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

% **Judgment reserved on : 16 April 2024**
Judgment pronounced on: 07 May 2024

+ **CO.PET. 594/2015 & CO.APPL. 2379/2015**

ALLEGIS SERVICES (INDIA) PVT. LTD. Petitioner
Through: **Mr. Angad Kochhar & Mr.**
Sparsh Prasad, Adv.

versus

OLIVE TELECOMMUNICATION PRIVATE LTD.
..... Respondent
Through: **Mr. Nitish Kant, Adv.**

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. The instant company petition has been preferred under Sections 433 (e) and (f), 434 and 439 of the Companies Act, 1956, praying that the respondent company – M/s. Olive Telecommunication Private Ltd., be wound and is predicated on the non-payment of the principal amount of Rs. 89,48,638/- . In this regard, it is stated that the audited balance sheet of the respondent company, as filed with the Registrar of Companies, reflects a liability of Rs. 24,73,438/- payable to the petitioner; however, the same does not reflect the total due amount as it does not account for the amount of Rs. 50,43,071/- along with interest @15% per annum, awarded vide the Arbitral Award dated 30.04.2014 passed in CMP No. 22/2014, relating to the same subject matter.

2. Briefly stated, the parties entered into a Master Service



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Agreement dated 01.12.2010 whereby the respondent company agreed to utilize the marketing and sales services of the petitioner company, initially for a period of 3 months, which came to be extended up to 15.05.2011. It is stated that pursuant to the services rendered, the petitioner raised (6) invoices, of which payment was made by the respondent company with respect to only the first invoice.

3. Despite repeated reminders, the respondent company failed/neglected to discharge its liability owed to the petitioner, and consequently, the petitioner invoked arbitration proceedings against the respondent company. Thereafter, an Award dated 30.04.2014 came to be passed in the said proceedings, bearing CMP No. 22/2014 and an amount of Rs. 76,12,526 was adjudged to be due and payable by the respondent company, which included interest @ 15% per annum as also costs. It is brought forth that since the amount awarded remained unpaid, the petitioner was constrained to serve a statutory legal notice upon the respondent company, calling upon them to make good the liability owed within a period of three weeks, failing which winding up proceedings would be instituted against the respondent company.

4. 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 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 this company petition.

5. In view of this, vide order 21.07.2023, the parties were directed



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to file written submissions with regards to the date of service of the present petition, as also whether or not the present matter is liable to be transferred to the National Company Law Tribunal¹. Pursuant to the said order, written submissions have been filed on behalf of the petitioner. It has been urged therein that in the present petition, service was effected on 29.10.2016, which date is prior to the coming into effect of the Companies (Transfer of Pending Proceedings) Rules, 2016,² which came into force on 15.12.2016. As regards the transfer of the present petition to the NCLT, it is submitted that the aforementioned rules provide for two circumstances, namely compulsory transfer and transfer at the discretion of the Company Court. As regards compulsory transfer, it is stated that Rule 5 of the Transfer Rules stipulates that those proceedings wherein the petition has not been served must be compulsorily transferred to the NCLT. However, since the service was effected in the present petition prior to the coming into force of the Transfer Rules, the said provision pertaining to compulsory transfer would not apply to the present petition. As regards the transfer of a petition at the discretion of the Company Court, reliance has been placed on the fifth *proviso* to Section 434 (1)(c) of the Companies Act of 2013, and it is stated that an application seeking such transfer is a pre-condition, and since no such application has been filed in the present proceedings, no occasion arises to entertain a plea for transfer of the present matter to the NCLT.

¹ NCLT

² Transfer Rules



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6. It would be expedient to consider 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 view of the same, 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 Tribunal. 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 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



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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.]

7. Reliance may also be placed on the decision of the Supreme Court in the case titled **Action Ispat and Power Private Limited v. Shyam Metalics and Energy Limited**³, 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

³ (2021) 2 SCC 641



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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.”

8. 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 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 submissions advanced by learned counsels for the parties cannot be countenanced, in view of categorical directions of the Supreme Court in the above noted case of



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Action Ispat (supra). 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.

9. Hence, the instant petition is transferred to the NCLT. 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 petition be transmitted to the NCLT within a period of one week by the Registry.

11. 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 this petition, if any, shall continue till the said date.

12. In view of the aforesaid, the present company petition as well as pending applications, if any, are accordingly disposed of.

DHARMESH SHARMA, J.

MAY 07, 2024

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