OD-4 & 6

**IN THE HIGH COURT AT CALCUTTA**
**CIVIL APPELLATE JURISDICTION**
**ORIGINAL SIDE**

**APOT/79/2026**
**IA NO: ACO/1/2026**

**SHIVA SHAKTI SECURITY SERVICES**
**VS**
**OFFICIAL LIQUIDATOR**

***AND***

**APOT/316/2023**
**WITH CP/49/2016**
**IA NO: ACO/1/2024**

**SHIVA SHAKTI SECURITY SERVICES**
**VS**
**OFFICIAL LIQUIDATOR**

**BEFORE:**

**The Hon'ble JUSTICE DEBANGSU BASAK**

**-AND-**

**The Hon'ble JUSTICE MD. SHABBAR RASHIDI**

| | | |
|---|---|---|
| For the Appellant | : | Mr. Surajit Nath Mitra, Sr. Adv.<br>Ms. Nilanjana Adhya, Adv. (VC)<br>Mr. Arindam Paul, Adv.<br>Ms. Debarati Das, Adv.<br>Ms. Sohini Choudhury, Adv.<br>Mr. Sujato P. Ghosh, Adv.<br>Ms. Eshika Nandy, Adv. |
| For the Official Liquidator | : | Mr. Ranajit Chowdhury, Adv.<br>Mr. Sudipto Chowdhury, Adv.<br>Ms. Sampoorna Saha, Adv. |
| HEARD ON | : | 11.05.2026 |
| DELIVERED ON | : | 11.05.2026 |

**DEBANGSU BASAK, J.:-**

**1.** Two appeals are taken up for analogous hearing as both the appeals are at the behest of the same appellant. Same issues are involved in the two appeals.

**2.** APOT/316/2023 (hereinafter referred to as the first appeal, for the sake of convenience) is at the behest of the appellant assailing an order dated January 18, 2023 passed in IA No. CA/1/2021, CP/49/2016.

**3.** By the order impugned in the first appeal, learned Company Court, directed transfer of CP/49/2016 to the National Company Law Tribunal, Kolkata (NCLT). Learned Company Court also transferred all connected applications to NCLT. Such order was passed in view of the order dated September 26, 2022 passed in CP/347/2015.

**4.** APOT/79/2026 is an appeal at the behest of the appellant and directed against an order dated September 26, 2022 passed in CP/347/2015 (hereinafter referred to as the second appeal, for the sake of convenience). By such order, learned Company Court, took note of **(2021) 2 SCC 641 (Action Ispat and Power Private Limited Vs. Shyam Metalics and Energy Limited)** and **(2021) 4 SCC 435 (A. Navinchandra Steels Private Limited Vs. SREI Equipment Finance Limited and Others)** and transferred the winding up petition along with connected applications to the NCLT.

**5.** Learned Senior Advocate appearing for the appellant submits that, the appellant was appointed by the Official Liquidator to protect and preserve the assets of the company (in liquidation). He submits that, the appellant provided security guards. Appellant raised on and submitted bills with the Official Liquidator for the services rendered. Such bills remained unpaid till date. He submits on instructions that, the appellant is still continuing to protect the assets of the company (in liquidation).

**6.** Learned Senior Advocate appearing for the appellant submits that, the company (in liquidation) and all stakeholders particularly, the secured creditors stand benefitted out of the protection and preservation of the assets of the company (in liquidation) done by the appellant. He submits that, the Official Liquidator never alleged that, the appellant failed and neglected to discharge its duties and responsibilities.

**7.** Learned Senior Advocate appearing for the appellant refers to **Action Ispat and Power Private Limited (supra)**. He submits that, **Action Ispat and Power Private Limited (supra)** was rendered in a particular factual context. He refers to the factual context. He submits that, the Company Court, therein, noted that, the Official Liquidator incurred heavy expenses in protecting the factory premises of the company (in liquidation). It also noted the assurance given by the secured creditor to reimburse the expenses of the Official Liquidator. It is in such factual matrix that, **Action Ispat and Power Private Limited (supra)** should be read. Essentially, the expenses that the Official Liquidator borne should come out prior to the transfer of the winding up petition to the NCLT.

**8.** Referring to **A. Navinchandra Steels Private Limited (supra)**, learned Senior Advocate appearing for the appellant draws the attention of the Court to the factual matrix therein. He submits that, there also, the Company Court directed transfer of the winding up petition conditionally upon the expenses of the Official Liquidator being paid. He refers to the orders of the Company Court which are reported in **2019 SCC Online Bom 10495 (Action Barter Private Limited Vs. Shree Ram Urban Infrastructure Limited and Others)** and **2020 SCC Online Bom 2264 [Action Barter Private Limited Vs. Shree Ram Urban Infrastructure (In Liqn)]**. He submits that **A. Navinchandra Steels Private Limited (supra)** should be read in such context.

**9.** Learned Senior Advocate appearing for the appellant draws the attention of the Court to the judgment and order dated November 13, 2025 passed by this Bench, in **APO/36/2022 [M/S M.S. Glass Industries Limited (In Liqn) & RMC Readymix (India) Vs. The O/L]**. He submits that, the essential factual matrix of **Action Ispat and Power Private Limited (supra)** and **A. Navinchandra Steels Private Limited (supra)** was not brought to the attention of the Court when, it rendered **M/S M.S. Glass Industries Limited (In Liqn) (supra)**.

**10.** Learned Senior Advocate appearing for the appellant submits that, in the event, the winding up petition is transferred to the NCLT, as directed by the impugned order, then, the expenses that the appellant incurred in protecting and preserving the assets of the company (in liquidation) will not be treated as expenses in the Corporate Insolvency and Restructuring Process and therefore, the entirety of the claim of the appellant for protecting and preserving the assets of the company (in liquidation) will be at stake. He submits that the appellant should not be made to suffer due to the action taken by the Official Liquidator particularly when, such action was led to be taken by the Company Court. He draws the attention of the Court to the principle of *custodia legis*. He submits that, the action of the Court should not prejudice any party.

**11.** Learned Senior Advocate appearing for the appellant refers to Section 529(2) of the Companies Act, 1956 and submits that the appellant would be able to prove its claim before the Company Court.

**12.** Official Liquidator is represented. None appears for the secured creditor, despite notice.

**13.** CP/49/2026 is pending in this High Court. The company involved is Martina Boi Genics Pvt. Ltd. (in liquidation). The company namely, Martina Boi Genics Pvt. Ltd. suffered an order of winding up on November 21, 2016.

**14.** Official Liquidator was directed to take possession of the assets and properties of the company (in liquidation) including books, records and documents by the order dated November 21, 2016. Official Liquidator appointed the appellant as the security guard to protect and preserve the assets of the company (in liquidation).

**15.** Appellant functioned under the Official Liquidator as the security guards of the company (in liquidation). According to the appellant, bills raised for such purposes are yet to be paid by the Official Liquidator. Official Liquidator claims that, the secured creditor did not pay and therefore, the bills of the appellant could not be paid.

**16.** During the pendency of the winding up petition before this Hon'ble Court, provisions of Section 434 of the Companies Act, 2013 came into effect. The issue of transfer of pending winding up petition upon coming into effect of the Companies Act, 2013, was considered by the Supreme Court in **Action Ispat and Power Private Limited (supra)** and **A. Navinchandra Steels Private Limited (supra)**.

**17.** In **Action Ispat and Power Private Limited (supra)**, the Supreme Court held as follows:-

> *"14. What becomes clear upon a reading of the three judgments of this Court is the following:*
>
> *14.1. So far as transfer of winding-up proceedings is concerned, the Code began tentatively by leaving proceedings relating to winding up of companies to be transferred to NCLT at a stage as may be prescribed by the Central Government.*
>
> *14.2. This was done by the Transfer Rules, 2016 (supra) which came into force with effect from 15-12-2016. Rules 5 and 6 referred to three types of proceedings. Only those proceedings which are at the stage of pre-service of notice of the winding-up petition stand compulsorily transferred to NCLT.*
>
> *14.3. The result therefore was that post notice and pre-admission of winding-up petitions, parallel proceedings would continue under both statutes, leading to a most unsatisfactory state of affairs. This led to the introduction of the 5th proviso to Section 434(1)(c) which, as has been correctly pointed out in Kaledoniaz, is not restricted to any particular stage of a winding-up proceeding.*
>
> *14.4. Therefore, what follows as a matter of law is that even post admission of a winding-up petition, and after the appointment of a Company Liquidator to take over the*

*assets of a company sought to be wound up, discretion is vested in the Company Court to transfer such petition to NCLT. The question that arises before us in this case is how is such discretion to be exercised?"*

**18.** Supreme Court in **Action Ispat and Power Private Limited (supra)**, answered the question raised in paragraph 14.4 in paragraph 25 thereof, as follows:-

*"25.Given the aforesaid scheme of winding up under Chapter XX of the Companies Act, 2013, it is clear that several stages are contemplated, with the Tribunal retaining the power to control the proceedings in a winding-up petition even after it is admitted. Thus, in a winding-up proceeding where the petition has not been served in terms of Rule 26 of the Companies (Court) Rules, 1959 at a pre-admission stage, given the beneficial result of the application of the Code, such winding-up proceeding is compulsorily transferable to NCLT to be resolved under the Code. Even post issue of notice and pre-admission, the same result would ensue. However, post admission of a winding-up petition and after the assets of the company sought to be wound up become in custodia legis and are taken over by the Company Liquidator, Section 290 of the Companies Act, 2013 would indicate that the Company Liquidator may carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company, and may even sell the company as a going concern. So long as no actual sales of the immovable or movable properties have taken place, nothing irreversible is done which would warrant a Company Court staying its hands on a transfer application made to it by a creditor or any party to the proceedings. It is only where the winding-up proceedings have reached a stage where it would be irreversible, making it impossible to set the clock back that*

> *the Company Court must proceed with the winding up, instead of transferring the proceedings to NCLT to now be decided in accordance with the provisions of the Code. Whether this stage is reached would depend upon the facts and circumstances of each case.”*

**19.** **Action Ispat and Power Private Limited (supra)** was considered in **A. Navinchandra Steels Private Limited (supra)** or where, it was held that, transfer of pending admitted winding up petition to the NCLT under the Insolvency and Bankruptcy Code, 2016 are subject only to the test irreversible/irretrievable act(s)/stage as laid down in **Action Ispat and Power Private Limited (supra)** or where a company in winding up is near corporate death.

**20.** In **Action Ispat and Power Private Limited (supra)**, the Company Court, while allowing an application for transfer of the winding up petition from the Company Court to the NCLT, noted that, the Official Liquidator incurred heavy expenses for protecting the factory premises as also the statement of the secured creditor that it would reimburse the expenses of the Official Liquidator. The Company Court directed the secured creditor to bear the costs and expenses.

**21.** In **Action Ispat and Power Private Limited (supra)**, there was an application filed by the secured creditor stating that an application under Section 7 of the Board of 2016 was pending before the NCLT. It is in such context that such direction was issued by the Company Court. In our understanding, notwithstanding such direction being issued by the Company Court on appraisal of the authorities and the provisions cited before it, Supreme Court in

**Action Ispat and Power Private Limited (supra)** laid down the test as enumerated in paragraphs 14 and 25 thereof. Therefore, Supreme Court did not hold that, payment of expenses incurred by the Official Liquidator is a *sine qua non* prior to transfer of the proceedings pending before the Company Court to the NCLT. Rather, it directed transfer of winding up proceedings from the Company Court to the NCLT provided that, no irreversible/irretrievable stage or act occurred in the winding up proceeding.

**22.** The view of **A. Navinchandra Steels Private Limited (supra)** is same. In fact, it noticed **Action Ispat and Power Private Limited (supra)** and proceeded to hold that, the test of irreversible irretrievable act/stage is to be applied as one of the grounds for transfer and the other ground is where the company in winding up is near corporate death.

**23.** **A. Navinchandra Steels Private Limited (supra)** reached the Supreme Court from orders passed by the Company Court of the Bombay High Court. The two orders of the Company Court of the High Court of Bombay referred to by the learned Senior Advocate appearing for the appellant, does not assist the appellant. In the facts and circumstances of **A. Navinchandra Steels Private Limited (supra)**, a secured creditor went out of the winding up proceedings and sought to sell the assets of the company (in liquidation). Nonetheless, the two tests as noted above, were applied to decide whether or not a company petition is required to be transferred to the NCLT.

**24.** In **M/S M.S. Glass Industries Limited (In Liqn) (supra)**, we transferred the winding up petition to the NCLT after noticing **Action Ispat and Power Private Limited (supra)**.

**25.** The tests laid down in **Action Ispat and Power Private Limited (supra)** and **A. Navinchandra Steels Private Limited (supra)** are required to be applied on the issue as to transfer of a winding up petition from the Company Court to the NCLT on Section 434 of the Act of 2013 coming into effect. Post admission of a winding up petition, post order of winding up, as also post appointment of the official liquidator, a Company Court, retains the discretion to transfer a winding up petition to the NCLT. As long as sale of the immovable or movable properties of the company liquidation did not take place and nothing irreversible was done which would warrant a Company Court staying his hands on an application for transfer, a winding up petition ought to be transferred to the NCLT. A winding up petition need not be transferred by the Company Court where, the winding up proceedings reached a stage making impossible to set the clock back. Whether such a stage is reached would depend upon the facts and circumstances of each case.

**26.** So far as the instant case is concerned, the issue is whether or not the irreversible/irretrievable act(s) or stage occurred during the pendency of the winding up petition before the Company Court. Our attention is not drawn to any fact which can be construed as an act(s) or stage which is irreversible/irretrievable vis a vis the company (in liquidation) or the winding up petition.

**27.** Section 529 of the Companies Act, 1956 does not assist the appellant. Appellant can make its claim before the NCLT. Pendency of the claim of the appellant, or its alleged non-payment does not qualify to hold that, the company petition attend a irreversible stage warranting the Company Court not to transfer the winding up petition to the NCLT.

**28.** ACO 1 of 2026 in the Second Appeal is an application for condonation of delay and leave to prefer the Second Appeal.

**29.** For the ends of justice, the causes shown in the application in the Second Appeal are accepted as sufficient. Delay is condoned. Leave is granted to the appellant to prefer the appeal since, the appellant contends that its valuable right stands affected by reason of the decision rendered by the impugned order in the Second Appeal.

**30.** In the facts and circumstances of the present case, we find no error in the order impugned passed by the learned Company Court in any of the two appeals.

**31.** APOT/316/2023 and APOT/79/2026 are dismissed along with all connected applications, without any order as to costs.

**(DEBANGSU BASAK, J.)**

**32.** I agree.

**(MD. SHABBAR RASHIDI, J.)**

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