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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CO.PET. 58/2014**

M/S TRADING ENGINEERS INTERNATIONAL LTD

..... Petitioner

Through: Mr. Arindam Dey, Adv.

versus

M/S GAMA INFRAPROP (P) LTD

..... Respondent

Through: Mr. Samyak Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

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05.03.2024

1. The present petition has been preferred under Section 439 read with Sections 433 (e) & (f) and 434(1)(a) of the Companies Act, 1956 and Rule 95 of the Companies (Court) Rules, 1959, seeking winding up of the respondent company – M/s. Gama Infraprop (P) Ltd., on the ground of non-payment of dues amounting to Rs.6,10,35,221/-.

2. Briefly stated, the respondent company engaged the petitioner company for the purpose of supply of certain goods and civil erection/piping work at Kashipur, Udham Singh Nagar District, Uttarakhand and placed two purchase orders dated 29.12.2011 in furtherance of execution of the said work. Pursuant to the same, the petitioner company commenced executing the work and raised various bills/invoices from time to time as against the respondent company. It is stated that the total bills raised by the petitioner company amounted to Rs. 11,17,79,221/- out of which the respondent made part-payment of Rs. 5,07,44,000/- in the period starting from 31.03.2012 up till 29.10.2012 and that at present, an amount of Rs. 6,10,35,211/- is



outstanding and remains unpaid. Since the respondent failed to discharge its liability despite repeated reminders, the petitioner company served a legal notice under the Companies Act, 1956, dated 01.07.2013 upon the respondent company, calling upon them to make payment of the legally due outstanding amount along with interest @ 18%.

3. The respondent company replied to the afore-mentioned legal notice vide letter dated 15/07/2013, stating that they are willing to clear the outstanding dues subject to the withdrawal of the legal notice. Thereafter, a meeting was held between the parties on 11.10.2013 wherein the parties arrived at a settlement and an execution plan for the payment of the outstanding amount as also a schedule of work was drawn up and the same were sent to the respondent company vide email dated 17.10.2013, which was accepted and approved by the respondent company vide email dated 31.10.2013. Even subsequent to arriving at a settlement, the respondent company did not discharge its liability and did not repay the outstanding amount to the petitioner company, hence, the present petition was preferred by the petitioner company, seeking winding up of the respondent company.

4. From a perusal of the record it is borne out that these winding up proceedings are a complete non-starter. It appears that no effective orders have been passed in this matter so much so that not even a Provisional Liquidator has been appointed to the respondent company.

5. It would be expedient to consider that during the pendency of the present petition the Insolvency and Bankruptcy Code, 2016⁴ has

⁴ IBC



been enacted, along with the introduction of Companies Act, 2013⁵. Section 434 of the said Act has to be considered, which provides for the transfer of proceedings relating to winding up, pending before High Courts, to the National Company Law Tribunal⁶, and reads as under:

“434. Transfer of certain pending proceedings

(1) On such date as may be notified by the Central Government in this behalf,-

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act; (b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order: Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days; and

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

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts; shall be dealt with

⁵ The Act

⁶ NCLT



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 subsection (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.”

6. Here it would be apposite to invite reference to decision of the Supreme Court in **Action Ispat and Power Private Limited v. Shyam Metalics and Energy Limited**⁷, the relevant extract of which is provided below:

“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.”

[Underlined portions emphasized]

⁷ (2021) 2 SCC 641



7. The decision of the Supreme Court in *Action Ispat (supra)* has been relied upon by this court in **Citicorp International Limited v. Shiv-Vani Oil & Gas Exploration Services Limited**⁸ wherein it was held that winding up proceedings pending before High Courts, which are at a nascent stage and have not progressed to an advanced stage, ought to be transferred to the NCLT. It is but evident that the present company petition has not yet reached an advanced stage and no substantive orders have been passed towards the winding up of the respondent company.

8. In light of the foregoing discussion the present winding up proceedings deserve to be transferred to the NCLT.

9. The parties are directed to appear before the NCLT on 22.04.2024.

10. The electronic records of this Court shall be transmitted to the Registrar NCLT within one week along with a copy of today's order.

11. The present company petition, along with pending applications, if any, are disposed of accordingly.

DHARMESH SHARMA, J.

MARCH 5, 2024/sa

⁸ CO.PET. 446/2013