

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2nd DAY OF APRIL, 2024

BEFORE

THE HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

COMPANY APPLICATION NO.31 OF 2024

IN

COMPANY PETITION NO. 42 OF 2016

BETWEEN:

M/S MAGNIFICO MINERALS PRIVATE LIMITED,
HAVING ITS REGISTERED OFFICE AT 75,
KHIRKI VILLAGE, MALVIYA NAGAR,
NEW DELHI, REPRESENTED BY ITS
CHIEF GENERAL MANAGER, FINANCE,
SRI RADHEY SHYAM AGGARWAL,
S/O KALYAN CHAND AGGARWAL.

... APPLICANT

(BY SRI SHIVARUDRAPPA SHETKAR, ADVOCATE)

AND:

M/S SARAVANA ALLOYS STEELS PVT.LTD.
21/D, INDUSTRIAL SUBURB, II STAGE,
YESHWANTHPURA, TUMKUR ROAD,
BANGALORE - 560 022,
REPRESENTED BY ITS DIRECTOR

...RESPONDENT

(BY SRI B K SAMPATH KUMAR, SR. ADVOCATE FOR
SRI KASHYAP N NAIK, ADVOCATE)

THIS COMPANY APPLICATION IS FILED UNDER SECTION 434(1)(c) OF THE COMPANIES ACT, 2013 PRAYING TO TRANSFER THE PENDING PROCEEDINGS IN THE ABOVE MATTER TO THE HON'BLE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU BENCH, FOR FURTHER ADJUDICATION, IN THE INTEREST OF JUSTICE AND EQUITY.

THIS COMPANY APPLICATION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 6TH MARCH, 2024 AND COMING ON FOR PRONOUNCEMENT THIS DAY THE COURT PRONOUNCED THE FOLLOWING:

ORDER

On an application invoking 5th proviso to Section 434(1) (c) of the Companies Act 2013, whether the Company Court is bound to transfer the Company Petition for winding up under the Companies Act 1956, to the National Company Law Tribunal, is the question that needs to be answered.

2. The applicant in Company Application No.31/2024, being the respondent is seeking transfer of Company Petition No.42/2016 to the National Company Law Tribunal. The petitioner in COP No. 42/2016 is opposing the transfer application.

3. Learned Senior counsel Sri. B.K.Sampath Kumar, appearing for the applicant would contend that 5th proviso to Section 434(1)(c) of Companies Act 2013(for short 'Act of 2013') enables any party to the winding up petition to seek transfer of the Company Petition to the National Company Law Tribunal. It is also urged that the Company Petition is not yet admitted and there is no progress in the petition which compels the Court to

retain the petition before this Court. Reliance is placed on the judgment of the Hon'ble Apex Court in ***ACTION ISPAT AND POWER PRIVATE LIMITED VS. SHYAM METALICS AND ENERGY LIMITED, (AIR 2021 SC 309)***. Referring to paragraph No.22 of the said judgment, the learned senior counsel would urge that the application seeking transfer of the Company Petition has to be allowed notwithstanding the fact that the notice before admission is already served on the respondent in the Company Petition. He would also submit that co-ordinate bench of this Court in COP No.21/2014 as well as in COP No.119/2014 has transferred the petitions to the National Company Law Tribunal for disposal in accordance with law despite service of notice to the respondents in those petitions.

4. Learned counsel appearing for the respondent i.e., the petitioner in Company Petition opposed the prayer on the premise that no parallel proceeding is pending between the applicant and the respondent, before the National Company Law Tribunal. In ***ACTION ISPAT*** supra, the Hon'ble Apex Court was dealing with a situation where a parallel proceeding was pending under the

Insolvency and Bankruptcy Code. Thus, the facts in the present case do not attract the ratio in the judgment.

5. It is also his submission that because of the use of the word "**may**" in 5th proviso to Section 434(1)(c) of the Act of 2013, the discretion lies with the Company Court as to whether or not to transfer the Company Petition to the National Company Law Tribunal. He placed reliance on ***NITESH RESIDENCY HOTELS PRIVATE LIMITED VS. ARCHDIOCESE OF BANGALORE, (2021 SCC ONLINE KAR 14704)***

6. He would further submit that no valid ground is made out seeking transfer of the Company Petition and this application is filed only to protract the proceeding.

7. This Court has considered the contentions raised at the Bar.

8. The Act of 2013 came into force in a phased manner. Even after the commencement of the 2013 Act, the jurisdiction of this Court (Company Court) to deal with certain matters initiated under the provisions of the Companies Act, 1956, is

retained. It is an admitted position before the introduction of 5th proviso to Section 434(1)(c) of the Act of 2013, the Act of 2013 enabled the Company Court to adjudicate the winding up petitions on merit where notice regarding admission under Rule 26 of the Companies (Court) Rules, 1959 (for short Rules, 1959) was served.

9. 5th proviso to Section 434(1)(c) of the Act of 2013 is introduced in the year 2018 after the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

10. Section 434(1)(c) of the Act of 2013 would read as under:

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

(a) xxxxx

(b) xxxxx

(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 the winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to the winding up of companies that 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.

*Provided further that any party or parties to any proceedings relating to the winding up companies pending before any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, **may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal** and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*

(emphasis supplied)

11. 5th proviso to Section 434(1)(c) of the Act of 2013 provides for an application seeking transfer of the pending company petition to the National Company Law Tribunal. The plain reading of the said provision, particularly the use of the word “may” at two places in the provision, would clearly demonstrate that the party has the **option** to seek transfer and the Company Court **may** transfer the petition to the National Company Law Tribunal. To put it differently, 5th proviso to Section 434(1)(c) of the Act of 2013 confers the discretion on the Company Court either to retain the Company Petition or to transfer the Company Petition subject to inherent limitations in law on exercise of discretionary jurisdiction.

12. Thus, the transfer of the petition is not mandatory on the application by any of the parties to the proceeding. An element of discretion lies with the Court. Else there was no need to introduce the 5th proviso in the manner in which it is couched. Whenever a discretionary power is conferred to the Court, then the person who seeks such discretionary power to be exercised in his favour has to make out a valid ground for the exercise of such power.

13. A valid ground of pendency of a parallel proceeding before the National Company Law Tribunal is recognised by the Apex Court in ***ACTION ISPAT*** supra. Admittedly no parallel proceeding is pending between the parties to this application before the National Company Law Tribunal. This Court is also conscious of the fact that the judgment in ***ACTION ISPAT*** supra cannot be interpreted to say that the pendency of parallel proceedings before the National Company Law Tribunal is the only ground recognised in ***ACTION ISPAT*** supra. Certainly, it is not the philosophy of the said judgment. The underlying philosophy of the said judgment is to transfer the company petition on an application, if there is a valid ground for transfer.

14. The question before this Court is, “whether the applicant has made out any ground to transfer the Company Petition to the National Company Law Tribunal?”

15. This Court has perused the application filed by the applicant. The application does not make out any ground-seeking transfer of the petition to the National Company Law Tribunal other than citing the judgment of the Hon’ble Apex Court in **ACTION ISPAT** supra.

16. The co-ordinate bench of this Court in **NITESH HOTELS** supra has also considered the effect of the judgment of the Apex Court in **ACTION ISPAT** supra. The co-ordinate bench of this Court has taken a view that the **ACTION ISPAT** supra, judgment has to be understood in the context in which the judgment was delivered. The co-ordinate bench of this Court has taken a view that **ACTION ISPAT** supra, does not mandate the automatic transfer of the Company Petition on an application by one of the parties to the proceeding to the National Company Law Tribunal.

17. It is true that in ***ACTION ISPAT*** supra, the Apex Court has also taken a view that the transfer of the Company Petition to the National Company Law Tribunal is permissible even post-admission of the Company Petition in a situation where no irreversible transactions have taken place pursuant to the court order which would desist the Company Court from transferring the petition to the National Company Law Tribunal. It is also true that the Company Petition is not yet admitted and no transactions have taken place pursuant to the Court order which can be termed as 'irreversible transactions'. Nevertheless, the power of the Company Court to retain the petition under certain circumstances post service of notice under Rule 26 of Rules, 1959 and before admission is evident from the language employed in 5th proviso to Section 434(1)(c) of the Act of 2013.

18. It is well settled principle of law that the judgment cannot be read like a statute and it has to be understood in the context. Thus, the observation in paragraph No.22 of ***ACTION ISPAT*** supra, cannot be construed as a mandate to transfer the Company Petition on an application filed by any of the parties to the proceeding. The discretion to allow or to reject the application

under certain circumstances is still available with the Company Court. However such discretion is not absolute. No doubt fifth proviso to Section 434(1)(c) of the Act of 2013 is silent on the parameters to be taken into account while exercising the discretion. Even if the provision is silent on the parameters to be considered while exercising the discretion, then also the discretion on the Court is not to be construed as unfettered. The discretionary power conferred on the Court in the absence of any specific parameters guiding exercise of such power has inbuilt inherent limitations and the discretion of the Court is always guided by the principles of fair play, equity and justice.

19. Applying the aforementioned well-established principles, this Court is of the view that 5th proviso to Section 434(1)(c) of the Act of 2013 does not mandate the transfer of a Company Petition to the National Company Law Tribunal on an application filed by the parties. However the Court has to consider whether a case is made out to exercise the discretion. The party who seeks the discretion to be exercised in his favour must make out a valid ground for the exercise of the discretion in his favour. 5th proviso to Section 434(1) (c) of the Act of 2013 is not an

exception to such rule. On perusal of the application it is evident that except citing the judgment in ***ACTION ISPAT*** (which has no application to this case) the applicant has not made out a case to exercise the discretion in his favour.

20. There is one more reason not to exercise discretion in favour of the applicant. It is relevant to note that the petitioner's argument on admission of the Company Petition was heard on 31.01.2024. On that day, there was no appearance for the counsel for the respondent. Nevertheless, the Court showed indulgence, and awaiting the appearance of the respondent adjourned the matter to 09.02.2024 to hear the respondent. On 09.02.2024, the counsel for the respondent in the Company Petition sought a short accommodation. The case was adjourned to 16.02.2024. On that day the case was adjourned to 21.02.2024. On 21.02.2024, the learned senior counsel appearing for the respondent in the Company Petition sought short accommodation on the premise that the respondent to the Company Petition would apply to transfer the petition to the National Company Law Tribunal. Accordingly, the case was

adjourned to 28.02.2024 on which date the application was filed seeking transfer of the Company Petition.

21. Fifth proviso to Section 434(1)(c) of the Act of 2013, as already noticed confers the discretion on the Court to either retain the Company Petition or to transfer the Company Petition. This Court is of the view that the conduct of the party would also play a significant role while considering the application seeking transfer. Admittedly, the petition was filed in the year 2016 and the matter was heard relating to admission in the year 2024. The 5th proviso to Section 434(1)(c) of the Act of 2013 was introduced in the year 2018. The respondent has not chosen to move the application till 2024. The application is moved only after the submissions on the admission of the company petition by the counsel for the petitioner were concluded. The conduct of the applicant reveals that he is interested in protracting the hearing and nothing else. This being the position, this Court does not find any reason to exercise discretion in favour of the applicant.

22. In Company Petition No.21/2014 as well as in Company Petition No.119/2014, relied upon by the learned senior counsel for the applicant, this Court passed an order for transfer

placing reliance on the Judgment of **ACTION ISPAT** supra. It is relevant to note that in the aforementioned two cases, none of the parties to the proceeding opposed the prayer for the transfer of the petitions to the National Company Law Tribunal and the orders passed in the said petitions are in the nature of consent orders and those orders do not assist the applicant.

23. Accordingly, the Company Application is dismissed.

**Sd/-
JUDGE**

BRN