NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.337 of 2018

[Arising out of Order dated 07.09.2018 passed by National Company Law Tribunal, Mumbai Bench in TCSP 1 of 2017]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Rasiklal S. Mardia S/o Late Shantilal Mardia R/o 183, Manekbaug Society, Ambawadi, Ahmedabad – 380015 Gujarat	Original Petitioner	Appellant
Versus		
1. Amar Dye Chem Limited (In Liquidation) Through the Official Liquidator Bank of India Building, 5th Floor, Mahatma Gandhi Road, Mumbai – 400023 Maharashtra	Original Respondent	Respondent No.1
2. The Regional Director, Western Region, Everest Building, 5th Floor, 100 Marine Drive, Mumbai – 400 002 Maharashtra		Respondent No.2
3. Registrar of Companies, Mumbai 100, Everest Building, Marine Drive, Mumbai – 400 002 Maharashtra		Respondent No.3

For Appellant: **Dr. U.K. Chaudhary, Sr. Advocate with Ms. Manisha Chaudhary, Shri Mansumyer Singh and Shri Himanshu Handa, Advocates**

For Respondents: **Shri Amish Tandon, Shri Sameer Abhyankar, Shri Ayuesh Beotra and Shri Akshay Joshi, Advocates**

J U D G E M E N T

(8th April, 2019)

A.I.S. Cheema, J. :

1. This Appeal has been filed by the Appellant – Ex. Chairman and shareholder of Amar Dye Chem Limited (In Liquidation) (hereafter referred as – Company) being aggrieved by Order dated 07.09.2018 delivered on 10.09.2018 (Impugned Order) whereby the National Company Law Tribunal, Mumbai Bench ('NCLT', in short) dismissed TCSP 1 of 2017 which had been filed by the Appellant for approval of the scheme of compromise/arrangement propounded by him between the Company, its creditors and members under Sections 391/394 read with Sections 80, 81, 100 and 103 of The Companies Act, 1956 (old Act – in short). The Petition was dismissed on the ground of locus standi, without going into the material facts of the case. According to the Appellant, NCLT misinterpreted the law.

2. Briefly stated, the facts are that, the Company was incorporated on 14th May, 1954. There was a reference of the Company to the Board of Industrial and Financial Reconstruction (BIFR) as a sick company in April, 1993. After due procedure, BIFR referred the Company to winding up before the Hon'ble High Court of Bombay in 1998 and High court admitted the winding up petition on 9th December, 1998. The Order of the High

Court (Annexure A3) passed in CP 895/1998 mentioned that BIFR has recorded an opinion that it was just and equitable that the Company should be wound up. The Hon'ble Single Judge of the High Court in the Order recorded that he had perused the various Orders of BIFR and he found rehabilitation and revival of the Company is not possible and therefore, in the public interest, the company should be wound up. Accordingly, the Order was passed to wind up the Company and Official Liquidator attached to the High Court was directed to take charge of all the affairs, assets and properties of the Company with usual powers under the Companies Act.

3. After the above Orders dated 9th December, 1998, the winding up proceedings started. The Appellant has relied on Annexure - A4 – Order of the Hon'ble High Court dated 14th February, 2008 in CP 895/1998 which shows the Hon'ble High Court considering inventory report of the valuer which mentioned assets still available at the site. Hon'ble High Court gave certain directions to the Official Liquidator with respect to sale of movable assets and for the purpose to issue advertisement in newspapers. The present Appellant appears to have raised some issues which in the Order dated 14th February, 2008, Hon'ble High Court said would be considered at the appropriate stage. It is now stated that the Appellant proposed to the High Court that Appellant along with co-investors was in a position to revive the Company. For this, the Appellant is relying on para – 4 of the Order dated 14th February, 2018 (Annexure - A4) where it was observed:-

> "It is also made clear that it will be open to the Mr. Mardia to submit revival scheme, if he so desires, which request will be considered on its own merits."

The Appellant is relying on this observations of the Hon'ble High Court to claim that he had locus to submit the scheme which was permitted by the High Court and his locus has now been wrongly held against him in the Impugned Order. According to the Appellant, he thus moved First Motion Application bearing Company Application No.137 of 2010 on 31.03.2010 for convening the meeting of shareholders and creditors which was allowed by the Hon'ble High Court by Order dated 31.03.2010. Copy of the Order has been put on record by the Appellant at Annexure – A5. Reference is then made to another Order dated 21.07.2011 of the Hon'ble High Court whereby extension of time was granted for convening meetings of the shareholders and creditors.

4. It is argued that at these stages, the Respondent Official Liquidator had never objected to the right of Appellant to file such scheme of compromise/arrangement under Section 391 – 394 of the old Act.

5. It is claimed that the Appellant subsequently filed Second Motion Petition No.243 of 2012 before the Hon'ble High Court. When the Second Motion was pending, Ministry of Corporate Affairs issued Notification No. GSR 1119(E) dated 7th December, 2016 titled as "The Companies (Transfer of Pending Proceedings) Rules, 2016" (Rules – in short). According to the Appellant, NCLT, Mumbai issued Notice dated 22.03.2017 (Annexure – 6)

which showed transfer of the Companies Scheme Petition 243 of 2012 which had been filed by the Appellant to the NCLT. He has filed copy downloaded from the official website of the High Court of Bombay (Page – 77) which showed remark that the proceedings had been "transferred to NCLT, vide office letter bearing No.COM/12/2017 dated 07.01.2017". The concerned Notification of the Rules has also been filed for perusal.

6. It appears that the matter came up before NCLT and the NCLT after hearing the parties referred to Section 391(1) of the old Act and concluded that once the Company was in liquidation, it was the liquidator alone who was authorized to file the Company Petition either for compromise or arrangement in respect of the Company in liquidation. NCLT also discussed Judgement in the matter of "**Sunil Gandhi and Ors. Vs. A.N. Buildwell Private Limited and Ors."** reported in MANU/DE/0780/2017 : [2017]203CompCas330(Delhi) but discarded the Judgement looking at it from the angle whether or not it deals with the issue, namely – whether the petition filed by ex-management was maintainable.

7. The Respondent No.1 Company through the Official Liquidator has filed Reply and opposed the Appeal trying to justify the view taken by NCLT that when the Company is in liquidation, only the Official Liquidator could apply for scheme of arrangement/compromise. The Respondent is trying to show as to how the Appellant has been protracting the proceedings over the years and in the Reply, raised grounds relating to the

merits of the scheme of arrangement/compromise to demonstrate as to how the same could not be accepted.

8. The learned Counsel for the Appellant has argued that when the Hon'ble High Court vide Order passed in 2008 had given liberty to the Appellant to submit a scheme, NCLT could not have reopened the issue whether or not the Appellant was competent to file the scheme when the Company was already in liquidation. According to him, even in the First Motion, no such objections were raised and in the meanwhile, the matter got transferred to NCLT. The Counsel has relied on certain Judgements to show that even when the Company is in liquidation, it is not that only the liquidator can apply with a scheme of arrangements/compromise.

9. The learned counsel for the Respondent Official Liquidator submitted that in the present matter, the transfer of the matter from the High Court to NCLT itself was wrong. The proceeding before the Hon'ble High Court showed that efforts on revival had failed and only thereafter, the winding up was started after reference from BIFR. Referring to the Notification dated 07.12.2016 (Appeal Page – 78), it has been argued that Rule 3 and 5 as framed by the Government in "The Companies (Transfer of Pending Proceedings) Rules, 2016" did not contemplate transferring of proceedings like present one, which were in relation to winding up. According to the Counsel, there can be conflict of Orders if winding up proceedings remains in the High Court while scheme relating to compromise/arrangements is taken up in another forum like NCLT. The

Counsel relied on the same Judgement of "Sunil Gandhi" (Supra) to submit that in the present matter, the proceedings could not have been transferred to NCLT. He submitted that the NCLT referred to this Judgement only from the angle of looking at it to see if person other than the Liquidator could apply under Section 391 of the old Act, but did not consider that Judgement was primarily holding that such matters like the present one could not have been transferred in the first place itself and NCLT should not have exercised jurisdiction in such matter when the winding up proceeding is in advanced stages pending in the High Court. It was submitted that Appellant has been delaying the proceedings for one reason or the other. It was submitted that all the concerned have objected to the scheme as can be seen from the Impugned Order itself and the Petition filed by the Appellant should have been dismissed on merits. The Counsel stated that since 1998, the Company was not functional and the present proceedings are mere protracting of the liquidation proceedings. The Counsel also referred to the Orders dated 1st October, 2018 passed by this Tribunal in this Appeal directing Official Liquidator not to go ahead with the sale/auction of movable/immovable assets of the Company. According to the Counsel, in such liquidation proceedings pending for long, merely because a scheme had been proposed would not be any reason to stay the liquidation.

10. We have gone through the matter and heard the Counsel for both sides. The Impugned Order shows that in NCLT the Official Liquidator;

Regional Director; seven workmen; a secured debenture holder; Mazdoor Congress Union; one Amritlal Chemaux Private Limited, shareholder and promoter of the Company, all have raised objections to the scheme proposed by the Appellant. The Impugned Order referred to the details of the objections raised but did not go into the merits of the same as in para – 10 of the Impugned Order, it raised a point for consideration as under:-

> "Now the point for consideration is as to **whether or not the promoter directors or some of the shareholders of a company in liquidation can file an application under Section 391(1) of the Companies Act, 1956/Section 230(1) of the Companies Act, 2013 seeking arrangement as sought in this application.**"

In para – 12 of the Impugned Order, NCLT observed that since the Petitioner/shareholder of the Company, which was in liquidation, has filed the Petition seeking revival of the Company in liquidation through a compromise with creditors, a legal conundrum had come up "whether the petition filed by the promoter director having shareholding in the company on his own can file a petition to have some compromise or arrangement with the creditors." NCLT went ahead to extract portion of Section 391(1) of the Companies Act. We will also reproduce the same for convenience of reading:-

> "**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,** 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."

Reading the above Section, the NCLT has recorded a view that it clearly provided "that liquidator alone is authorized to file company petition either for compromise or arrangement in respect to the company in liquidation".

[Emphasis supplied]

Thus the NCLT reads the word "alone" in the provision which word has not been used by the legislature and concluded that when Official Liquidator has been appointed in winding up Order, nobody has locus to represent the company save and except the Liquidator appointed in that Company because the statute has given a mandate since winding up Order has been passed, Official Liquidator is the sole authority and custodian on behalf of such Company. Taking such view, the NCLT has proceeded to dismiss the Company Petition. The Judgement in the matter of "Sunil Gandhi" (Supra) also was analysed by the NCLT only from this angle to conclude that ex-management could not apply under Section 391(1) of the old Act although the NCLT noticed that the Judgement recorded that in

cases like present one, the same could exclusively be dealt with by the Company Court, i.e. Hon'ble High Court.

11. The learned Counsel for the Appellant relied on the Judgement in the matter of **"Vasant Investment Corporation Ltd."** reported in 1978 SCC OnLine Bom 151 and Judgement in the matter of **"Rajendra Prasad Agarwalla & Ors. Versus The Official liquidator, High Court"** reported in 1977 SCC OnLine Cal 189, which Judgements along with others were considered by the Hon'ble High Court of Delhi in the matter of **"National Steel & General Mills Versus Official Liquidator"** reported in 1989 SCC OnLine Del 118. The Judgements dealt with the above provision under Section 391 of the old Act. In para – 10 of the Judgement of Division Bench of the Hon'ble High Court of Delhi, it was observed:-

> "10. The consensus view of the various High Courts, therefore emerges is that the liquidator is the additional person and not the exclusive person who can move an application under Section 391 of the Act."

In para – 18, it was mentioned:-

> "18. There does not seem to be much substance in this argument. As already discussed above, the liquidator is an additional person who can make an application under Section 391 of the Act for compromise or settlement of the scheme and under Section 457 of the Act the liquidator has been given a general power in the company being wound up with the sanction of the Court to institute or defend any suit, prosecution, or other legal proceedings and as such there is no inconsistency between the two provisions. Further this general power has been conferred on the liquidator with the sanction of the

> Court only. This does not take away the special power of the member, creditor and the company to move the Court for compromise/arrangement under Section 391 of the Act without sanction of the Court as general power cannot take away and prevail over the special power."

The Counsel for the Appellant further relied on Judgement in the matter of **"Meghal Homes (P) Ltd. Versus Shree Niwas Girni K.K. Samiti"** (2007) 7 SCC 753 in which it was observed in para – 33 and 34 as under:-

> "33. The argument that Section 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being would up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(I)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application.
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> 34. By and large, the High Courts are seen to have taken the view that the right of the Official Liquidator

> to make an application under Section 391 of the Act was in addition to the right inhering in the creditors, the contributories or members and the power need not be restricted to a motion only by the liquidator. For the purpose of this case, we do not think that it is necessary to examine this question also in depth. We are inclined to proceed on the basis that the Somanis, as contributories or the members of the Company, are entitled to make an application to the Company Court in terms of Section 391 of the Act for the purpose of acceptance of a compromise or arrangement with the creditors and members."

Against the above Judgements relied on by the learned Counsel for the Appellant, the learned Counsel for Respondent No.1 relined on the Judgement in the matter of **"Rajiv Sachdeva Vs. Rajhans Steel Ltd. (In Liquidation)"** reported in AIR2011Jhar139 and submitted that when the proceedings had been initiated initially before BIFR, it becomes matter of record that rehabilitation was not possible and consequently, the Company was required to be wound up. He referred to para – 17 to 21 of the Judgement:-

> "17. In this case, in the garb of the scheme of rehabilitation, the promoters are basically trying to question the order of the BIFR which says that rehabilitation is not possible and consequently the Company should be wound up.
>
> 18. Not having been questioned in appeal and thereafter in writ jurisdiction, the order and recommendation of the Board has attained finality, and the High Court by virtue of Section 20(2) of the SICA (which at the cost of repetition has overriding effect) is bound to proceed to wind up the Company.
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> 19. We may also point out here that accepting the contention of the Appellant that it is open to the promoters or the company or other persons to

> continuously pester the Company Judge with one after another scheme of rehabilitation would result in indefinite stalling of the winding up proceedings to the detriment of the creditors and workers by depleting the resources of the sick company under winding up, by passage of time.
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> 20. That being the position, we are of the opinion that learned Company Judge was right in refusing to sanction the alleged scheme of rehabilitation and to direct the winding up proceedings to continue.
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> 21. In the above view of the matter, the reasons given in the impugned order it may not be very material, but still it can be mentioned that the learned Company Judge has come to a conclusion that the rehabilitation package offered is a ruse to dispose of the assets of the Company in liquidation, in favour of the Respondent No.3, namely M/s. Diversified Vyapar Pvt. Ltd. (hereinafter referred as DVPL)."

12. We find that Judgement in the matter of "Rajiv Sachdeva" could be relevant while examining the merit of the scheme proposed but the said Judgement is not helpful to consider whether the Impugned Order is right in its view that only the liquidator could apply. The Judgement in the matter of "National Steel & General Mills Versus Official Liquidator" (referred supra) makes it quite clear that Liquidator is only an additional person and not exclusive person who can move application under Section 391 of the old Act when the company is in liquidation. Looking to these Judgements, we are unable to support the view taken by NCLT that the Appellant could not have filed the Petition under Section 391 of the old Act.

13. The NCLT did not examine the matter on its merits. Ordinarily, we would have directed remand of this mater and would have directed the NCLT to decide the matter on merits. But, however, here we have a difficulty which the learned Counsel for Respondent No.1 has raised in the present Appeal. It is a legal question and we have to examine the same. The Notification dated 7th December, 2016 (Page – 78 of the Appeal) which framed the Rules mentioned has been discussed by the Hon'ble High Court in the matter of "Sunil Gandhi". In this Judgement, the Hon'ble High Court dealt with the following issue:-

> "4. The issue that arises for consideration is whether the Company Court has the exclusive jurisdiction to adjudicate applications instituted under the provisions of Section 391 of the Companies Act, 1956, in relation to the revival of a Respondent Company in provisional liquidation, subsequent upon coming into force of the subject notification, w.e.f. 15.12.2016."

The Hon'ble High Court then referred to the facts of that matter to observe that the winding up Petition had been admitted and official liquidator had been appointed as provisional Liquidator. Further developments in the said matter were noted. The Hon'ble High Court then reproduced the Notification. We reproduce Rules 3 and 5 of the said Notification which read as under:-

> "**3. Transfer of pending proceedings relating to cases other than Winding up.-** All proceedings under the Act, including proceedings relating to arbitration, compromise, arrangements and reconstruction, other than proceedings relating to winding up on the date of coming into force of these

rules shall stand transferred to the Benches of the Tribunal exercising respective territorial jurisdiction:-

Provided that all those proceedings which are reserved for orders for allowing or otherwise of such proceedings shall not be transferred."

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

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

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

The Hon'ble High Court has then extensively dealt with the expression in the above Rules relating to "other than proceedings relating

to winding up" employed in Rule 3 and considering various Judgements observed in para – 27 as follows:-

> **"27.** On a conspectus of the above decisions, the following legal positon emerges:
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> "(i) That the expression 'proceedings relating to winding up' is of the widest amplitude and content.
>
> (ii) The expression 'relating to' which is used synonymously with the expression 'pertaining to' is an expression of expansion and not of contraction.
>
> (iii) The expression 'relating to the winding up' is much wider and much more expansive than the expression 'arising out of'.
>
> (iv) That the argument, that subsequent to the subject notification coming into force on 15.12.2016, an application under section 391 of the Companies Act, 1956, would stand transferred to the NCLT automatically, even in the circumstance that a winding up petition against the same company has been admitted by the company court, is fallacious, and nothing stands in the way of the Company court from exercising jurisdiction and considering, a revival scheme proposed in relation to a company ordered to be wound up. The Company Court has powers vested in it under the Companies Act, 1956 to accept a scheme for revival of a company including a company that is being wound up until the ultimate step is taken or before the assets are disposed of, pursuant to liquidation.
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> (v) Section 446 of the Companies Act, 1956 is wide in its scope and under the provisions of section 446(2), the Company Court, by virtue of a non obstante clause has the jurisdiction to entertain and dispose of an application under section 391 proposing a scheme in respect of the company, whether such application has been

> filed before or after the order of winding up has been made.
>
> (vi) The scheme of the Companies Act, 1956 empowers the Company Court to consider and approve a scheme of compromise and/or arrangement proposed by way of an application moved by the liquidator under the provisions of section 391 of the Act, in the case of a company which is being wound up. This manifestly indicates that in case of a company which has been ordered to be wound up by the Company Court, a scheme proposed for its revival, would be exclusively dealt with by the Company Court itself.
>
> (vii) All pending proceedings in relation to the revival of a Company in provisional liquidation, as in the present case, will continue to be dealt with by the Company Court under the applicable provisions of the Companies Act, 1956 including Section 446 of the Companies Act, 1956.
>
> (viii) The expression employed in clause 3 of the subject notification, 'other than proceedings relating to winding up' would operate as an exception to the subject notification. The rules of interpretation qua an exception require a strict construction in terms of the legislative intention. However, once the ambiguity or doubt about the applicability has been lifted, then the exception has to be given a wide and liberal construction."

Dealing with the submission on behalf of the Petitioners in that matter, with regard to legislative intent qua the proceedings relating to revival, it was observed:-

> "iv. A bare reading of the subject notification itself and in particular Clause 5 thereof, shows that where the respondent has been served, the proceedings shall be retained by the Company Court and would not be transferred to the National Company Law Tribunal."

> "vi. In the proceedings relating to winding up, as in the present case, applications under the provisions of section 391 of the Companies Act, 1956, for the revival of the company in provisional liquidation, would constitute an exception, and would a fortiori fall outside the purview of independent proceedings which ought to be transferred to the National Company Law Tribunal, under clause 3 of the subject notification."

The Hon'ble High Court answered the issue (referred supra in para – 4) in affirmative and recorded that the Company Court would exercise exclusive jurisdiction for adjudicating application, in relation to the revival of the Company in provisional liquidation. The Hon'ble High Court declined to transfer the matter it had before itself to the NCLT. Considering the view taken by the Hon'ble High Court and the law as it appears to us considering the facts of the present matter, the NCLT could not exercise jurisdiction for adjudicating the application for scheme of compromise/arrangement which had been moved by the Appellant, in liquidation proceeding on being divorced from the liquidation/winding up proceeding.

14. In the present matter, the Appellant had filed the proceedings before Hon'ble Company Court but it appears to have got transferred to NCLT by an Office letter dated 7th January, 2017 (Page – 77). It does not appear that there was any Judicial Order to transfer. The Appellant cannot be held responsible for the transfer. However, now when the issue appears to be going to the root of jurisdiction, although we propose to remand back the matter to the NCLT, it appears to us that the present proceedings in

NCLT should remain stayed giving opportunity to the Appellant to move the Hon'ble High Court to ensure that Scheme filed in Liquidation/winding up proceeding and Liquidation/winding up proceeding should be before same forum. We have no doubt that a scheme of compromise and arrangement can be filed even when liquidation proceeding is pending but if such application/petition is filed, it would be a proceeding relating to the winding up going on and the same has to be in the same forum.

15. We proceed to pass the following Order:-

ORDER

For reasons discussed above, we set aside the Impugned Order of NCLT and restore TCSP 1 of 2017 on the file of the National Company Law Tribunal, Mumbai Bench with a further direction that the NCLT will give one opportunity to the Appellant to move the Hon'ble High Court of Bombay – Company Court in the light of the Judgement in the matter of ""**Sunil Gandhi and Ors. Vs. A.N. Buildwell Private Limited and Ors."** to ensure that the Scheme and Liquidation/winding up proceedings are before one and same forum. If the Hon'ble High Court passes Order on the judicial side, NCLT will act as per the Order of the Hon'ble High Court as may be passed. If the Appellant does not take benefit of this

opportunity, NCLT will proceed to reject the TCSP for reasons discussed by us in this Judgement.

Interim Order dated 01.10.2018 passed in this appeal at the stage of admission shall stand lapsed.

Parties are directed to appear before NCLT on 26th April, 2019.

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

/rs/nn