



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

% **Judgment reserved on : 05 March 2024**  
**Judgment pronounced on: 24 April 2024**

+ **CO.PET. 320/2008 & CO.APPL. 1162/2008, CO.APPL. 373/2019**

**ESTER INDUSTRIES LTD. .... Petitioner**  
Through: **Mr. Kunal Kher, Adv.**

versus

**INDUS POLYFILMS SPECIALISTS PVT LTD.**  
..... Respondent  
Through: **Mr. Lokesh Chopra, Adv. for applicant.**

**CORAM:**  
**HON'BLE MR. JUSTICE DHARMESH SHARMA**

**CO.PET. 320/2008**

1. The instant Company Petition has been instituted under Sections 433(e), 434 and 439 of the Companies Act, 1956 seeking winding up of the respondent company – M/s. Indus Polyfilms Specialists Pvt. Ltd., and is predicated on the non-payment of outstanding dues amounting to Rs. 31,78,615/- along with interest @ 18% per annum.
2. Briefly stated, the petitioner company is engaged in the business of manufacturing, marketing and sale of certain polyester products such as yarns, films and other allied products. It is stated on behalf of the petitioner company that the respondent company placed certain orders for the supply of the above-mentioned polyester goods. Further, it was agreed upon between the parties that the petitioner company



was to supply the goods to an associate company of the respondent, namely M/s. SJS Packaging Inc. situated in Chicago, USA, and that the payment for such supplies would be made by the respondent company and its associate company – SJS Packaging Inc.

3. It appears that the respondent company issued the following cheques to partly discharge its liabilities towards the invoices raised by the petitioner company:

- (i) Cheque No. 020473, dated 15.02.2008 – for an amount of Rs. 9,80,000/-;
- (ii) Cheque No. 205906, dated 25.07.2008 – for an amount of Rs. 5,00,000/-; and
- (iii) Cheque No. 205907, dated 25.07.2008 – for an amount of Rs. 5,00,000/-

4. In this regard, it is stated on behalf of the petitioner company that said cheques were drawn on Centurion Bank of Punjab, Green Park Extension, New Delhi; and on presentation of the cheques for encashment, all three of the above-noted cheques stood dishonored with the remarks “Funds Insufficient”, vide the Cheque Return Memo dated 31.07.2008.

5. It is the case of the petitioner company that the respondent company failed to discharge its liability despite a notice dated 11.08.2008 having been issued under Section 138 of the Negotiable Instruments Act of 1881. Thereafter, in view of the fact that the respondent company failed/neglected to discharge its liability, the petitioner company was constrained to serve a legal demand notice dated 15.09.2008 upon the respondent company under Section 434 of the Companies Act, 1956 calling upon them to repay the outstanding amount of Rs. 31,78,615/- along with interest @ 18% per annum.



However, despite issuance and service of the legal notice dated 15.09.2008, the respondent company failed to repay the outstanding amount, and hence, the present petition was instituted.

6. It is borne out from the record that a Provisional Liquidator was appointed to the respondent company vide order dated 17.03.2010. However, subsequently, an application being CO.APPL. No. 621/2010 was moved seeking recall of the order dated 17.03.2010 and said application was allowed vide order dated 18.10.2010 and the order dated 17.03.2010, appointing a Provisional Liquidator, was thereby recalled. Thereafter, vide order dated 17.01.2012, the CO.APPL. bearing No. 1162/2008, seeking appointed of a Provisional Liquidator was revived, which has since been pending.

7. Evidently, the respondent company has failed to pay its debt in the normal and ordinary course of its business, hence, the present petition has been filed. However, on a perusal of the record, it is borne out that this winding up petition has been a complete non-starter, and as of yet, no substantial orders have been passed in furtherance of the liquidation of the respondent company.

8. It is apposite 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 view of this, 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<sup>1</sup>. In this regard, it is necessary to consider Section 434 of the Companies Act, 2013

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<sup>1</sup> NCLT



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; 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.]

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.”

9. It is also expedient to consider the decision of the Supreme Court in the case titled **Action Ispat and Power Pvt. Limited v. Shyam Metalics and Energy Limited**<sup>2</sup>, wherein the aforesaid provision came up for interpretation and the relevant extract of which is reproduced hereunder:

“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.”

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<sup>2</sup> (2021) 2 SCC 641

