REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs.4230-4234 OF 2020

A. Navinchandra Steels Private Limited …Appellant

VERSUS

SREI Equipment Finance Limited & Ors. …Respondents

JUDGMENT

R.F. Nariman, J.

1. This appeal arises out of the judgment dated 07.02.2020, as corrected by order dated 21.09.2020, by the National Company Law

Appellate Tribunal ["**NCLAT**"]. The Appellant is an operational creditor of Respondent No.2 herein – M/s. Shree Ram Urban Infrastructure Limited ["**SRUIL**"], the company under winding up – and has a decree dated 07.10.2015 in its favour passed by the Bombay High Court in Summary Suit No.626 of 2014. Vide order dated 06.10.2016, the Division Bench stayed the order dated 07.10.2015 and directed SRUIL to deposit INR14

crore with the Prothonotary and Senior Master of the High Court or furnish a bank guarantee for the same, failing which the stay order would get vacated. The said appeal is pending as on date. We are also informed that an execution application, being Execution Application (L) No.934 of 2016 was filed by the Appellant before the Bombay High Court and the same is also pending as on date.

2. Sometime in 2015, the Appellant had filed a winding up petition, being Company Petition No.1039 of 2015 against SRUIL before the Bombay High Court, the same being pending as on date.

3. A winding up petition, being Company Petition No.1066/2015 filed by Respondent No.3 herein, M/s Action Barter Pvt. Ltd. ["**Action Barter**"] against SRUIL, by a conditional order dated 05.10.2016, stood admitted on the failure of SRUIL to deposit INR 5.90 crore. The appeal instituted by SRUIL against this order was dismissed by the Division Bench of the High Court on 17.01.2017, whereas the appeal instituted by Action Barter was allowed vide the same order and the amount to be deposited by SRUIL was enhanced from INR 5.90 crore to INR 18 crore. Vide order dated 27.02.2017, this Court disposed of SLP(C) No.5849/2017 filed by SRUIL, after recording a statement by the counsel for SRUIL that SRUIL would

deposit INR three crore the same day, and the balance of INR 15 crore within six months from the date of the order. The parties then filed consent terms before the Single Judge of the Bombay High Court on 22.03.2017, wherein Action Barter agreed to accept a sum of INR 15 crore, payable in instalments. Apart from the payment of the first instalment of INR 25 lakh, no further instalment was paid, as a result of which the winding up petition stood revived on 24.08.2017. On 17.04.2018, the provisional liquidator took over the physical possession of the assets of SRUIL.

4. While this winding up petition was pending, Indiabulls Housing Finance Ltd. ["**Indiabulls**"], a secured creditor of SRUIL, filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ["**IBC**"] before the National Company Law Tribunal ["**NCLT**"], which was dismissed by the NCLT vide order dated 18.05.2018 as being not maintainable as a winding up petition had already been admitted by the Bombay High Court. An appeal to the NCLAT suffered a similar fate as the appeal was dismissed on 30.05.2018. However, on 06.08.2018, the Supreme Court admitted a Civil Appeal from the NCLAT order, which is pending as on date.

5. An application filed by Indiabulls for the following relief:

> "The Hon'ble Court be pleased to direct the Provisional Liquidator to handover physical possession of the said Mortgaged Property i.e. all the pieces and parcels of land

> bearing C.S. Nos. 288, 289 (part), 1/1540 (part), 2/1540 (part) and 3/1540 (part), collectively forming Plot Nos.5B and 6 admeasuring approximately 28,409.57 square meters situated at Worli Estate, Lower Parel Division, Mumbai to the Secured Creditor herein, in accordance with and pursuant to the provisions of the Companies Act, 1956 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 …"

resulted in an order dated 07.02.2019 by which the learned Company Judge allowed the aforesaid application in favour of Indiabulls. Indiabulls is a secured creditor who stood outside the winding up, and who sought to realise its security outside such winding up proceeding, notices having already been issued under Sections 13(2) and 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ["**SARFAESI Act**"]. The Court referred to an order of 12.04.2018, by which the provisional liquidator was to take physical possession of the assets of SRUIL within one week of the date of that order. Importantly, paragraph 2 of the said order stated:

> "**2.** Ms. Maitra states that the secured creditors have already commenced proceedings under SARFAESI against the company. As and when the banks may take out an application for banks submissions to hand over that part of the assets secured to the bank, appropriate orders will be passed."

6. This being the case, the learned Company Judge allowed the application in the following terms:

> "**13.** For the reasons aforesaid, the present Application is allowed. The Provisional Liquidator is directed to forthwith handover possession of the Mortgaged Property to the Applicant. However, the Applicant shall conduct the sale of the property in consultation with the Official Liquidator. The Applicant shall also deposit the sale proceeds or part thereof with this Court as and when the Court directs the Applicant to do so, for the purpose of making payments to workers as prescribed in section 529A of the Companies Act, 1956."

7. As per the aforesaid order dated 07.02.2019, the provisional liquidator handed over possession of the property mortgaged with Indiabulls to Indiabulls, who then conducted a sale of the said property to M/s. Honest Shelters Pvt. Ltd. ["**Honest Shelters**"], Respondent No.4 herein, for a sum of INR 705 crore, in which not only was the mortgaged property sold, but also the superstructure standing thereon, together with two other flats. We have since been informed that three sale certificates were issued to Honest Shelters on 26.06.2019 by Indiabulls on receiving the said payment of INR 705 crore. We have also been informed that the ex-Directors of SRUIL had challenged the aforesaid sale in the Debt Recovery Tribunal and the Debt Recovery Appellate Tribunal unsuccessfully. The provisional liquidator has also challenged the said sale in the Bombay High Court, alleging that the conditions of the order dated

7. 02.2019 were flouted, and that what was sold was much more than what was mortgaged to the secured creditor, and that too at a gross undervalue.

We are informed that the next date in these pending proceedings is 23.03.2021.

8. Meanwhile, Respondent No.1 before us, i.e., SREI Equipment Finance Limited ["**SREI**"] filed a petition under Section 7 of the IBC before the NCLT, which petition was admitted by the NCLT on 06.11.2019. An appeal was then filed by Action Barter against the aforesaid NCLT order in which, after setting out this Court's judgment in **Forech (India) Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.**, (2019) 18 SCC 549 ["**Forech**"], the NCLAT dismissed the appeal with the following observations:

> "**5.** The case of the Appellant is covered by the decision of the Hon'ble Supreme Court in ***Forech India Ltd*** (supra), therefore, we hold that the Application under Section 7 of the I&B Code filed by the Respondent – SREI Equipment Finance Limited is not maintainable. In so far as pending winding up petition before the Hon'ble Bombay High Court is concerned, the Appellant in terms of the decision of the Hon'ble Supreme Court in ***Forech India Ltd*** (supra) may move before the Hon'ble High Court of Bombay.
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> The Appeal is dismissed with the aforesaid observations. No costs."

9. By an order dated 21.09.2020, the NCLAT corrected the order by deleting the word "not" that occurred in paragraph 5 of the order dated 07.02.2020.

10. An appeal was then filed to this Court by Action Barter on 08.10.2020, in which this Court, by order dated 27.10.2020, issued notice and directed the parties to maintain status quo qua the mortgaged property and also stayed further proceedings before the NCLAT. An appeal was also filed by the Appellant on 09.12.2020, in which this Court, by order dated 18.12.2020, issued notice and stayed further proceedings before the NCLT and tagged the appeal with the appeal filed by Action Barter.

11. We have been informed that pursuant to a settlement between Action Barter and the purchaser of the mortgaged property, i.e., Honest Shelters, Action Barter has now withdrawn its appeal that was filed before this Court. Thus, the only surviving appeal before us is Civil Appeal Nos.4230-4234 of 2020, filed by A. Navinchandra Steels Pvt. Ltd.

12. Dr. Abhishek Manu Singhvi and Shri Ranjit Kumar, learned Senior Advocates appearing on behalf of the Appellant, argued that in view of the judgment in **Action Ispat and Power Pvt. Ltd. v. Shyam Metalics and Energy Ltd.**, 2020 SCC OnLine SC 1025 [“**Action Ispat**”], this matter is concluded in their favour inasmuch as irreversible steps have been taken in a winding up petition that has already been admitted by the Bombay High Court in that the plot on which a 72-storey building stands, has now been

sold, as a result of which it is now clear that the Section 7 petition that was filed by SREI on 30.05.2019 under the IBC, would have to be held to be non-maintainable. They also argued that the effect of Section 446 of the Companies Act, 1956 (which is equivalent to Section 279 of the Companies Act, 2013) is that no suit or other legal proceeding can be initiated once there is admission of a winding up petition. This being the case, post admission of a winding up petition, no petition under Section 7 of the IBC can be filed. They also argued that it is a misnomer to think that winding up proceedings must result in corporate death. On the contrary, according to them, Sections 391 to 393 of the Companies Act, 1956 would apply if the company were to be restructured, as a result of which the winding up court could then stay the winding up and order restructuring. The learned counsel have also argued that there are gross malafides in the present case as SREI was not only aware of the winding up petition before the Bombay High Court, but has also participated in the winding up proceeding and filed its claim before the provisional liquidator. All this has been suppressed in the petition filed under Section 7 of the IBC. Further, the only route available to SREI was really to ask for transfer of the company petition in winding up from the Bombay High Court to the NCLT, which route has been

circumvented by filing a Section 7 petition and suppressing the winding up proceeding.

13. Shri Abhijeet Sinha, learned counsel appearing on behalf of SREI, took us through various judgments of this Court, including the latest judgment in **Action Ispat** (supra). According to him, a Section 7 proceeding under the IBC is an independent proceeding, which can be initiated at any time, even after a winding up order is made. He argued that this was a result of our decisions and that Section 238 of the IBC, which contains a non-obstante clause, clearly comes to his rescue as, if there is any conflict between Section 446 of the Companies Act, 1956 / Section 279 of the Companies Act, 2013 and the IBC, the IBC will prevail. According to him, this point is no longer *res integra*. He also argued, in the alternative, that there are no irretrievable steps that have been taken in the winding up proceeding in the present case, as the provisional liquidator continues to be seized of other assets of SRUIL. He further argued that a private sale by a secured creditor outside the winding up is not the irretrievable step that is spoken of in **Action Ispat** (supra), such step having to be taken by the provisional liquidator himself in selling the assets of the company in the process of winding up the company. He also added that, on facts, two orders dated 28.11.2019 and 20.01.2020 of the Bombay High Court would

indicate that the Company Court itself had directed the provisional liquidator to hand over the records and assets of SRUIL to the interim resolution professional ["**IRP**"] that had been appointed in the Section 7 proceeding. Doubtless, such assets had not been handed over because they were only to the handed over two weeks after certain payments had been made by the IRP to the provisional liquidator, which payments have not yet been made.

14. Having heard learned counsel for all the parties, it is important to restate a few fundamentals. Given the object of the IBC as delineated in paragraphs 25 to 28 of **Swiss Ribbons (P) Ltd. v. Union of India**, (2019) 4 SCC 17 ["**Swiss Ribbons**"], it is clear that the IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. Vis-à-vis the Companies Act, which is a general statute dealing with companies, including companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non-obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.

15. In **Allahabad Bank v. Canara Bank**, (2000) 4 SCC 406, this Court had to deal with whether the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ["**RDB Act**"] was a special statute qua the Companies Act, 1956. This Court held that the Companies Act is a general Act and does not prevail against the RDB Act, which was a later Act and which has a non-obstante clause that clearly excludes the provisions of the Companies Act in case of conflict. This was stated by the Court as follows:

> "*Special law* v. *general law*
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> **38.** At the same time, some High Courts have rightly held that the Companies Act is a general Act and does not prevail under the RDB Act. They have relied upon *Union of India* v. *India Fisheries (P) Ltd.* [AIR 1966 SC 35 : (1965) 3 SCR 679 : (1965) 57 ITR 331].
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> **39.** There can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis yet another legislation. Such situations do arise as held in *LIC of India* v. *D.J. Bahadur* [(1981) 1 SCC 315 : 1981 SCC (L&S) 111 : AIR 1980 SC 2181]. It was there observed:
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> > "… for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law".
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> For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in *Damji Valji Shah* v. *LIC of India* [AIR 1966 SC 135 : (1965) 3 SCR 665] (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the *Companies* Act,

1956 can be treated as a *general* statute. This is clear from para 19 of that judgment. It was observed:

> "Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general Act, viz., the Companies Act which is an Act relating to companies in *general.*"
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> (emphasis in original)

Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute.

Special law v. *special law*

40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in *Maharashtra Tubes Ltd.* v. *State Industrial and Investment Corpn. of Maharashtra Ltd.* [(1993) 2 SCC 144] where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the

> "1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one". (SCC p. 157, para 9)

Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts."

16. Likewise, in **Bakemans Industries (P) Ltd. v. New Cawnpore Flour Mills**, (2008) 15 SCC 1, this Court, in the context of the State Financial Corporations Act, 1951 ["**SFC Act**"] and the Companies Act, 1956, held that though the SFC Act was an earlier Act of 1951, yet, it would prevail over the winding up proceedings before a Company Judge, given that the SFC Act is a special statute qua the general powers of the Company Judge under the Companies Act. This was stated as follows:

> "**37.** The 1951 Act indisputably is a special statute. If a financial corporation intends to exercise a statutory power under Section 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.
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> **38.** There cannot be any doubt whatsoever that the proceedings under Section 29 of the 1951 Act would prevail over a winding-up proceeding before a Company Judge in view of the decision of this Court in *International Coach Builders Ltd.* v. *Karnataka State Financial Corpn.* [(2003) 10 SCC 482] wherein it has been held: (SCC p. 496, para 26)
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> > "*26*. We do not really see a conflict between Section 29 of the SFC Act and the Companies Act at all, since the rights under Section 29 were not intended to operate in the situation of winding up of a company. Even assuming to the contrary, if a conflict arises, then we respectfully reiterate the view taken by the Division Bench of this Court in *A.P. State Financial Corpn. Case* [*A.P. State Financial Corpn.* v. *Official Liquidator*, (2000) 7 SCC 291]. This Court pointed out therein that Section 29 of the SFC Act cannot override the provisions of Sections 529(1) and 529-A of the Companies Act, 1956, inasmuch as SFCs cannot exercise the right under Section 29 ignoring a *pari passu* charge of the workmen."

The view taken therein was reiterated by a three-Judge Bench of this Court in *Rajasthan State Financial Corpn.* v. *Official Liquidator* [(2005) 8 SCC 190] wherein it was stated: (SCC pp. 201-02, para 18)

> "*18*. In the light of the discussion as above, we think it proper to sum up the legal position thus:
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> (*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.
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> (*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."
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> (See also *ICICI Bank Ltd.* v. *SIDCO Leathers Ltd.* [(2006) 10 SCC 452 : (2006) 5 Scale 27])"

17. In **Madras Petrochem Ltd. v. BIFR**, (2016) 4 SCC 1, this Court had to deal with whether a predecessor statute to the IBC, which has been repealed by the IBC, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, prevails over the SARFAESI Act to the extent of inconsistency therewith. This Court noted that in the case of two statutes which contain non-obstante clauses, the later Act will normally prevail, holding:

> "**36.** A conspectus of the aforesaid decisions shows that the Sick Industrial Companies (Special Provisions) Act, 1985 prevails in all situations where there are earlier enactments with non obstante clauses similar to the Sick Industrial Companies (Special Provisions) Act, 1985. Where there are later enactments with similar non obstante clauses, the Sick Industrial Companies (Special Provisions) Act, 1985 has been held to prevail only in a situation where the reach of the non obstante clause in the later Act is limited—such as in the case of the Arbitration and Conciliation Act, 1996—or in the case of the later Act expressly yielding to the Sick Industrial Companies (Special Provisions) Act, 1985, as in the case of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Where such is not the case, as in the case of Special Courts Act, 1992, it is the Special Courts Act, 1992 which was held to prevail over the Sick Industrial Companies (Special Provisions) Act, 1985.

37. We have now to undertake an analysis of the Acts in question. The first thing to be noticed is the difference between Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 does not include the Sick Industrial Companies (Special Provisions) Act, 1985 unlike Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 37 of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 states that the said Act shall be in addition to and not in derogation of four Acts, namely, the Companies Act, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It is clear that the first three Acts deal with securities generally and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 deals with recovery of debts due to banks and financial institutions. Interestingly, Section 41 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 makes amendments in three Acts—the Companies Act, the Securities Contracts (Regulation) Act, 1956, and the Sick Industrial Companies (Special Provisions) Act, 1985. It is of great significance that only the first two Acts are included in Section

37 and not the third i.e. the Sick Industrial Companies (Special Provisions) Act, 1985. This is for the obvious reason that the framers of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 intended that the Sick Industrial Companies (Special Provisions) Act, 1985 be covered by the non obstante clause contained in Section 35, and not by the exception thereto carved out by Section 37. Further, whereas the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is expressly mentioned in Section 37, the Sick Industrial Companies (Special Provisions) Act, 1985 is not, making the above position further clear. And this is in stark contrast, as has been stated above, to Section 34(2) of the Recovery of Debts Due to Banks

> and Financial Institutions Act, 1993, which expressly included the Sick Industrial Companies (Special Provisions) Act, 1985. The new legislative scheme qua recovery of debts contained in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has, therefore, to be given precedence over the Sick Industrial Companies (Special Provisions) Act, 1985, unlike the old scheme for recovery of debts contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993."

18. Indeed, this position has been echoed in several judgments of this Court. In **Jaipur Metals & Electricals Employees Organization v. Jaipur Metals & Electricals Ltd.**, (2019) 4 SCC 227 ["**Jaipur Metals**"], this Court, in dealing with whether proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 were to be transferred to the NCLT under the IBC, held:

> "**19.** However, this does not end the matter. It is clear that Respondent 3 has filed a Section 7 application under the Code on 11-1-2018, on which an order has been passed admitting such application by NCLT on 13-4-2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding-up proceedings before the High Court. It was open for Respondent 3 at any time before a winding-up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows:
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> > "**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."

> **20.** Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule to the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule to the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside. NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment [*Jaipur Metals and Electricals Ltd., In re*, 2018 SCC OnLine Raj 1472]."

19. Likewise, in **Forech** (supra), in a situation in which notice had been issued in a winding up petition and the said petition was ordered to be transferred to the NCLT, to be treated as a proceeding under the IBC, this Court clearly held:

> "**22.** This section is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the Code in respect of whom a liquidation order has been made. From a reading of this section, it does not follow that until

> a liquidation order has been made against the corporate debtor, an insolvency petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the Appellate Tribunal. Hence, any reference to Section 11 in the context of the problem before us is wholly irrelevant. However, we decline to interfere with the ultimate order passed by the Appellate Tribunal because it is clear that the financial creditor's application which has been admitted by the Tribunal is clearly an independent proceeding which must be decided in accordance with the provisions of the Code."

20. In **Duncans Industries Ltd. v. AJ Agrochem**, (2019) 9 SCC 725, this Court was faced with a situation of conflict between Section 16-G(1)(c) of the Tea Act, 1953, under which winding up/liquidation proceedings were to take place (and which could not take place without prior consent of the Central Government), and a proceeding initiated under Section 9 of the IBC. After relying upon the judgment of this Court in **Innoventive Industries Ltd. v. ICICI Bank**, (2018) 1 SCC 407 and **Swiss Ribbons** (supra), this Court held:

> "**7.4.** Section 16-G(1)(*c*) refers to the proceeding for winding up of such company or for the appointment of receiver in respect thereof. Therefore, as such, the proceedings under Section 9 IBC shall not be limited and/or restricted to winding up and/or appointment of receiver only. The winding up/liquidation of the company shall be the last resort and only on an eventuality when the corporate insolvency resolution process fails. As observed by this Court in *Swiss Ribbons (P) Ltd.* [*Swiss Ribbons (P) Ltd.* v. *Union of India*, (2019) 4 SCC 17 : AIR 2019 SC 739], referred to hereinabove, the primary focus of the legislation while enacting IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate

> debtor from its own management and from a corporate debt by liquidation and such corporate insolvency resolution process is to be completed in a time-bound manner. Therefore, the entire "corporate insolvency resolution process" as such cannot be equated with "winding up proceedings". Therefore, considering Section 238 IBC, which is a subsequent Act to the Tea Act, 1953, shall be applicable and the provisions of IBC shall have an overriding effect over the Tea Act, 1953. Any other view would frustrate the object and purpose of IBC. If the submission on behalf of the appellant that before initiation of proceedings under Section 9 IBC, the consent of the Central Government as provided under Section 16-G(1)(*c*) of the Tea Act is to be obtained, in that case, the main object and purpose of IBC, namely, to complete the "corporate insolvency resolution process" in a time-bound manner, shall be frustrated. The sum and substance of the above discussion would be that the provisions of IBC would have an overriding effect over the Tea Act, 1953 and that no prior consent of the Central Government before initiation of the proceedings under Section 7 or Section 9 IBC would be required and even without such consent of the Central Government, the insolvency proceedings under Section 7 or Section 9 IBC initiated by the operational creditor shall be maintainable."

21. In **Kaledonia Jute and Fibres Pvt. Ltd. v. Axis Nirman and Industries Ltd.**, 2020 SCC OnLine SC 943 ["**Kaledonia**"], this Court decided as to whether a winding up proceeding in the Company Court could be transferred despite the fact that the winding up order had been passed and then been kept in abeyance. This Court, in paragraph 27, held:

> "**27.** Apart from providing for the transfer of certain types of winding up proceedings by operation of law, Section 434(1)(c) also gives a choice to the parties to those proceedings to seek a transfer of such proceedings to the NCLT. This is under the fifth proviso to Clause (c)."

The Court then went on to hold that in a winding up proceeding that has been admitted, since all creditors would be parties to such proceeding *in rem*, a secured creditor being such a party could, therefore, move the Company Court under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 to transfer the aforesaid proceeding to the NCLT to be tried as a proceeding under Section 7 or Section 9, as the case may be.

22. In **Action Ispat** (supra), this Court was faced with a proceeding in which a winding up petition had been admitted by the High Court and then transferred to the NCLT to be tried as a proceeding under the IBC. After referring to the judgments in **Jaipur Metals** (supra), **Forech** (supra), and **Kaledonia** (supra), and after setting out various Sections dealing with winding up of companies under the Companies Act, 2013, this Court then held:

> "**20.** What becomes clear upon a reading of the three judgments of this Court is the following:
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> (i) 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.
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> (ii) This was done by the Transfer Rules, 2016 [Companies (Transfer of Pending Proceedings) Rules, 2016] 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 the NCLT.

(iii) 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 *Kaledonia* [*Kaledonia Jute & Fibres Pvt. Ltd.* v. *Axis Nirman & Industries Ltd.*, 2020 SCC OnLine SC 943], is not restricted to any particular stage of a winding up proceeding.

(iv) 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 the NCLT. The question that arises before us in this case is how is such discretion to be exercised?"

xxx xxx xxx

"**31.** 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 the 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 the 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."

23. A conspectus of the aforesaid authorities would show that a petition either under Section 7 or Section 9 of the IBC is an independent proceeding which is unaffected by winding up proceedings that may be filed qua the same company. Given the object sought to be achieved by the IBC, it is clear that only where a company in winding up is near corporate death that no transfer of the winding up proceeding would then take place to the NCLT to be tried as a proceeding under the IBC. Short of an irresistible conclusion that corporate death is inevitable, every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country. It is, thus, not possible to accede to the argument on behalf of the Appellant that given Section 446 of the Companies Act, 1956 / Section 279 of the Companies Act, 2013, once a winding up petition is admitted, the winding up petition should trump any subsequent attempt at revival of the company through a Section 7 or Section 9 petition filed under the IBC. While it is true

that Sections 391 to 393 of the Companies Act, 1956 may, in a given factual circumstance, be availed of to pull the company out of the red, Section 230(1) of the Companies Act, 2013 is instructive and provides as follows:

> "**230. Power to compromise or make arrangements with creditors and members**.—(1) Where a compromise or arrangement is proposed—
>
> (*a*) between a company and its creditors or any class of them; or
>
> (*b*) between a company and its members or any class of them,
>
> the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.
>
> *Explanation*.—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.
>
> xxx xxx xxx"

What is clear by this Section is that a compromise or arrangement can also be entered into in an IBC proceeding if liquidation is ordered. However, what is of importance is that under the Companies Act, it is only winding up that can be ordered, whereas under the IBC, the primary emphasis is on revival of the corporate debtor through infusion of a new management.

24. On facts also, in the present case, nothing can be said to have become irretrievable in the sense mentioned in paragraph 31 of **Action Ispat** (supra).

25. It is settled law that a secured creditor stands outside the winding up and can realise its security dehors winding up proceedings. In **M.K. Ranganathan v. Govt. of Madras**, (1955) 2 SCR 374, this Court held:

> "The position of a secured creditor in the winding up of a company has been thus stated by Lord Wrenbury in *Food Controller* v. *Cork* [1923 Appeal Cases 647]:
>
> > "The phrase 'outside the winding up' is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is in winding up or not. I remain outside the winding up" and shall enforce my rights as mortgagee. This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up".
>
> It is also summarised in *Palmer's Company Precedents* Vol. II, page 415:
>
> > "Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made".
>
> The secured creditor is thus outside the winding up and can realise his security without the leave of the winding up Court,

> though if he files a suit or takes other legal proceedings for the realisation of his security he is bound under Section 231 (corresponding with Section 171 of the Indian Companies Act) to obtain the leave of, the winding up Court before he can do so although such leave would almost automatically be granted. Section 231 has been read together with Section 228(1) and the attachment, sequestration, distress or execution referred to in the latter have reference to proceedings taken through the Court and if the creditor has resort to those proceedings he cannot put them in force against the estate or effects of the Company after the commencement of the winding up without the leave of the winding up Court. The provisions in Section 317 are also supplementary to the provisions of Section 231 and emphasise the position of the secured creditor as one outside the winding up, the secured creditor being, in regard to the exercise of those rights and privileges, in the same position as he would be under the Bankruptcy Act.
>
> The corresponding provisions of the Indian Companies Act have been almost bodily incorporated from those of the English Companies Act and if there was nothing more, the position of the secured creditor here also would be the same as that obtaining in England and he would also be outside the winding up and a sale by him without the intervention of the Court would be valid and could not be challenged as void under Section 232(1), Indian Companies Act."
>
> (at pages 383, 384)

This principle has been followed in **Central Bank of India v. Elmot Engineering Co.**, (1994) 4 SCC 159 (at paragraph 14), **Industrial Credit and Investment Corpn. of India Ltd. v. Srinivas Agencies**, (1996) 4 SCC 165 (at paragraph 2), and **Board of Trustees, Port of Mumbai v. Indian Oil Corpn.**, (1998) 4 SCC 302 (at paragraph 12).

26. Indiabulls, a secured creditor of the corporate debtor, *viz*. SRUIL, has, in enforcement of its debt by a mortgage, sold the mortgaged property outside the winding up. The aforesaid sale is the subject matter of proceedings in the Bombay High Court filed by the provisional liquidator. If the aforesaid sale is set aside, the asset of SRUIL that has been sold will come back to the provisional liquidator for the purposes of winding up. If the sale is upheld, equally, there are other assets of SRUIL which continue to be in the hands of the provisional liquidator for the purposes of winding up. We may also add that on the facts of this case, though no application for transfer of the winding up proceeding pending in the Bombay High Court has been filed, the Bombay High Court has itself, by the orders dated 28.11.2019 and 23.01.2020, directed the provisional liquidator to hand over the records and assets of SRUIL to the IRP in the Section 7 proceeding that is pending before the NCLT. No doubt, this has not yet been done as the IRP has not yet been able to pay the requisite amount to the provisional liquidator for his expenses.

27. Dr. Singhvi and Shri Ranjit Kumar have vehemently argued that SREI has suppressed the winding up proceeding in its application under Section 7 of the IBC before the NCLT and has resorted to Section 7 only as a subterfuge to avoid moving a transfer application before the High Court in

the pending winding up proceeding. These arguments do not avail the Appellant for the simple reason that Section 7 is an independent proceeding, as has been held in catena of judgments of this Court, which has to be tried on its own merits. Any "suppression" of the winding up proceeding would, therefore, not be of any effect in deciding a Section 7 petition on the basis of the provisions contained in the IBC. Equally, it cannot be said that any subterfuge has been availed of for the same reason that Section 7 is an independent proceeding that stands by itself. As has been correctly pointed out by Shri Sinha, a discretionary jurisdiction under the fifth proviso to Section 434(1)(c) of the Companies Act, 2013 cannot prevail over the undoubted jurisdiction of the NCLT under the IBC once the parameters of Section 7 and other provisions of the IBC have been met. For all these reasons, therefore, the appeal is dismissed and the interim order that has been passed by this Court on 18.12.2020 shall stand immediately vacated.

..... J.
[ROHINTON FALI NARIMAN]

..... J.
[B.R. GAVAI]

New Delhi;
March 01, 2021.