

\$~9

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

*Reserved on: 23rd August, 2012
Date of Decision: 7th January, 2013*

+ **CO. APP. 19/2009**

INDO ROLHARD INDUSTRIES LTD.

.....Appellant

Through: Mr. Sarat Chandra, Mr. Manoj Kumar
Garg, Mr. Animesh Kumar Sinha and
Mr. Abhinav Anand, Advocates.

versus

M. K. MAHAJAN & ANR.

..... Respondents

Through: Ms. Vibha Mahajan Seth, Advocate.
Mr. Kanwal Chaudhary, Advocate for
Official Liquidator.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

The short question that arises in this appeal is whether the company court can order winding up of a company without ordering the petition to be advertised.

2. The appellant is a company. A petition was filed by two shareholders for winding up of the company under section 433 of the Companies Act, 1956 before the company court. The company court (learned single judge) by the impugned order: (a) admitted the petition; (b) directed the company to be wound up; (c) appointed the official liquidator and directed him to take charge of the assets and records of the company and proceed in accordance with law and (d) directed the citation to be published in the “Statesman” (English) and “Jansatta” (Hindi) for 16.03.2009. All these directions were issued in a single order – impugned in the present appeal – passed on 16.02.2009; the relevant paragraph is quoted below:

“46. I, accordingly, admit this petition and direct that the respondent company be wound up. The official liquidator attached to this Court is appointed as the liquidator in respect of the

respondent company. He shall forthwith take over all the assets and records of the respondent company and proceed according to law. Citation shall be published in the 'Statesman' (English) and 'Jansatta' (Hindi) for 16.03.2009. Petitioner may take steps accordingly."

3. Counsel for the appellant-company contends on the strength of the judgment of the Supreme Court in *National Conduits (P) Ltd. v. S.S. Arora*, (1967) 37 Com. Cases 786 that the procedure adopted by the learned company judge is unsustainable and that an order for winding up cannot be passed before publishing the advertisement. The contention appears to us to be sound. The judgment cited above lists the steps involved in ordering the winding up of a company under the supervision of the High Court. It was observed (@ page 788): -

"When a petition is filed for winding up of a company under the supervision of the High Court, the High Court may: (i) issue notice to the company to show cause why the petition should not be admitted; (ii) admit the petition, fix a date for hearing and issue notice to the company before giving directions for advertising; or (iii) admit the petition, fix the date for hearing, order advertisement and direct service upon those who are specified in the order. A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2)."

The judgment refers to Rule 96 of the Companies (Court) Rules, 1959 framed by the court which states that when an application for winding up is presented it shall be posted before the judge in Chambers for admission and fixing a date for hearing and *"for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served"* and that the judge, if he thinks fit, direct that notice be given to the company before giving directions as to the advertisement of the petition. There is thus an opportunity to be provided to the company as contemplated by the rule.

4. It can still be argued that the opportunity to the company is required to be given only if the judge thinks it fit to do so and that in the present case, having regard to the tenor of the impugned judgment, the learned judge did not consider it fit to give notice to the appellant-company before issuing directions as to the

advertisement. Such an argument is taken care of adequately by Rule 9 of the aforesaid Rules – noticed by the Supreme Court in the judgment cited supra – which reads:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

The judgment of the Punjab High Court in *Lord Krishna Sugar Mills Ltd. v Smt. Abnash Kaur*, (1961) 31 Comp. Cas. 587 was approvingly noticed (subject to qualifications which are not relevant for our purpose) by the Supreme Court. In that judgment, the High Court had held that in an appropriate case the court has the power to suspend advertisement of a petition for winding up, pending disposal of an application for revoking the order of admission of the petition. The Supreme Court traced the power to entertain an application by the company that in the interest of justice or to prevent abuse of the process of the court, the petition for winding up be not advertised, to Rule 9 (supra), and observed that such an application may be made by the company even when there is an unconditional admission of the petition for winding up. It was observed that the power to entertain such an application is inherent in the court and Rule 9 only reiterates that power. Similarly, in a later Supreme Court decision, in *Cotton Corporation Of India v. United Industrial Bank*, AIR 1983 SC 1272 it was held that: -

“There is sufficient built- in safeguard in the provisions of the Companies Act and the Rules framed thereunder which would save the company from any adverse consequences, if a petitioner actuated by an ulterior motive presents the petition. This was taken notice of by this Court in National Conduits (P) Ltd. v. S. S. Arora, (1968) 1 SCR 430 : (AIR 1968 SC 279) wherein this Court set aside the order of the High Court of Delhi which was of the opinion that once a petition for winding-up is admitted to the file, the Court is bound to forthwith advertise the petition. This Court held that the High Court was in error in holding that a petition for winding-up must be advertised even before the application filed by the company for staying the proceeding for the ends of justice or to prevent abuse of the process of this court. This court held that the view taken by the High Court that the court must as soon the petition is admitted, advertise the petition is contrary to the plain terms of Rule 96 and such a view if accepted, would make the court an instrument, in

possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury.”

5. The impugned judgment in which several directions are rolled-up, (vide paragraph 46) including the direction to advertise the petition for winding-up, read in light of the judgments of the Supreme Court (supra), seems to have denied the appellant-company an opportunity to invoke the inherent powers of the court, codified by Rule 9, that the winding up petition should not be advertised on whatever grounds it would be advised to take.

6. It was contended on behalf of the respondent who had succeeded before the learned single judge that the purpose of the advertisement is the protection of the creditors and the shareholders of the company which is the primary consideration and the fact that the company sought to be wound up was not heard before the advertisement was ordered was not relevant. The answer to this contention is to be found in the judgment of the Supreme Court itself (supra). In the penultimate paragraph of the judgment (@ page 789), the court was examining the correctness of the view expressed by this court that the court must, as soon as the petition for winding up is admitted, advertise the petition. Rejecting the view, the Supreme Court observed:

“Such a view, if accepted, would make the court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury.”

Recently, the Supreme Court had occasion to examine the question of issue of advertisement from the point of view of the company which is sought to be wound up, in *IBA Health Ltd. v. Info-Drive Systems Sdn. Bhd.*, (C.A. No. 8230/2010, dated 23.09.2010) where it was held as follows: -

“PUBLIC POLICY CONSIDERATIONS

26. *A creditor's winding up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other*

economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of public at large.

27. *We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.*

28. *In the above mentioned facts and circumstances of the case, we are of the view that the order passed by the Company Court ordering publication of advertisement in the newspaper would definitely tarnish the image and reputation of the appellant company resulting in serious civil consequences and, hence, we are inclined to allow this appeal and set aside the order passed by the Company Court dated 17.09.2009 in Company Petition 41 of 2009 and the judgment of the Division Bench of the High Court of Karnataka dated 21.10.2009 passed in OSA No. 36 of 2009, and we order accordingly. However, we make it clear that the observations and findings rendered by this Court in this proceeding will not prejudice the parties in approaching the appropriate forum for redressal of their grievances and, in the event of which, that forum will decide the case in accordance with law.”*

This is sufficient justification for granting an opportunity to the company (appellant herein) to show to the company court why an advertisement should not automatically follow the admission of the petition. It can invoke the inherent powers of the court embodied in Rule 9 and it would then be for the company court to deal with the reasons shown and take a decision.

7. Counsel for the respondent however points out that there can possibly be no damage to the reputation or business of the company since its operations have been closed down as is evident from the letter dated 15.04.2009 written by its managing director, a copy of which was filed before us. One Anil Koshal has in the letter

Co. App. 19/2009

informed the official liquidator that the company has closed down its manufacturing activities since March, 2003 and subsequently all business activities have come to a standstill and that the office premises are being used by him in his personal capacity for his own business in which the records of the company are also kept. This is something which, if the company judge thinks fit and proper, needs to be answered by the company if and when it moves an application before the company court invoking the inherent powers to dispense with the requirement of issuing a citation. The question before us is one of opportunity and fair procedure to be followed by the company court; we are not concerned with the merits of the claim of the company which would be for the company judge to decide. Moreover, the Supreme Court has observed in *National Conduits (P) Ltd. (supra)* that an application for dispensing with the citation may be made even when there is an unconditional admission of the petition for winding up. It appears to us that that right cannot be denied.

8. The appeal is allowed. The order of the learned single judge is set aside and the company application is remanded with the direction that it may be disposed of in accordance with law and with the further direction that in case an application is moved by the company under Rule 9 within seven days from today, the same may also be decided in accordance with law. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JANUARY 7, 2013
hs