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

\+ CO.PET. 590/2012 & CO.APPL. 2443/2012, CO.APPL. 2444/2012, CO.APPL. 1583/2013, CO.APPL. 2788/2016, CO.APPL. 4251/2016, CO.APPL. 698/2023

DRAEGERWERK AG & CO. KGAA ..... Petitioner
Through: Ms. Shweta Bharti and Ms. Sonali Khanna, Advs.

versus

M/S ION BIO MED I-CARE PVT LTD ..... Respondent
Through: Ms Srishty Kaul, Mr. Harish Nadda, Mr. Kumar Shashank and Mr. Anant Singhi, Advs.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

O R D E R

% **20.02.2024**

1. This company petition has been instituted under Section 433(e) read with 434 and 439 of the Companies Act, 1956, seeking winding up of the respondent company – **M/s Ion Bio Med I-Care Pvt. Ltd.**, and is predicated on the arbitral award dated 29.06.2012 whereby the petitioner/decree holder was awarded a sum of EUR 17,67564.13/- along with interest @ 18% per annum payable from 18.11.2004, as also other costs, such that the total sum payable by the respondent company amounted to Rs. 32,22,32,961.26/- along with due interest.

2. Briefly stated, the parties entered into a 'Distributor Agreement' dated 22.02.1999, whereby the respondent company was appointed as an 'Exclusive Distributor' for the distribution of certain medical equipment manufactured by the petitioner company. It is the case of

the petitioner company that the respondent company made irregular and ad-hoc payments towards the invoices raised, as a result of which, the petitioner company was constrained to terminate the Distributor Agreement, vide letter dated 18.06.2003. Thereafter, the petitioner company served a legal notice dated 06.07.2004 to the respondent company calling upon them to remit the due balance payable on date, failing which the petitioner company would invoke the arbitration clause of the agreement. Despite said legal notice, the respondent company failed to repay the outstanding amount, and consequently the dispute was referred for arbitration to the International Chamber of Commerce and an award dated 29.06.2012 was passed in favour of the petitioner company.

3. Thereafter, the petitioner company moved OMP No. 777/2012 before this Court, under Section 9 of the Arbitration and Conciliation Act, 1996[1], as an interim measure of protection against the respondent company. The aforementioned OMP was disposed of vide order of this Court dated 17.10.2012 and thereafter, the petitioner company instituted an Execution Petition under Section 36 of the A&C Act, read with Order XXI Rule 11(2) of the Code of Civil Procedure, 1908 bearing EX.P. No. 346/2012, for execution of the award dated 29.06.2012. It is also relevant to note that a statutory legal notice under Sections 433 and 434 of the Companies Act, 1956 dated 19.11.2012 was served upon the respondent company. It is stated that the petitioner company did not receive a response to the said notice and nor was it in receipt of the amount due from the respondent company, hence, the present company petition seeking winding up of

[1] A&C Act

the respondent company was preferred. On a perusal of the record, it is brought out that the petitioner sought enforcement of the award and preferred a petition bearing EX.P. No. 271/2014 before this court in furtherance of the same, which came to be disposed of vide order dated 28.04.2023.

4. It is but evident that the respondent company is unable to repay its debt in the normal and ordinary course of its business. However, from a perusal of the record it is borne out that this winding up petition has been a complete non-starter so much so that neither a Provisional Liquidator nor an Official Liquidator have been appointed to the respondent company. During the course of these winding up proceedings, the petitioner company has also moved an application for dissolution of the respondent company, bearing CO.APPL. 698/2023, under Section 481 of the Companies Act, 1956 and the same is pending. The said fact has also been brought to the notice of this Court by the learned counsel for the petitioner, who urged that since the respondent company is virtually defunct and carrying no business nor has any available funds, it would be rather reasonable for the respondent company to be finally dissolved by this Court. Although, this would be practical approach, this Court is now left with no jurisdiction to pass a final order for the dissolution of the company.

5. In this regard, it is relevant to note that during the pendency of these proceedings, the Insolvency and Bankruptcy Code, 2016 as well as the Companies Act, 2013, have since been enacted. In light of such enactments, it is the opinion of the court that the present petition does not deserve to continue before the court, and it would be appropriate for the same to be transferred to the National Company Law

Tribunal[2]. In this regard, it is relevant to consider Section 434 of the Companies Act, 2013 which deals with 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 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.]

[2] NCLT

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. At this stage, it would also be relevant to place reliance on the decision of the Supreme Court in the case titled **Action Ispat and Power Limited v. Shyam Metalics and Energy Limited**[3] the relevant extract of which reads 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. <u>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</u>."

7. The above noted decision of the Supreme Court has been relied upon by this court in **Citicorp International Limited v. Shiv-Vani**

[3] (2021) 2 SCC 641

Oil & Gas Exploration Services Limited[4] 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. In view of the above, the present company petition as well as pending applications, if any, are disposed of.

8. Hence, the instant petition is 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.

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

10. 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.

FEBRUARY 20, 2024/*sp*

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[4] CO.PET. 446/2013