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

Date of Decision: 21st September, 2023

+ **CO.PET. 147/2014 & CO.APPLs. 858/2018, 301/2023, OLR 211/2019, OLR 293/2019**

UMA SHARMA

..... Petitioner

Through: Mr. Jai Bansal, Adv.
versus

OCTAGON BUILDERS & PROMOTERS & ANR. Respondents

Through: Ms. Ruchi Sindhwani, Sr. Standing
Counsel with Ms. Megha Bharara,
Adv. for OL. (M: 9811533510)
Mr. Rajat Bhatia, Ms. Alka Nupur
Singh, Mr. Karan Ahuja, Ms. Ekta
Mudgil, Advs. for Intervenor. (M:
9999251398s)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed under Section 433(e) and Section 439 of the Companies Act, 1956 seeking winding up of the Respondent Company. The company in liquidation is “M/s Octagon Builders & Promoters”. The following nine petitions were filed before this Court against the company in liquidation seeking winding up on the ground that the amounts which they had paid had not been returned to them. The details of the petitions are :



<i>S. No.</i>	<i>Petition No.</i>	<i>Title</i>
1	<i>CO.PET.154/2014</i>	<i>RAJIV MATHUR v. OCTAGON BUILDERS & PROMOTERS</i>
2	<i>CO.PET.156/2014</i>	<i>SUDHIR ANAND v. OCTAGON BUILDERS & PROMOTERS</i>
3	<i>CO.PET.157/2014</i>	<i>MUKESH KUMAR v. OCTAGON BUILDERS & PROMOTERS</i>
4	<i>CO.PET.168/2014</i>	<i>DEEPAK MITTAL v. OCTAGON BUILDERS & PROMOTERS & ANR.</i>
5	<i>CO.PET.169/2014</i>	<i>C P SHARMA v. OCTAGON BUILDERS & PROMOTERS & ANR.</i>
6	<i>CO.PET. 170/2014</i>	<i>AJAY KAPUR v. OCTAGON BUILDERS & PROMOTERS & ANR.</i>
7	<i>CO.PET. 212/2014</i>	<i>MRS. SIKHA KAUSHAL v. OCTAGON BUILDERS & PROMOTERS</i>
8	<i>CO.PET. 290/2014</i>	<i>ALANKAR PATHAK & ANR. v. OCTAGON BUILDERS & PROMOTERS & ANR.</i>
9	<i>CO.PET. 147/2014</i>	<i>UMA SHARMA v. OCTAGON BUILDERS & PROMOTERS & ANR</i>

3. This Court had, vide order dated 27th August, 2018 appointed the liquidator in ***CO.PET.147/2014*** in the following terms:



“I, accordingly, admit the present petition. The Official Liquidator attached to this Court is appointed as the Liquidator. He is directed to take over all the assets, books of accounts and records of the respondent company forthwith. The citations be published in the Delhi editions of the newspapers 'Statesman' (English) and 'Veer Arjun' (Hindi), as well as in the Delhi Gazette, at least 14 days prior to the next date of hearing. The cost of publication of Rs.75,000/- will be paid to the OL collectively by the petitioners in Co. Petition Nos.154/2014, 156/2014, 157/2014, 168/2014, 169/2014, 170/2014, 212/2014 & 290/2014.

Petitioners shall deposit a sum of Rs.75,000/- with the Official Liquidator within 2 weeks, subject to any further amounts that may be called for by the liquidator for this purpose, if required. The Official Liquidator shall also endeavour to prepare a complete inventory of all the assets of the respondent-company when the same are taken over; and the premises in which they are kept shall be sealed by him. At the same time, he may also seek the assistance of a valuer to value all assets to facilitate the process of winding up. It will also be open to the Official Liquidator to seek police help in the discharge of his duties, if he considers it appropriate to do so. The Official Liquidator to take all further steps that may be necessary in this regard to protect the premises and assets of the respondent-company.”

4. On the said date, the following order was passed in the remaining petitions:

“These petitions are filed seeking winding up of the respondent company. This court has today in CP 147/2014 admitted the petition and appointed the OL as the Provisional Liquidator. Accordingly, the present petitions have become infructuous and stand



disposed of.

Liberty is granted to the petitioners to file their claim before the OL within six weeks in the prescribed manner as per law.

Petitions stand disposed of.”

5. Pursuant to the said order dated 27th August, 2018, the amount of Rs.75,000/- is stated to be deposited by the Petitioners and the citations were published by the OL. However, as per Ms. Sindhwani, counsel for the OL, no steps have been taken thereafter.

6. As per ***OLR Nos. 211/2019*** and ***293/2019*** the stand of the OL is that the directors have not been cooperating and that in effect, even the statement of affairs is not fully recorded. Thus, the OL has even sought action against Mr. Kuldip Nandrajog, the ex-director of the Respondent.

7. In the meantime, a petition has come to be filed before the NCLT, Allahabad Bench, Prayagraj by one M/s Mind Makers Communication Pvt. Ltd. against the company which is under liquidation before this Court. The last order dated 13th September, 2023 passed by the NCLT has been handed over by Ms. Ruchi Sindhwani, Id. Senior Standing Counsel for the OL, which reads as under:

“1. Ld. Counsel representing the IRP submits that the present IA No.193/2019 has been filed for payment of the professional fees to be paid to the IRP. He further submits that except for the initial amount which was paid to the IRP, no further expenses towards the CIRP cost have been released to the IRP.

2. It is also pointed by him that as per the order dated 27th August, 2018 passed by the Hon’ble Delhi High Court, the respondent company has already been ordered to be wound up. He further



undertakes to file the latest status report with respect to the matter pending before the Hon'ble Delhi High Court.

3. With respect to the payment of the fee/CIRP cost to the IRP, let the notice be issued to the Operational Creditor through the Ld. Counsel representing the Operational Creditor.

4. The matter to come up on 1st November, 2023 for further hearing along with other IAs.”

8. During the pendency of this petition, the Insolvency and Bankruptcy Code, 2016 has been enacted and pending proceedings under Section 434 of the Companies Act, 1956 are to be transferred to the National Company Law Tribunal (NCLT). The said section 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 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.”

9. The issue of transfer of winding up petitions to the NCLT has been dealt with in the notification dated 7th December, 2016 passed by the



Ministry of Corporate Affairs where in respect of pending proceedings for winding up, Rule 5 states 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 the date of this notification, failing which the petition shall abate.

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 upto 15th day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15th day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to



winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

10. The said issue of transfer of pending cases has also been considered by this Court in *Co. Pet 446/2013* titled *Citicorp International Limited v. Shiv-Vani Oil & Gas Exploration Services Limited* wherein the Court relying on the decision of the Supreme Court in *Action Ispat and Power Limited v. Shyam Metalics and Energy Limited (2021) 2 SCC 641* has observed as under:

“20. As per the proviso highlighted above, upon the application being filed by any of the parties to the proceedings, the transfer may be made by the Court in terms of the second proviso of Section 434 (1) of the Companies Act, 1956. In Action Ispat (supra), if the winding up is not at an advanced stage, the High Court may transfer the matter to the NCLT. The relevant portion of the said judgement is set out below:

31. 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 pre-admission 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.

11. A conjoint reading of Rule 5 of the notification dated 7th December, 2016 along with the aforementioned judgment would show that in cases where the petition is not at an advanced stage, the matter is to be transferred to the NCLT.

12. Furthermore, in the petition before the NCLT being **CP(IB) No.289/ALD/2018**, an IRP has already been appointed. Considering the fact



that the winding up proceedings are at a nascent stage and only initial publication/citation was done in the newspapers, this Court is of the opinion that the matter cannot proceed before two fora.

13. One of the primary objectives of the enactment of IBC is to provide for the revival of the corporate debtor and liquidation has to be resorted to only as a last resort as observed by the Supreme Court in ***K.N. Rajakumar v. V. Nagarajan [C.A. No. 1792/2021, date of decision 15th September, 2021]***.

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.”

14. IBC being a statute which is meant to encourage revival of the company, it is deemed appropriate to transfer the present petition to NCLT, Allahabad Bench, Prayagraj.

15. In view of the fact that the remaining company petitions have been disposed of permitting them to file claims before the OL, the following petitions deserve to be revived:

1	<i>CO.PET.154/2014</i>	<i>RAJIV MATHUR v. OCTAGON BUILDERS & PROMOTERS</i>
2	<i>CO.PET.156/2014</i>	<i>SUDHIR ANAND v. OCTAGON BUILDERS & PROMOTERS</i>
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8	<i>CO.PET. 290/2014</i>	<i>ALANKAR PATHAK & ANR. v. OCTAGON BUILDERS & PROMOTERS & ANR.</i>

16. The order dated 27th August, 2018 appointing the Liquidator is recalled. The present petition is transferred to the NCLT. The claimant in this petition is free to pursue its claim before the NCLT.

17. List before the NCLT Allahabad Bench on 1st November, 2023.

18. It is made clear that any transactions carried out post the filing of these petitions would be liable to be dealt with in accordance with law by the NCLT. The said transactions would also not prejudice the interest of the Petitioners.

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

20. The petition, along with all pending applications, is disposed of in the above terms.



CO.APPL. 301/2023 (for impleadment)

21. This is an application for impleadment which has been filed by Mr. Naresh Kumar Dhawaria, who also has a claim against the company in liquidation. In view of the order passed above, the said applicant is also permitted to appear before the NCLT and pursue his claim in accordance with law.

22. The application is disposed of.

**PRATHIBA M. SINGH
JUDGE**

SEPTEMBER 21, 2023/dk/sk