



2023:DHC:7415



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision:-10th October, 2023.

+ **CO.PET. 531/2016 & CO.APPL. 1671/2017**

AAKASH ENGINEERS & CONTRACTORS Petitioner

Through: None.

versus

GAURSONS HI-TECH INFRASTRUCTURE (P)

LTD

..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. None appears for the Petitioner or for the Respondent.
3. The present petition has been filed by the Petitioner- Aakash Engineers & Contractors seeking winding up of the Respondent company under Section 433 of the Companies Act, 1956 on the ground of non-payment of Rs.9,77,55,897/-.
4. A brief background of the present petition is that in 2012, the Respondent advertised for contractors for its project situated at, '**5th Avenue, GC-5 at Gaur City, Sector - 4, Greater Noida**'. Initially, another contractor was hired, but due to unsatisfactory performance, the Petitioner was later approached for the project. Consequently, the Petitioner received several work orders for construction as provided at paragraph 9 of the petition. At the time of awarding the said work orders, it is stated that the Respondent assured the Petitioner of timely payments and cooperation. However, the Respondent, as stated by the Petitioner, caused hindrances



during the execution of the said project and failed to make timely payments, resulting in losses for the Petitioner. It is stated that the Petitioner continued and completed the work, incurring a total cost of Rs. 19,03,55,896/-. The Petitioner then raised bills accordingly.

5. The Petitioners submits that due to non-payment by the Respondent, a legal notice dated 1st March 2016 as per Section 434(1)(a) of the Companies Act, 1956. It is stated that the said notice was received by the Respondent, but no reply to the legal notice was received, leading the Petitioner to believe that their claims in the notice should be deemed admitted.

6. Notice was issued in the present petition on 25th July, 2016 and an interim order was passed to the following effect:

“xxx xxx xxx
Till the next date of hearing, the respondent company shall not dispose off or alienate or encumber either directly or indirectly, or otherwise part with possession of any assets of the company to the tune of Rs.9.5 crores, except in the ordinary course of business and for the payment of salaries and statutory dues.”

7. Thereafter the pleadings have been completed. The Respondent-company has filed a reply dated 10th January 2017 to the present petition. The Respondent – company, disputes the fact that a Statutory Notice under Section 434 of the Companies Act, 1956 was served to the Respondent-company as claimed. On the other, a legal notice dated 3rd February 2016 was issued by the Petitioner to invoke the arbitration clause mentioned in the said work orders. Therefore, it is submitted that since the Petitioner has invoked the alternate remedy available to the Petitioner under the Arbitration & Conciliation Act, 1996, the present petition should not be allowed to proceed.



8. The Petitioner has also filed rejoinder dated 25th May 2017, which is on record. From the rejoinder, it appears that there were arbitration proceedings also between the parties.

9. Vide order dated 16th August 2018, the Court directed the parties to file a copy of the arbitration award that was rendered in the arbitration proceedings between the parties. Thereafter, the present petition has been adjourned from time to time. The order sheets from dates 27th July 2022, 2nd November 2022, 18th April 2023 and 23rd August 2023 indicate that either one or none of the parties appeared in the matter.

10. Since then, this Court has not proceeded with the present petition. Further, Provisional Liquidator has not been appointed in the present petition.

11. The Supreme Court in ***Action Ispat and Power Limited v. Shyam Metals and Energy Limited (2021) 2 SCC 641***, has held that winding up proceedings which have not reached an advanced stage ought to be transferred to the National Company Law Tribunal (NCLT). The relevant extract of the said decision is extracted as under:

“22. 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 preadmission 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.

12. This Court has also examined the legal position in respect of cases where the winding up petition is not at an advanced stage in judgement dated 25th July, 2023, ***Citicorp International Limited v. Shiv-Vani Oil & Gas Exploration Services Limited, 2023:DHC:5206.***

13. In the opinion of this Court, since hardly any proceedings have been taken towards winding up of the company, the petition no longer deserves to be continued before this Court. The petition is itself at the very nascent stage and no substantive orders have been passed towards winding up of the company.

14. In view of the Section 434 of the Companies Act, 2013 and Companies (Transfer of Pending Proceedings) Rules, 2016, and the settled



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legal position in *Action Ispat (supra)*, the present petition is transferred to the NCLT.

15. Let the electronic record of this petition be transmitted to the NCLT within a period of one week by the Registry.

16. Interim order to continue till the first hearing of the present petition by the NCLT Bench.

17. Let the parties appear before the NCLT on 23rd November, 2023.

18. It is made clear that the Court has not examined the merits of the case of either of the parties. The petitioner is free to avail of its remedies in accordance with law, in respect of any alleged dues from the Respondent.

PRATHIBA M. SINGH
JUDGE

OCTOBER 10, 2023

Rahul/dn