



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on : 04 January 2024**
Judgment pronounced on : 24 January 2024

+ **CO.PET. 510/2016**

PIVOT MULTIFAR INDUSTRIAL SERVICES LTD.

..... Petitioner

Through: **Mr. Vivek Sharma and Mr.
Pranjal Sharma, Advs.**

versus

DSC LIMITED

..... Respondent

Through: **Mr. Vineet Tayal and Ms.
Nishtha Wadhwa, Advs.for R-4**

CORAM:

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. The instant Company Petition has been moved under Section 433(e) read with Sections 434 and 439(1)(b) of the Companies Act, 1956 seeking winding up of the respondent company – **M/s DSC Limited**. The petitioner company has moved the present company petition against the respondent company on the basis of non-payment of dues amounting to Rs. 67,70,984/- arising out of a contract for services entered into between the parties.

FACTUAL BACKGROUND:

2. Briefly stated, the petitioner company is engaged in the business of providing manpower i.e. labor, supervisors and technical persons for construction and other works, and had been contracted by the



respondent company for deploying manpower at their various sites in the year 2008. Said facilities were formalized vide contract dated 01.11.2008 bearing Ref. No. DSC-UP/Link/2008, which contained the terms and conditions entered into between the parties. The contract between the parties was renewed on various occasions thereafter on 01.08.2009, 01.04.2010, 29.09.2010, 01.01.2011 and 01.03.2011. Per the contract, services were provided by the petitioner company regularly for time to time for which the respondent company made regular payments up until 2012, and thereafter the respondent company became negligent in clearing its outstanding dues despite repeated reminders.

3. It is stated that the petitioner company sent emails dated 17.09.2012 and 04.10.2012 to the respondent company, requesting them to clear the outstanding amount of Rs. 67.7 lacs, however, the amount outstanding remained unpaid. Furthermore, it is the case of the petitioner that the respondent company acknowledged the amount due to the petitioner, vide email dated 09.04.2013, written by one, Mr. Nitin Goel of the respondent company, stating that the amount of Rs. 67,70,984/- was in the books of accounts of the respondent company, as outstanding dues payable to the petitioner company.

4. Since the respondent company failed to clear the dues and discharge its liability, the petitioner company was constrained to serve a statutory legal notice dated 11.11.2013, upon the respondent company, as provided for under Section 434 of the Companies Act, 1956. Since the notice was not replied to by the respondent company,



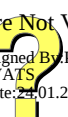
and neither was the outstanding amount paid to the petitioner company, a winding up petition was preferred against the respondent company, bearing CO.PET. 197/2014. Thereafter, a reply was filed by the respondent company urging its objection to the winding up petition on the ground that the legal notice under Sections 433 and 434 were not served upon the respondent at its registered office.

5. It may be apposite to note that the parties were directed to appear before the Delhi High Court Mediation and Conciliation Centre vide order dated 16.11.2015. The matter was listed for mediation on several dates – 04.12.2015, 21.12.2015 and finally 05.01.2016. However, the mediation was not successful.

6. Subsequent to the mediation failing, the petitioner company moved CO.APPL. 941/2016, seeking permission of this court to withdraw the winding up petition without prejudice, and serve afresh, a legal notice upon the respondent at its registered office. The same was allowed vide order of this court dated 15.03.2016, after which a legal notice under Section 433 read with 434 of the Companies Act, 1956 was served upon the respondent company at its registered office. Following this, present winding up petition was moved before this court on 07.04.2016.

SUBMISSIONS:

7. Vide order dated 04.12.2023, this court had raised a query upon the parties – as to why the present petition does not stand to be





transferred to the National Company Law Tribunal¹. In this respect, it has been submitted on behalf of the respondent company that those petitions which are pending admission and have been served upon the respondent, shall continue to remain with the High Court, pending their admission. Reliance has been placed on a judgement of the Bombay High Court in **West Hills Reality Private Limited v. Neelkamal Realtors Tower Pvt. Ltd.**² In furtherance of this submission, learned Counsel for the respondent company has also brought the attention of this court to Rule 5(1) of the Companies (Transfer of Pending Proceedings) Rules, 2016³; per which all winding up petitions moved under Section 433(e) of the Companies Act, 1956 that are (i) on the ground of inability to pay debts; and (ii) where the petition has not been served on the respondent as per Rule 26 of the Companies (Court) Rules, 2016, stand to be transferred to the NCLT. Further, reliance has been placed on another judgement of the Bombay High Court – **Commissioner of Income Tax – 8, Mumbai v. Registrar of Companies, Mumbai & Ors.**⁴, wherein the court noted that those winding up petitions, moved under Section 433(e) of the Companies Act, 1956, which have not been served by the petitioner upon the respondent on or before 15.12.2016, which is the date on which the 2016 Rules came into effect, stand to be transferred to the NCLT as provided for under Rule 5 of the 2016 Rules. In the aforesaid judgement, it was further held that the *sine qua*

¹ NCLT

² 2016 SCC OnLine Bom 10038

³ 2016 Rules

⁴ Company Petition 643/2014 dated 02.05.2017



non for transfer of a winding up petition is the non-service of a pending petition. In this regard, it is the case of the respondent company that the petitioner had served a copy of the petition to the respondent company, to which a reply was also duly filed, prior to the cut-off date of 15.12.2016.

8. It has also been submitted on behalf of the respondent company that the present petition is not maintainable on the ground that the claims put forth by the petitioner company have been rendered unrecoverable and are as such barred by limitation. This submission has been urged in the context of the fact that along with the present petition, the petitioner company has also filed a Civil Suit for recovery bearing No. 5790/2016 before the learned District Court at Saket. In the said Suit, the respondent had filed an Application under Section 8 of the Arbitration & Conciliation Act, 1996 which came to be disposed of vide order dated 17.12.2016, and liberty was granted to the petitioner to initiate arbitration proceedings. However, since the petitioner failed to initiate any arbitration proceedings, it is stated that the claims of the petitioner no longer remain a payable debt and have become unrecoverable. With regards to this submission, reliance has been placed on the judgement of the Bombay High Court in the case of **The Jayabharat Credit Limited v. Jalgaon Re-rolling Industries Ltd.**⁵ wherein the court held that once a debt becomes unrecoverable as a result of the Suit being barred by limitation, the same ceases to be a payable debt. Further that, where a debt becomes barred by

⁵1996 SCC OnLine Bom 621



limitation, a winding up petition based on such debt shall not be liable to be admitted and will therefore, have to be dismissed.

ANALYSIS & DECISION:

9. At the outset, it is apposite to point out that the present winding up petition is a complete non-starter. A perusal of the record shows that the proceedings are at a very nascent stage, so much so that neither a Provisional Liquidator nor an Official Liquidator has been appointed to the respondent company. As such, no substantive orders have been passed in these company petitions.

10. In view of the enactment of the Insolvency and Bankruptcy Code, 2016 as well as the Companies Act, 2013, it is the opinion of this court that the present petition does not deserve to continue before this court, and it would be appropriate for the same to be transferred to the National Company Law Tribunal⁶. In this regard, it is relevant to consider Section 434 of the Companies Act, 2013 which provides for the transfer of proceedings relating to winding up, pending before High Courts, to the NCLT, 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

⁶ NCLT



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

(b)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 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.”

11. Reliance may also be placed on the decision of the Supreme Court in the case titled **Action Ispat and Power Limited v. Shyam Metalics and Energy Limited**⁷, whereby it was held that those winding up proceedings pending before High Courts, which have not

⁷ (2021) 2 SCC 641



progressed to an advanced stage, ought to be transferred to the NCLT.

The relevant extract of the said decision is as follows:

“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. In view of the foregoing discussion, it is the opinion of this Court, that since no substantive proceedings have been undertaken towards winding up of the company, the present petition does not deserve to be continued before this Court. The present company petition is at a very nascent stage and no effective orders as such have been passed towards the winding up of the company. Before parting



with this matter, it would suffice to state that the three decisions⁸ have no bearing on the matters in issue in view of categorical directions of the Supreme Court in the above noted case of *Action Ispat and Power Limited (supra)*.

13. In view of the above, the present company petition as well as pending applications, if any, is accordingly disposed of.

14. Hence, the instant petitions are transferred to the NCLT. Parties to appear before the NCLT on 01.04.2024. The interim orders passed by this Court in these petitions, if any, shall continue till the said date.

15. It is left to the NCLT to consider the matter and pass appropriate orders in accordance with law.

16. The electronic record of the instant petitions be transmitted to the NCLT within a period of one week by the Registry. List before the NCLT on 01.04.2024.

DHARMESH SHARMA, J.

JANUARY 24, 2024

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⁸ West Hills Reality Private Limited, Commissioner of Income Tax-8, Mumbai, The Jayabharat Credit Limited