

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on : 09 April 2024**
Judgment pronounced on : 17 May 2024
+ CO.PET. 88/2016 & CO.APPL. 381/2016, CO.APPL.
382/2016, CO.APPL. 1514/2018

ARABIAN OILFIELD SUPPLIERS & SERVICES... Petitioner
Through: Mr. Saurabh Jain & Mr. Prayag
Jain, Advs.

versus

GREKA DRILLING (INDIA) LIMITED Respondent
Through: Mr. Yogesh Jagia, Mr. Amit
Sood & Mr. Chandan Dutta,
Advs.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. The instant company petition has been instituted under Section 433 (e) and (f) read with Sections 434 and 439 of the Companies Act of 1956,¹ seeking winding up of the respondent company – M/s. Greka Drilling (India) Limited, predicated on the non-payment of outstanding dues to the tune of US\$ 723,193.03/- along with due interest.
2. Briefly stated, the respondent company is engaged in the business of providing drilling services for the oil and gas sector, and is incorporated as a „Foreign Company“ under the Companies Act, 1956.

¹ The Act

It appears that pursuant to certain discussions and negotiations, the respondent company placed a purchase order bearing No. GDIL PO 2014255 dated 11.12.2014, with the petitioner company, for the supply of CIF Kolkata Port casing material of desired specifications. The said purchase order was for an amount of US\$ 738,380/-. It is stated that subsequent to the receipt of the purchase order, certain terms of the agreement as regards the charges of delayed payments were not agreeable to the petitioner company, and therefore, correspondence ensued between the parties and consequently, it was agreed vide e-mail dated 16.12.2014 that charges of 1% per month would be payable for delayed payments and liquidated damages were waived off. Thereafter, the respondent placed another purchase order bearing No. GDIL PO2014277 dated 24.12.2014, for the supply of casing material of a different specification, and said order amounted to US\$ 199,466,50/-.

3. It is stated on behalf of the petitioner that it duly supplied the goods to the respondent company as per the purchase orders and raised certain invoices against the same dated 29.12.2014, 05.02.2015 and 15.02.2015 for a total amount of US\$ 818,496.58/-. Further, it is stated that except the amount of US\$ 147,111.66/-, paid by the respondent company in instalments, and the last payment having been made in August 2015, the respondent company did not make any further payments. Thereafter, the petitioner company raised certain further invoices in respect of delay in payments and the same amounted to US\$ 66,957.34/-.

4. It appears that the respondent company repeatedly gave assurances to the petitioner company that the payment of outstanding dues would be made at the earliest. However, despite several reminders, the respondent company failed/neglected to discharge its liability, and consequently, the petitioner company was constrained to serve a statutory legal notice dated 15.10.2015 under Section 434 of the Act, calling upon the respondent company to make good the payment of US\$ 723,193.03 along with interest @ 18% per annum with effect from the dates of the respective invoices raised. It is stated that the said legal notice was received by the respondent company on 23.10.2015, and yet they did not respond to the same, nor did the respondent company comply with the demand raised therein and failed/neglected to pay the sum demanded.

5. On a perusal of the record, it is borne out that the present company petition was admitted vide order dated 14.08.2018, and the Official Liquidator attached to this Court was appointed as the Liquidator of the respondent company. However, subsequent to this, no substantive orders have been passed in furtherance of winding up of the respondent company and no such steps have been taken by the Official Liquidator which may suggest that these proceedings are at an advanced stage. In fact, apart from the appointment of a Liquidator, the present proceedings have been a complete non-starter.

6. At this stage, it is also necessary to take note that the respondent company had preferred an appeal bearing CO.APP. 25/2018 wherein it challenged the present winding up petition. The respondent company took the stand that since it is a Foreign Company, the winding up

proceedings instituted against it are not maintainable. The above-noted appeal was disposed of by a Division Bench of this Court vide order dated 12.11.2018, granting liberty to the respondent company (appellant therein) to file a review petition. Thereafter, the respondent company moved an application bearing CO.APPL. 1514/2018, seeking a review of the order dated 14.08.2018, and in view of the Division Bench order dated 12.11.2018, this Court vide order dated 21.09.2022, directed the parties to make submissions on the question *„whether the petitioner complied with the conditions as prescribed in Section 583 of the Companies Act, 1956, for the respondent is a foreign company not registered in India.’*

7. It is pertinent to mention here that as per Section 2(10) of the Companies Act, a company means a company as defined under Section 3. Section 3 defines a company under sub-Clause (i) to mean a company formed and registered under this Act or an existing company as defined in clause (2). Clause (2) pertains to existing companies which were incorporated under the earlier provisions pertaining to company matters. In the 1956 Act, Section 582 defines an “unregistered company” as under:

“582. MEANING OF "UNREGISTERED COMPANY"

For the purposes of this Part, the expression "unregistered company" - (a) shall not include - (i) a railway company incorporated by any Act of Parliament or other Indian law or any Act of Parliament of the United Kingdom ; (ii) a company registered under this Act ; or (iii) a company registered under any previous companies law and not being a company the registered office whereof was in Burma, Aden or Pakistan immediately before the separation of that country from India ; and (b) save as aforesaid, shall include any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association or company, as

the case may be, is presented before the 1 [Tribunal]. 1. Substituted for "Court" by the Companies (Second Amendment) Act, 2002 (w.e.f. a date yet to be notified)”

8. In order to determine whether or not the present winding up petition is maintainable, it would be expedient to consider the relevant provision, being Section 583 of the Companies Act, 1956, which provides for the winding up of unregistered companies, and is reproduced herein under:

“583. WINDING UP OF UNREGISTERED COMPANIES

(1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the exceptions and additions mentioned in sub-sections 1 [(3)] to (5).

(2) 2 [* * *]

(3) No unregistered company shall be wound up under this Act voluntarily [by the Tribunal].

(4) The circumstances in which an unregistered company may be wound up are as follows : (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs ; (b) if the company is unable to pay its debts ; (c) if the [Tribunal] is of opinion that it is just and equitable that the company should be wound up.

(5) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts –

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the [Tribunal] may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor ;

(b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer

of the company or by otherwise serving the same in such manner as the [Tribunal] may approve or direct, the company has not, within ten days after service of the notice, -

- (i) paid, secured or compounded for the debt or demand ; or
- (ii) procured the suit or other legal proceeding to be stayed ; or
- (iii) indemnified the defendant to his satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same ;
- (c) if execution or other process issued on a decree or order of any court [or Tribunal] in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied in whole or in part ;
- (d) if it is otherwise proved to the satisfaction of the [Tribunal] that the company is unable to pay its debts.”

9. A careful perusal of the aforesaid provision would clearly bring out that the respondent company is an unregistered company and the circumstances under which an unregistered company may be wound up are indicated vide sub-clause (4) to Section 583 of the Companies Act. *A fortiori*, since the respondent company has been unable to pay its debts, winding up proceedings against the company are clearly maintainable. Incidentally, even an unregistered company is amenable or subject to winding up proceedings under Part-II comprising of Section 375 of the newly enacted Companies Act, 2013 and sub-Clause 3(b) is *pari materia* to Section 583 of the old Companies Act, 1956.

10. In taking the above view, reference can be invited to the decision of the Supreme Court in the case of **Rajah of Vizianagram v. Official Receiver and Official Liquidator**² wherein Section 270 of the Companies Act, 1930 came up for consideration, which defines

² 1962 Supp (1) SCR 344

“unregistered company”, as also Section 271 of the said Act which provides for winding up of an unregistered company. Suffice to state that Section 270 and 271 of the 1930 Act are in *pari materia* as the provisions of Section 582 and 583 of the 1956 Act respectively. It would be expedient to quote the relevant observations made therein, which are reproduced as under:-

15. The courts of a country dealing with the windingup of a company can ordinarily deal with the assets within their jurisdiction and not with the assets of the company outside their jurisdiction. It is therefore necessary that if a company carries on business in countries other than the country in which it is incorporated, the courts of those countries too should be able to conduct windingup proceedings of its business, in their respective countries. Such winding up of the business in a country other than the country in which the company was incorporated is really an ancillary winding up of the main company whose winding up may have already been taken up in that country or may be taken up at the proper time.

16. It appears that so long as the company as such is able to carry on business profitably and be in a position to meet its liabilities, neither the company nor its creditor nor its contributory would think of the winding up proceedings even if the company ceases to carry on business in any particular country. The persons interested in the company will be getting their proper return on the amount lent or contributed. Ordinarily, the winding up of the company will be proceeding simultaneously in the various countries where it carried on business whenever the business of the company has ceased to be profitable and the company is reduced to a position in which it is not expected to make good its liabilities.

17. It is the company incorporated outside India which is really wound up as an unregistered company in this country. In fact, there is no separate unregistered company which is being wound up here. The various branch offices of the company in India cannot be deemed to be the branches of an independent unregistered company. Sub-section (3) of Section 271 itself says that the company incorporated outside India may be wound up as an unregistered company when it ceases to carry on business in India. Further, there are no separate creditors or contributories of the so called unregistered company. There are no separate creditors or contributories of the offices or branches of the company in India.

All the creditors and contributories are really creditors and contributories of the company incorporated outside India and therefore all of them, on principle, should be able to do what creditors and contributories resident in India can do in the winding up proceedings.”

11. A similar view was taken by the Calcutta High Court in the case of **Deutsche Dampshiffshrts Gessellschaft “Hansa” Bremen v. Bharat Aluminium Co. Ltd.**³

12. In view of the above, while it is the opinion of this Court that the present winding up petition is maintainable against the respondent company, since these proceedings are still at a nascent stage and no substantive orders have been passed towards the winding up of the respondent company, it would be appropriate for the same to be transferred to the National Company Law Tribunal⁴.

13. In this regard, it would be expedient to consider that during the pendency of the present petition the Insolvency and Bankruptcy Code, 2016⁵ has been enacted, along with the introduction of Companies Act, 2013⁶. It is necessary to consider Section 434 of the said Act, 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

³ 1983 SCC OnLine Cal 216

⁴ NCLT

⁵ IBC

⁶ The Act

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 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.”

14. Reliance must also be placed on the decision of the Supreme Court in *Action Ispat and Power Private Limited v. Shyam*

Metals and Energy Limited⁷, 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.”

15. 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

⁷ (2021) 2 SCC 641

company petition has not yet reached an advanced stage and no substantive orders have been passed towards the winding up of the respondent company.

16. In light of the foregoing discussion, the present winding up proceedings are transferred to the NCLT.

17. The parties are directed to appear before the NCLT on 09.07.2024.

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

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



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE.

DHARMESH SHARMA, J.

MAY 17, 2024

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⁸ CO.PET. 446/2013