

(2024) 02 DEL CK 0023

Delhi High Court

Case No: CCP(CO.) No. 24 Of 2016, Company Petition No. 981 Of 2015, 120 Of 2016,
CO.APPL. No. 3878 Of 2015, 544, 545 Of 2016, 128 Of 2021

E & M Specialty Co.Inc

APPELLANT

Vs

Anil Wahal (Director)

RESPONDENT

Date of Decision: Feb. 7, 2024

Acts Referred:

- Companies (Court) Rules, 1959 - Rule 6, 9, 26
- Companies (Transfer of Pending Proceedings) Rules, 2016 - Rule 5
- Code of Civil Procedure, 1908 - Section 151, Order 23 Rule 3, Order 23 Rule 9
- Companies Act, 1956 - Section 433, 433(e), 433(f), 434, 439
- Companies Act, 2013 - Section 290
- Contempt of Courts Act, 1971 - Section 11, 12

Hon'ble Judges: Dharmesh Sharma, J

Bench: Single Bench

Advocate: Nikhil Palli, Kshitij Pal, Anil Nag, Jyoti Suri, Madhu Suri, Mahima Aggarwal

Final Decision: Dismissed

Judgement

Dharmesh Sharma, J

1. The present Company Petitions have been moved under Sections 433(e) & (f), 434 and 439 of the Companies Act, 1956, read with Rules 6 and 9 of the Companies (Court) Rules, 1959, seeking winding up of the respondent company - M/s. Interdril Asia Ltd., predicated on the non-payment of dues amounting to USD 171,903/-(approximately Rs. 1,13,06,051.70, at the time of filing of the petition) in CO.PET.981/2015; and Rs. 30,25,397/- in CO.PET. 120/2016, along with due interest.

FACTUAL BACKGROUND:

CO.PET. 981/2015

2. Briefly stated, the petitioner company placed a Purchase Order with the respondent company on 27.02.2012 for the supply of Spiral Drill Collars and Spiral Heavy Drill Pipes for a total amount of USD 573,012/-. Thereafter, on 19.03.2012 in furtherance of the Purchase Order and per the terms of the agreement, the petitioner paid an advance of 30% of the Purchase Order value, amounting to USD 171,903/-, receipt of which was confirmed by the respondent company vide email dated 20.03.2012.

3. However, the respondent company failed to supply the goods, consequent to which the petitioner company terminated the Purchase Order vide letter dated 22.11.2012 as well as email dated 25.11.2012, and sought a refund of the advance payment from the respondent company. The termination of the Purchase Order was acknowledged by the respondent company vide email dated 27.11.2012.

4. Despite repeated reminders and follow ups, the respondent company neglected to repay the advance amount paid by the petitioner company, as a result of which the petitioner company was constrained to serve a statutory legal notice under Section 433 and 434 to the respondent company on 15.10.2015, calling upon them to pay the due amount along with interest @ 6% from 19.03.2012 onwards i.e. the date of remittance of the advance. The said notice was not replied to and the due amount remained unpaid by the respondent company, hence, the petitioner company preferred the present company petition.

5. This court issued notice of the company petition to the respondent company on 01.02.2016.

CO.PET. 120/2016

6. This petition for winding up has been moved by the petitioner company which is engaged in the business of providing Security Services. The petitioner company entered into a Security Services Agreement with the respondent company on 25.06.2011 and agreed to deploy security personnel at a unit of the respondent company in Raigad District.

7. It is stated that the respondent company was irregular in making payments towards the invoices/bills raised by the petitioner company, and has deliberately neglected to make payment of an amount of Rs. 30,25,397/- arising out of invoices raised for the period from 01.01.2013 to 24.02.2015. It is further stated that the respondent company is also liable to pay interest @ 24% per annum on the delayed payments.

8. The respondent company failed to discharge its liability and neglected to pay the outstanding amount despite several reminders. Consequently, the petitioner company was constrained to serve a statutory legal notice upon the respondent company on 31.07.2015, as provided for under Section 433 and 434 of the Companies Act, 1956. Although the notice was served to the site office, directors and the corporate office of the respondent company, the same was not replied to and neither was the outstanding amount paid.

9. This court issued notice of the company petition to the respondent company on 16.02.2016.

SUBMISSIONS:

10. It has been submitted on behalf of the petitioner in CO.PET. 981/2015 that the present company petition stands to be admitted by this court. A two-fold argument has been put forth in this regard. Firstly, it has been submitted that a statement of the respondent company came to be recorded in the order of this court dated 07.02.2018, whereby the respondent company undertook to pay the monies due to the petitioner, and further stated that in case the respondent company is unable to pay the outstanding amount, the admission of this petition would not be resisted. It has been submitted that since the respondent company has failed to pay the outstanding amount, in view of the order of this court dated 07.02.2018, the petition stands to be admitted. Secondly, it has also been submitted that notice of this petition had been issued on 01.02.2016.

Therefore, in keeping with Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, which provides that only those petitions which have not been served shall be transferred to the National Company Law Tribunal [NCLT]; the present petition stands to be admitted by this court since notice has already been issued.

11. Per contra, it has been submitted on behalf of the respondent company that the present petitions stand to be transferred to the NCLT since nothing irreversible has been done in the winding up proceedings. In furtherance of the same, reliance has been placed on the decision of the Supreme Court in Action Ispat and Power Pvt. Ltd. v. Shyam Metalics and Energy Ltd. (2021) 2 SCC 641.

ANALYSIS & DECISION

12. At the outset, it is apposite to note that these winding up proceedings are a complete non-starter. On a perusal of the record, it appears that not even a Provisional Liquidator is appointed to the respondent company yet and so far no substantive orders have been passed.

13. Moreover, it has been brought to the notice of this court that vide order dated 22.12.2022, the learned NCLT admitted an application seeking to move an Insolvency Petition against the respondent company, appointing an Interim Resolution Professional and declared moratorium in terms of the Insolvency and Bankruptcy Code, 2016. The same came to be challenged by the respondent company before the learned National Company Law Appellate Tribunal [NCLAT], and the constitution of the Committee of Creditors came to be stayed by the NCLAT vide order dated 18.01.2023; and that the matter is still pending before the learned NCLAT.

14. However, in view of the inceptive nature of the present winding up proceedings, as also the fact that the appeal for instituting the Corporate Insolvency Resolution Process [CIRP] is underway before the learned NCLAT, it is the opinion of this court that these winding up petitions stand to be transferred to the NCLT so as to prevent duplicity of proceedings and ensure judicial propriety and consistency.

15. During the pendency of these proceedings, the Insolvency and Bankruptcy Code, 2016 [IBC] has since been enacted, along with the introduction of Companies Act, 2013 [The Act]. In particular, Section 434 of the said Act has to be considered, which provides for the transfer of proceedings relating to winding up, pending before High Courts, to the National Company Law Tribunal [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

(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.”

16. The transfer of winding up petitions pending before High Courts has also been dealt with by a Notification of the Ministry of Corporate Affairs, dated 07.12.2016 [G.S.R. 1119 (E) dated 07.12.2016, Ministry of Corporate Affairs.], whereby the Companies (Transfer of Pending Proceedings) Rules, 2016 were enacted, Rule 5 of which is relevant and reads as under:

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.-

(1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

17. It would also be expedient to consider the decision of the Supreme Court in Action Ispat and Power Limited v. Shyam Metalics and Energy Limited (2021) 2 SCC 641, 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.”

18. This above noted decision of the Supreme Court has been relied upon by this court in Citicorp International Limited v. Shiv-Vani Oil & Gas Exploration Services Limited CO.PET. 446/2013 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 both the present company petitions have not yet reached an advanced stage and no substantive orders have been passed towards the winding up of the respondent company.

19. In light of the foregoing discussion and in light of the fact that the NCLT has already admitted an application for initiating CIRP against the respondent company vide order dated 22.12.2022, albeit the appeal against the same is still pending before the learned NCLAT. It is the view of this court that such proceedings cannot simultaneously proceed between the two fora and these winding up proceedings deserve to be transferred to the NCLT accordingly.

20. At this juncture and in this regard, reliance may be placed on the decision of the Supreme Court in K.N. Rajakumar v. V. Nagarajan C.A. No. 1792/2021, date of decision 15.09.2021, wherein it was held that the primary objective of the Insolvency and Bankruptcy Code, 2016 is the revival of the corporate debtor and liquidation has to be resorted to only as a last resort. The relevant portion of the said judgment reads as under:

“It could thus be seen that one of the principal objects of the IBC is providing for revival of the Corporate Debtor and to make it a going concern. Every attempt has to be first made to revive the concern and make it a going concern, liquidation being the last resort.”

21. The present petitions are therefore transferred to the learned NCLT. The claimants herein are at liberty to pursue their claims before the learned NCLT.

22. The parties are directed to appear before the NCLT on 01.04.2024.

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

24. Hence, the present company petitions, along with all pending applications, are disposed of accordingly.

CCP(CO.) 24/2016 & CO.APPL. 128/2021

25. This contempt petition has been preferred by the petitioner under Sections 11 and 12 of the Contempt of Courts Act, 1971 [CC Act], against the respondent - Mr. Anil Wahal, director of M/s Interdril Asia Limited, for non-compliance with the order of this court dated 12.02.2016, passed in CO.PET. No. 666/2014.

26. Briefly stated, the petitioner company had filed CO.PET. 666/2014 seeking winding up of M/s. Interdril Asia Limited, which came to be disposed of vide order dated 12.02.2016 passed by this court, on the basis of a settlement arrived at between the parties. The settlement was placed before this court vide an application bearing CA No. 466/2016 dated 09.02.2016, moved by the parties under Order 23 Rule 3 and Rule 9 read with Section 151 of the CPC, as per which the respondent was to repay a sum of USD 299,384/- in 11 monthly instalments and the petitioner had agreed to accept this sum as full and final settlement of its claims. It was also agreed upon between the parties that in case of default, the respondent would be liable to pay interest @ 18% per annum.

27. It is the case of the petitioner company that despite repeated reminders, the respondent failed to make the payments as per the settlement arrived at the parties and has not paid the outstanding amount to the petitioner company, and therefore contempt proceedings shall be initiated against the respondent for violating the order of this court dated 12.02.2016.

28. A perusal of the record indicates that the respondent/director has been granted several opportunities to settle the matter as well as to make payments towards the outstanding amount. It is also borne out from the record that the respondent undertook to make the payments by 31.03.2020, and the same came to be recorded in the order dated 30.08.2019 in CO.EPT. 981/2015 and thereafter in the present contempt petition vide order dated 02.09.2019. Per the Affidavit of Undertaking, the respondent had stated that the company was in the process of arranging funds through an Asset Reconstruction Company and that an infusion of funds was expected in the month of March 2020.

29. It has also been brought to the notice of this court, as stated above, that during the pendency of these proceedings, an application seeking to move an Insolvency Petition came to be moved against the Respondent Company at the behest of Punjab National Bank, before the NCLT, which was admitted vide order of the NCLT dated 22.12.2022, and the appeal pertaining to the matter is currently pending before the learned NCLAT.

SUBMISSIONS

30. It has been submitted on behalf the petitioner that the respondent is in violation of the order of this court dated 12.02.2016, and has wilfully disobeyed to make good the outstanding payments due to the petitioner, despite undertaking to make the payments as per the settlement arrived at between the parties. It has been submitted that the settlement arrived at between the parties as well as the undertaking to repay the outstanding dues of the petitioner company was given by the director before this court, prior to the date of the order being passed by the NCLT. Therefore, non-compliance with the order of this court dated 12.02.2016 as well as the undertaking placed before this court which came to be recorded in the order dated 30.08.2019 in CO.PET. 981/2015 and order dated 02.09.2019 in the present contempt petition, amounts to contempt, and proceedings under the Contempt of Courts Act shall be initiated against the respondent.

31. Per contra, it has been submitted on behalf of the respondent that the non-compliance with the order dated 12.02.2016 was neither wilful nor intentional, and failure to make payments towards the outstanding amount due to the petitioner was on account of reasons beyond the control of the respondent. It is stated that to show bonafides, the respondent made a payment of USD 10,000/- by arranging funds through personal loans.

32. It has further been submitted that the respondent has made all attempts to revive the respondent company, by arranging attempts to infuse funds through an Asset Reconstruction Company, namely Invent ARC Pvt. Ltd. In furtherance of the same, the respondent also persuaded its bank - Oriental Bank of Commerce, to agree for a One-Time Settlement (OTS) to the tune of Rs. 24 Cr, by way of assignment of its debt to Invent ARC Pvt., Ltd. However, this OTS failed and a dispute arose with regard to the release of one of the mortgaged assets by the bank, despite release of 10% of the OTS amount by Invent ARC to the bank. Despite best efforts, the respondent could not successfully revive the company, but it has been submitted that efforts have been made to repay the outstanding amount due to the petitioner company, and that the non-payment of the amount is not wilful.

33. It has also been submitted that the NCLT admitted an application for moving an Insolvency Petition against Interdril Asia Ltd. vide order dated 22.12.2022 whereby an Interim Resolution Professional has been appointed. The same has been challenged by Mr. Manish Wahal, and the appeal is currently pending before the learned NCLAT, whereby the constitution Committee of Creditors has been put in abeyance. However, it is submitted that the company is presently under the control of the Interim Resolution Professional. Further, it has been submitted that an affidavit has been placed on the record pursuant to directions dated 01.11.2022, wherein it is categorically stated that none of the assets of the company have been transferred in any for to any third party, since 12.02.2016.

34. In view of the above, it has been submitted that the inability to pay the outstanding amount is a consequence of business failure and for reasons outside the control of the respondent. Reliance has been placed on the judgement of this court in Ved Prakash Abbot v. Kishore K. Avarsekar & Ors Contempt Case (Civil) No. 579/2017, wherein it has been held that inability to pay in terms of an undertaking would not amount to wilful disobedience, specially when insolvency proceedings are pending against the company and the control of the management has been vested with the Interim Resolution Professional. Furthermore, reliance has also been placed on the judgement of this court in Vijay Kumar Bhatia v. Som Datt Enterprises Ltd. 2018 SCC OnLine Del 12764, which held that credible material must be placed to show that the alleged contemnor deliberately and wilfully avoided to make payments, despite having the resources.

ANALYSIS & DECISION:

35. Having heard learned counsels for the parties and on perusal of the record, unhesitatingly, this Court finds that the respondent cannot be proceeded against for any wilful disobedience of the directions of this Court under the Contempt of Courts Act, 1971.

36. It is well ordained in law that the contempt proceedings must demonstrate a wilful and intentional disobedience of an order or direction of the Court. Avoiding a long academic discussion, it was propounded in the case of U.N. Bora v. Assam Roller Flour Mills Assn. (2022) 1 SCC 101:-

(i) "It should be shown that there was due knowledge of the order or directions and that the disobedience is a deliberate, conscious and intentional act.

(ii) When two views are possible, the element of wilfulness vanishes as it involves a mental element.

(iii) Since the proceedings are quasi-criminal in nature, what is required is a proof beyond reasonable doubt since the proceedings are quasi-criminal in nature.

(iv) When a distinct mechanism is provided and that too, in the same judgment alleged to have been violated, a party has to exhaust the same before approaching the court in exercise of its jurisdiction under the Contempt of Courts Act, 1971."

37. Therefore, the proposition of law is established that disobedience of the orders of the Court have to be shown to be "wilful", such that there lies a certain mental element, and that such inaction or disobedience is done knowingly, intentionally, consciously and in a calculated and deliberate manner, with full knowledge of the consequences that may be flowing therefrom.

38. Hence, it flows that even when there is disobedience of an order, in such cases where the disobedience is a result of compelling circumstances, outside the control of the contemnor, the contemnor cannot be punished. The plea canvassed on behalf of the respondent is sound in so far that it has been urged that the disobedience was not wilful or intentional and this court finds the same to be sustainable in law. There has

never been any wilful disobedience to violate the directions of this Court. It is but evident that efforts have been made to repay the outstanding amount as also towards revival of the company through infusion of funds. The fact that winding up proceedings were underway and thereafter proceedings under the IBC have been initiated in the interim, affords a valid and sustainable defence to the contemnor in these proceedings.

39. In view of the foregoing discussion, the present contempt petition is dismissed. All pending applications are disposed of accordingly.