

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**SPECIAL BENCH**  
**NEW DELHI**

No.IB-190(PB)/2017

**UNDER SECTION 7 Insolvency and Bankruptcy Code, 2016**

**IN THE MATTER OF:**

**UNION BANK OF INDIA  
BRANCH OFFICE AT M-11,  
FIRST FLOOR,  
CONNAUGHT CIRCUS,  
NEW DELHI-110001.**

..... Petitioner

**V/s**

**ERA INFRA ENGINEERING Limited  
1107, INDRAPRAKASH BUILDING,  
21, BARAKHAMBA ROAD,  
NEW DELHI -110001.**

.....Respondent

**R.VARADHARAJAN  
Hon'ble Member (Judicial)**

**DEEPA KRISHAN  
Hon'ble Member (Technical)**

**For the Petitioner(s) : Mr. Nesar Ahmad, Practicing Company Secretary  
Mr.Ahsan Ahmad, Advocate**

**For the Respondent(s) : Mr.Manoj K. Singh, Advocate  
Mr.Vijay K.Singh, Advocate**

No.IB-110(PB)/2017

**UNDER SECTION 7 Insolvency and Bankruptcy Code, 2016**

**IN THE MATTER OF:**

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No.IB-190(PB)/2017 – Union Bank of India v. Era Infra Engineering Ltd.

No.IB-110(PB)/2017 – Alchemist Asset Reconstruction Co.Ltd. v. Tirupati Buildings & Offices Pvt. Ltd.

**ALCHEMIST ASSET RECONSTRUCTION COMPANY LTD.**

**D-54, First Floor,  
Defence Colony,  
New Delhi – 110024.**

**Financial Creditor/Petitioners**

**Versus**

**TIRUPATI BUILDINGS & OFFICES PVT. LTD.**

**Plot No.3,  
District Centre Sector-10,  
Dwarka, New -110075**

**Corporate Debtor /Respondent**

**R.VARADHARAJAN**

**Hon'ble Member (Judicial)**

**DEEPA KRISHAN**

**Hon'ble Member (Technical)**

**For the Petitioner(s) : Mr.Milan Singh Negi, Advocate,  
Mr. Kunal Godhwani, Advocate  
Ms.Varsha Banerjee, Advocate**

**For the Respondent(s) : Mr. Pulkit Deora, Advocate**

**ORDER**

*PRONOUNCED ON: 21.08.2017.*

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Union Bank of India has categorized itself as a Financial Creditor under the provisions of Insolvency & Bankruptcy Code, 2016 (hereinafter for sake brevity called as 'Code') for the purpose of initiating the Corporate Insolvency Resolution Process (CIRP) as contemplated under the Code against Era Engineering

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No.IB-190(PB)/2017 – Union Bank of India v. Era Infra Engineering Ltd.

No.IB-110(PB)/2017 – Alchemist Asset Reconstruction Co.Ltd. v. Tirupati Buildings & Offices Pvt. Ltd.

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Infra Limited, being the Corporate Debtor. The circumstances leading to the filing of the present petition as per the averments of the Financial Creditor is detailed as follows: -

- a) The Corporate Debtor being an EPC contractor is engaged in execution of large construction projects like construction of highways, airports and industrial projects and since 1990 has been availing credit from the Financial Creditor and the latest being in the year 2012 wherein a Working Capital Term Loan of Rs.100 crores on standalone basis was sanctioned vide sanction letter bearing No.IFB:CR:602.12. Pursuant to the sanction the loan was also disbursed to the Corporate Debtor on 31.12.2012. The amount of term loan along with interest was repayable in 14 instalments as agreed to between the parties. Perusal of the form as prescribed under Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 in Form I as filed by the Financial Creditor discloses in Part IV of the said form that the total amount sanctioned to the Corporate Debtor on several dates is to the extent of Rs.1506.33 crores and the amount claimed to be in default is to the extent of Rs.681.04 crores and in addition External Commercial Borrowing of USD 11,971,939.12 as on 31.05.2017 is also in default, all it is averred substantiated by Statement of Accounts filed along with the Petition. In relation to the facilities granted, the Financial Creditor has given in Part V of Form I as referred to above, securities created by the Corporate Debtor and held by the Financial Creditor under pari-passu charge as well as in relation to certain securities which it is having a first charge with the consortium of lenders as well as the personal guarantees given by the promoters of the Corporate Debtor as well as Corporate Guarantees given.

- b) After due notice of the petition by the Financial Creditor on the Corporate Debtor, appearance on behalf of the Corporate Debtor/Respondent was put in and as per the representation made by the Counsel for the respondent before the Hon'ble Principal Bench, NCLT which is evident

vide order dated 11.07.2017 that several company petitions seeking for winding up of the Corporate Debtor is pending before the Hon'ble High Court of Delhi and in the circumstances vide the said order of the Hon'ble Principal Bench the following question has been framed, namely:

***“Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions or it is to be considered as an independent process?”***

- c) For arguments of the aforesaid issue the Company Petition was listed on 25.07.2017.

Since the Hon'ble Principal Bench did not sit on the said date and as a Special Bench was constituted to hear the matters listed before the Hon'ble Principal Bench in lieu of it, this Special Bench taking into consideration the exigencies of the situation chose to hear the submissions of the respective parties in this as well as in **C.P.No.110 (PB) of 2017 in the matter of Alchemist Asset Reconstruction Company Limited – Vs- Tirupati Buildings & Offices Private Limited** in which petition also a similar issue has arisen due to the pendency of winding up petitions against the Corporate Debtor therein.

- d) At the time of submissions by the counsels appearing for the parties it was able to be discerned that coordinate benches of the NCLT have taken different viewpoints on the above question framed by the Hon'ble Principal Bench.
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- e) Thus in the matter of **M/s.Alcon Laboratories (India) Private Limited -Vs- M/s.Vasan Health Care Private Limited** the Hon'ble Division Bench of NCLT, Chennai, wherein one of the issues raised by the Corporate Debtor was to effect that since a winding up petition is sub-judice



before the Hon'ble High Court of Madras the maintainability was sought to be questioned of the CIRP process under the Code before it and in relation to the same it has been held as follows at Paragraph 5 of the said decision rendered on 21<sup>st</sup> April 2017, namely:-

The last objection that has been raised by the counsel for corporate debtor is that winding up petition is sub judice before the Hon'ble High Court of Madras, where the Court permitted Andhra Bank to appoint suitable person to conduct forensic audit of the corporate debtor. The pendency of the winding up petition cannot be a bar under the Code for initiating the corporate insolvency resolution process, because the Hon'ble High Court has not passed any order for winding up of the corporate debtor and no Official Liquidator has been appointed. Therefore, this objection is also rejected.

- f) Even though the above decision had been taken in Appeal before the Hon'ble NCLAT in ***Company Appeal (AT) (Insol.)No.41 of 2017*** by the Corporate Debtor, the Hon'ble Appellate Tribunal did not have the occasion to consider the above question in view of the Corporate Debtor having obtained a stay of the proceedings before the Hon'ble High Court of Madras in relation to the Insolvency Resolution Process pending before the Hon'ble NCLT, Chennai.
- g) The view of the Hon'ble NCLT, Ahmedabad it is seen from the decision rendered in ***Industrial and Commerce Bank of China -vs- Alok Industries Ltd in IA No.188 of 2017 in C.P. (I.B) No.48/7/NCLT/AHM/2017*** rendered as recently as 18.07.2017 is similar to the view expressed as above by the Hon'ble NCLT Bench, Chennai.
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- h) On the other hand the Hon'ble Principal Bench, NCLT, New Delhi in several of its orders including the one passed in ***M/s.Nauvata Engineering Pvt. Ltd -Vs- PunjLlyods Ltd in C.P.No.(IB)-217(PB)/2017 on 19.07.2017*** has held as follows:-

Learned Counsel for the respondent has brought to the notice of the Bench that winding up petition against the respondent company namely Punj Lloyds Ltd. is already pending before the Hon'ble Delhi High Court and taking notice of the aforesaid fact C.P.No. 1156 of 2016 was transferred back to the Hon'ble Delhi High Court.

In various orders passed by this Tribunal, we have expressed the opinion that in cases where winding up proceedings are pending against a Company, then it would not be conducive for the Tribunal to trigger insolvency process against that very company as there is likelihood of conflict between the two statutory entities, namely Official Liquidator and the Insolvency Resolution Professional. Therefore, the proceedings which are continuing in the Hon'ble Delhi High Court may constitute a better basis for adjudication being earlier in point of time and the claim having been made by other Operational Creditors in the proceedings for winding up. The Ministry of Corporate Affairs has also issued notification on 29.06.2017 to that effect. Accordingly, we refer this matter for consideration of Hon'ble High Court. The Registry is directed to send all the papers at the earliest.

Parties through their Counsel are directed to appear before the Hon'ble Delhi High Court on 18th September, 2017.

This order may first be placed before Hon'ble the Chief justice for appropriate orders.

- i) In the case of Nikhil Mehta and Sons (HUF) -Vs- AMR Infrastructure Ltd in C.P.No. (ISB) - 03(PB)/2017, a decision rendered by the Hon'ble Principal Bench, NCLT, New Delhi one of issues considered by it, amongst others, was in relation to the similar question on hand and at paragraph 14 of the said decision it has been held as follows:-

Even otherwise the present petition would not be maintainable as many winding up petitions have been filed before Hon'ble Delhi High Court being Company Petition No.477 of 2014, Company Petition Nos. 689,691,692,693,694,695,700 and 722 of 2015 alongwith CP No.238 and 244 of 2016. Even the Official Liquidator has been appointed as a provisional

liquidator although the matter is presently before the Appellate Bench with interim directions.

- j) The above decision rendered in Nikhil Mehta's case had been taken in appeal before the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No.07 of 2017 and it is pertinent to note that the Hon'ble NCLAT had framed the following two issues at paragraph 14 while rendering its judgement in appeal in Nikhil Mehta's case, namely:

**Whether the appellants who reached with agreements/Memorandum of Understanding with respondent for the purchase of three units being a residential flat, shop and office space in the projects developed, promoted and marketed by the respondent come within the meaning of 'Financial Creditor' as defined under the provisions of sub-section (5) of Section 7 of the 'I & B code'; and**

**Whether an application for triggering insolvency process under Section 7 of 'I & B code' is maintainable where winding up petitions have been initiated and pending before Hon'ble High Court against the 'Corporate Debtor'.**

- k) However question no.(ii) as framed above by the Hon'ble NCLAT has not been answered as probably it did not consider the same in view of holding that the petitioner will fall under the category of 'Financial Creditor' as compared what was otherwise held by Hon'ble NCLT and had thus remitted back the matter to NCLT, New Delhi for admission, if the papers are otherwise in order.

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- l) In addition, this Special Bench of NCLT in the case of *M/s.Nowfloats Technologies Pvt. Ltd -Vs- M/s.Getit Infoservices Pvt.Ltd in C.A.No. (IB) 45(PB)/2017 vide order dated 11.04.2017* had specifically held, where the Official Liquidator has been appointed as the Provisional Liquidator, then the recourse of the parties is to approach the Court which has thought it fit to appoint the



Liquidator and not this Tribunal and that the proceedings cannot be sustained before this Tribunal without obtaining the leave of the Hon'ble High Court under Section 450 of the Companies Act, 1956 for continuation of the proceedings under the Code.

- m) Strictly speaking the above cases referred to are not transferred cases as contemplated under Section 434 of the Companies Act, 2013 and the notifications issued thereunder from time to time to facilitate and to remove difficulties in relation to matters which are required to be transferred and for bringing in clarity as to jurisdiction of the respective judicial forums. A combined reading of Section 434 of the Companies Act, 2013 and the notifications issued thereunder from time to time, in relation to winding up, particularly under Section 433(e) of the Companies Act of 1956 discloses the following categorization and the judicial forum which is to have jurisdiction, namely: -

Category of Cases in relation to Winding up		Relevant Notification	Forum to have jurisdiction
i)	In which notice not served in relation To respondent company	07.12.2016 GSR 1119 (E)	NCLT
ii)	In the case of more than against the same respondent company notice served in one and notice not served in the other	29.06.2017 S.O.2042 (E)	High Court
iii)	<b>Winding up petition admitted Pending service</b>	-	<b>High Court*</b>
iv)	Winding up petitions in which orders Have been reserved prior to 15.12.2016	<b>07.12.2016</b>	High Court

**\*As interpreted by the Hon'ble High Court of Bombay in an order passed in C.P.No.331 of 2016 in the matter of M/s.West Hills Realty Pvt.Ltd vs Neelkamal Realtors Pvt Ltd dated 23.12.2016.**



n) The Hon'ble High Court of Bombay has also expressed its view in relation to the conflict of jurisdiction between High Courts on the one hand and NCLT on the other in relation to proceedings which were pending before it on 15.12.2016 and the notifications issued in relation to transfer of proceedings as well in relation to the non-obstante clause as provided under Section 238 of IBC of 2016 in following terms: -

**In my view, it is clear that all winding up proceedings shall not stand transferred to the NCLT. It is clear that if the service of the notice of the Company Petition under Rule 26 of the Companies (Court) Rules, 1959 is not complied before the 15<sup>th</sup> December 2016 such petitions shall stand transferred to NCLT whereas all other Company Petitions would continue to be heard and adjudicated upon only by the High Court. The Legislative intent is thus clear that two sets of winding up proceedings would be heard by two different forum i.e. one by NCLT and another by the High Court depending upon the date of service of Petition before or after 15<sup>th</sup> December 2016. In my view, there is thus, no embargo on this Court to hear this Petition along with other companion Petitions, in view of the admitted position that the notice under Rule 26 of the Companies (Court) Rules, 1959 has been served on the respondent prior to 15<sup>th</sup> December 2016.**

**In my view, since there is no inconsistency in the provisions of the Insolvency and Bankruptcy Code, 2016 and the Companies Act, 2013 or Companies Act, 1956 in respect of the jurisdiction of the Company Court or of the NCLT in so far as winding up proceedings are concerned, reliance placed by Mr. Andhyarujina, the learned Counsel appearing for the respondent on Section 238 of the Insolvency and Bankruptcy Code, 2016 is totally misplaced. The effect of non obstante provisions if any in Section 238 of the Insolvency and Bankruptcy Code, 2016 would have been significant only if there would have been conflict in aforesaid provisions and not otherwise. In my view, Mr. Sen, the learned Counsel appearing for the petitioner is right in his submission that Section 238 of the Code has no application in this situation on the ground that there is no conflict between the provisions of the Code and the provisions of the Companies Act, 1956 or the Companies Act, 2013.**

o) The above extracts is from the decision rendered on 11.04.2017 by the *Hon'ble High Court of Bombay in C.P.No.136 of 2014 along with C.A.No.932 of 2015 and C.A.No.887 of 2015 in the matter of Ashok Commercial Enterprises vs Parekh Aluminex Limited.*

p) Thus taking into consideration all the above and more particularly the differing views taken by coordinate benches of this Tribunal, this Special Bench is of the considered view that the matter should be placed before the Hon'ble President of NCLT for the purpose of being transferred to a Larger Bench or as the Hon'ble President may deem fit in accordance with the second proviso to sub section (2) of Section 419 of the Companies Act, 2013 and the question to be referred to such Bench as the Hon'ble President, NCLT may deem fit and proper is as follows:-

***"1. Whether the process under the Insolvency and Bankruptcy Code, 2016 can be triggered in the face of the pendency of the winding up petitions before the respective High Courts or it is to be considered as an independent process?"***

***2. In case the process is considered to be not independent, whether the petition filed under the Code is required to be transferred to the concerned High Court which is having seisin over the winding up proceedings or await the outcome of the winding up proceedings by adjourning it sine die?***

***3. Whether the Code gives any room for discretion to be exercised for adjourning it sine die in view of the statutory mandate given under Section 7, 9 and 10 of the Code for expeditious disposal of cases by either admitting or rejecting it within the fixed time frame?***

***4. In case if the petition is adjourned sine die and if the winding up petition is dismissed or set aside in appeal subsequently, whether there is***

***scope in such an eventuality for power of revival within the frame work of the Code conferred on this Tribunal?***

2. The Registrar, NCLT, New Delhi is directed to place the above reference made by this Special Bench, NCLT, New Delhi by virtue of second proviso to sub section (2) of Section 419 of the Companies Act, 2013 as expeditiously as possible before the Hon'ble President.

Sd/-

(DEEPA KRISHAN)  
MEMBER (TECHNICAL)

21.8.17

Sd/-

(R.VARADHARAJAN)  
MEMBER (JUDICIAL)

21.08.2017

U.D.Mehta

21.08.2017





File No. 25/02/2017-NCLT

राष्ट्रीय कम्पनी विधि अधिकरण / NATIONAL COMPANY LAW TRIBUNAL

छठा तल, ब्लॉक-3,  
सी. जी. ओ. कम्प्लेक्स, लोधी रोड,  
6<sup>th</sup> Floor, Block-3,  
CGO Complex, Lodhi Road,  
नई दिल्ली / New Delhi- 110003  
दिनांक / Dated: 13<sup>th</sup> September 2017

### **ORDER**

In continuation of this Tribunal order of even number dated 29.8.2017 wherein Hon'ble President NCLT has pleased to constitute a three member Special Bench on **22<sup>nd</sup> September, 2017** at NCLT, New Delhi to attend the matter C.P. No. IB-190(PB)/2017: Union Bank of India Vs. Era Infra Engineering Ltd and C.P. No. IB-110 (PB)/2017: Alchemist Asset Reconstruction Co. Ltd. Vs. Tirupati Buildings & Offices Pvt. Ltd. This matter has been referred to the Hon'ble President vide order dated 21.8.2017 passed in the matter. The Special Bench shall comprise of:

#### **Special Bench at NCLT New Delhi**

1. Chief Justice (Retd.) Shri M.M. Kumar, President
2. Shri R. Varadharajan Member (Judicial)
3. Ms. Deepa Krishan Member (Technical)

The Bench will deal with the question of maintainability of the petition filed under Insolvency and Bankruptcy Code, 2016 before the NCLT wherein winding up proceedings are pending against the corporate debtor before the Hon'ble High Court.

**It is informed that any Learned Counsel may intervene and assist the three member bench on aforementioned day.**

By Order of the National Company Law Tribunal.

(Shiv Ram Bairwa)

Registrar, NCLT

Telephone: 24363451

Copy to:-

1. P.S. to Hon'ble President, National Company Law Tribunal, New Delhi.
2. Hon'ble Members, National Company Law Tribunal.
3. Secretary, National Company Law Tribunal, New Delhi.
4. Officers of National Company Law Tribunal, Principal Bench, New Delhi/Kolkata/Mumbai/Chennai/Ahmedabad/Allahabad/Bengaluru/Chandigarh/Gauhati/Hyderabad.
5. PPS to Secretary, Ministry of Corporate Affairs, New Delhi.
6. PS to Joint Secretary, (Sh. Gyaneshwar Kumar Singh) Ministry of Corporate Affairs, New Delhi.
7. NCLT web site/ Notice Board.
8. The Institute of Chartered Accountants of India, ITO, New Delhi.
9. The Institute of Company Secretaries of India, ICSI, House 22, Institutional Area, Lodhi Road, New Delhi – 110003.
10. Corporate Law Adviser, 158, Basant Enclave, Palam Road, New Delhi-110057.
11. Taxman Allied Services Ltd., 59/32, New Rohtak Road, Delhi.
12. The All India Reporter Pvt. Ltd., 31-D, 'B' Block, Delhi High Court, New Delhi.
13. Bar Council, New Delhi/Mumbai.