Company Judge of this Court in a saved petition.

22) At the end, I hold that this Court possesses the jurisdiction to hear out the winding up petition being CP 1 of 2016 along with all connected applications. However, the winding up petition and the connected applications thereto should not be proceeded with till NCLT comes to the conclusion as to whether the resolution plan in respect of the said company is either approved or rejected. In case of approval, further orders may be passed in CP 1 of 2016 with regard to revival of the said company. In the event, the resolution plan is rejected and such rejection order achieves finality, the said winding up petition shall be proceeded by the Company Judge under the provisions of the Act of 1956 and rules framed thereunder for further course of action as to the winding up and dissolution of the said company. The Official Liquidator appointed as Provisional Liquidator shall render all assistance to the IRP appointed by the NCLT by giving inspection, supplying the copies of the documents and information as may be asked for by the IRP in connection with the preparation of the resolution plan.

CA 92 is accordingly disposed of.

There shall, however, be no order as to cost.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)