



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

% **Judgment reserved on : 25 April 2024**
Judgment pronounced on: 14 May 2024

+ **CO.PET. 299/2015 & CO.APPL. 1353/2015, CO.APPL. 1354/2015**

GURBAKSH SINGH BA, BULIDERS PRIVATE LIMITED

..... Petitioner

Through: **Mr. Tanmaya Mehta, Mr. Ravi Kapoor and Mr. Rishav Ambastha, Advocates.**

versus

FORTIS HOSPITAL LIMITED ESCORT HEART INSTITUTE & RESEARCH CENTRE Respondent

Through: **Mr. Anish Kapur, Ms. Pankhuri Budhiraja, Advocates**

+ **CO.PET. 354/2015 & CO.APPL. 1539/2015, CO.APPL. 1540/2015**

GURBAKSH SINGH BA BUILDERS PRIVATE LIMITED

..... Petitioner

Through: **Mr. Tanmaya Mehta, Mr. Ravi Kapoor and Mr. Rishav Ambastha, Advocates.**

versus

FORTIS HOSPITAL LIMITED Respondent

Through: **Mr. Anish Kapur, Ms. Pankhuri Budhiraja, Advocates**



CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. The present company petitions have been preferred under Section 433 of the Companies Act, 1956¹ read with Sections 434 and 439 of the Act by the petitioner company, seeking winding up of the respondent company on the grounds of non-payment of outstanding dues amounting to Rs. 2,48,39,128/- in CO.PET. 299/2015 and Rs. 2,34,53,258/- in CO.PET. 354/2015, along with due interest.

CO.PET. 299/2015

2. Briefly stated, the respondent company issued a work order dated 15.05.2014, bearing No. LDH-1/Addl Work/0101/R-1, in favour of the petitioner company for the purposes of carrying out certain work at Fortis Hospital, Ludhiana; and said work was completed by the petitioner to the satisfaction of the respondent company within the time stipulated in the work order.

3. Pursuant to the work done, the petitioner company raised bills dated 14.08.2014 and 20.08.2014, for a sum of Rs. 2,52,59,522/- and delivered the same to the office of the respondent company for payment. It is the case of the petitioner that vide email dated 21.08.2014, the respondent company confirmed the quantity of the work executed, and assured the petitioner that the amount due will be paid duly. However, despite repeated reminders, the respondent company failed to release the amount due, and therefore, the petitioner

¹ The Act



was constrained to serve a legal demand notice dated 16.10.2014 upon the respondent company. Thereafter, the petitioner company served a statutory legal notice dated 13.11.2014, under Section 271 (1)(a) read with Section 271 (2) (a) & (c) of the Companies Act, 2013, upon the respondent company.

4. The above-noted legal notices dated 16.10.2014 and 13.11.2014, were replied to by the respondent company through its counsel on 11.12.2014 and 26.12.2014 respectively, and suffice to state that although the respondent company admitted issuance of the Work Order, however, they denied any further liability to make payment to the petitioner stating that the payment had already been made under the MoU² dated 22.05.2014, and that the Work Order in question was an internal adjustment issued for the purpose of accounting. In this regard, it is stated on behalf of the petitioner that the MoU dated 22.05.2014 was with respect to other Agreements dated 03.12.2010 and 03.03.2011, and that the same had no relation to the work executed by the petitioner under the Work Order dated 14.05.2014.

CO.PET. 354/2015

5. This petition constitutes similar facts as in the CO.PET. 299/2015, except that it is in respect of a Work Order dated 12.05.2014 issued in favour of the petitioner. Thereafter, the work is stated to have been executed by the petitioner and a bill for a sum of Rs. 2,34,53,258/- was raised. However, the said amount due to the petitioner remained unpaid. Since the respondent company

² Memorandum of Understanding



failed/neglected to discharge its liability, the petitioner was constrained to serve a statutory legal notice dated 03.02.2015, calling upon the respondent company to repay the amount due. The respondent company in its reply dated 18.02.2015, stated that the Work Order dated 12.05.2014 had been cancelled and a fresh Work Order dated 14.05.2014 was thereafter issued, which too was issued for the purposes of internal accounting, and adjusting the amount already paid under the MoU dated 22.05.2015.

ANALYSIS & DECISION:

6. On a perusal of the record, it is borne out that the present winding up petitions are a complete non-starter. These proceedings are at a nascent stage, so much so that neither a Provisional Liquidator nor an Official Liquidator has been appointed to wrest charge over the properties and affairs of the respondent company. As such, no substantive orders have been passed in these company petitions.

7. In view of the same, vide order dated 22.07.2022, this Court called upon the petitioner to make submissions as to why these petitions should not be transferred to the National Company Law Tribunal³.

8. In this regard, submissions have been advanced by the learned Counsels for the parties. It has been urged on behalf of the learned Counsel for the Petitioner that the objective sought to be achieved by the provisions relating to the transfer of pending winding up proceedings, specially the fifth *proviso* to Section 434, is to ensure that parallel proceedings do not ensue; and that as regards the present

³ NCLT



case, no proceedings have been instituted before the NCLT as yet. Further, it is submitted that the present company petitions are at a stage which is pre-admission but post-notice, and that a petition at such a stage is not mandated to be compulsorily transferred to the NCLT but at the discretion of the Court, which discretion could only be exercised in case an appropriate application has been moved seeking transfer of the petition. It is thus urged that since no such application seeking transfer has been moved in the present petition, the matter should continue before this Court and not be transferred to the NCLT. Learned counsel for the petitioner has placed reliance on the decisions in: (i) **Kaledonia Jute and Fibres Private Limited v. Axis Nirman and Industries Limited & Ors.**⁴; and (ii) **Action Ispat and Power Private Limited v. Shyam Metalics and Energy Limited**⁵.

9. *Per contra*, it is submitted on behalf of the respondent company that in the decision of the Supreme Court in *Action Ispat (supra)*, it has been clearly spelled out that at any stage, even subsequent to the admission of a winding up petition, a company petition pending before the High Court can be transferred to the NCLT, till such time no irreversible steps have been taken towards the winding up of the company against who liquidation is sought. Further, as regards the requirement of moving an application for transfer of proceedings, it is submitted that the relevant provision of the statute itself uses the word ‘may’, and further that in the present petitions, this Court itself posed

⁴ (2021) 2 SCC 403

⁵ (2021) 2 SCC 641



a question to the petitioners as to why the present proceedings should not be transferred to the NCLT, and therefore, there arises no need for an application to be moved for the same.

10. I have heard the learned Counsels for the parties and have also perused the record.

11. At the outset, it would be apposite to reproduce 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 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;

(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 Court 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 sub-section (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.]

Provided further that any party or parties to any proceedings relating to the winding up of companies pending before the any Court immediately before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, may file an application for transfer of such proceedings and the Court may by order transfer such proceedings to the Tribunal and the proceedings so transferred shall be dealt with by the Tribunal as an application for initiation of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 (31 of 2016).

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.]

12. The aforesaid provision has been interpreted by the Supreme Court in the case titled **Action Ispat (supra)**, whereby it was held that those winding up proceedings pending before High Courts, which have not 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.”

(Underlined portions emphasized)

13. Thus, what follows is that the entire statutory scheme in respect of winding up of companies, as also a catena of judgements has been considered by the Supreme Court in holding that even post admission, such a petition may be transferred by the High Court to the NCLT, as long as no irreversible steps have been taken pursuant to the winding up of the company concerned. Further, the submission of the learned Counsel for the petitioner that no application seeking transfer of the present petitions to the NCLT has been moved, cannot be countenanced. A decision to transfer the matter to the NCLT is a matter of jurisdiction of the Court, which transfer can be effected *suo moto* by this Court and mere moving or non-moving of an application by any of the parties seeking such transfer, will not be decisive.



14. 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 petitions can not be allowed to be continued before this Court. Hence, the instant petitions are transferred to the NCLT. It is left to the NCLT to consider these matters on merits and pass appropriate orders in accordance with law.

15. The electronic record of the instant petitions be transmitted to the NCLT within a period of one week by the Registry.

16. List before the NCLT on 08.07.2024. The parties herein are directed to appear before the NCLT on the said date. The interim orders passed by this Court in these petitions, if any, shall continue till the said date.

17. In view of the aforesaid, the instant company petitions as well as pending applications, if any, are accordingly disposed of.

DHARMESH SHARMA, J.

MAY 14, 2024

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