

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CO. APP. NO.25/2014 and CM No.7626/2014**

INDO ROLHARD INDUSTRIES LTD. Appellant
Through: Mr.Manoj Kumar Garg, Advocate.

versus

M. K. MAHAJAN & ANR Respondents
Through: Ms.Vibha Mahajan Seth, Advocate.
Mr.Rajiv Bahl, Advocate for the
Official Liquidator.

% Date of Decision : July 8th, 2014

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

: REVA KHETRAPAL, J.

1. The present appeal is preferred against the order dated 13.02.2014 passed by the learned Single Judge in Company Application No.898/2013 of Company Petition No.136/2005 filed by the Respondent No.1 under Rule 9 read with Rule 29 of the Companies (Court) Rules, 1959.

2. The facts necessary for deciding the appeal are briefly delineated hereunder.

3. A Company Petition was filed by the Respondents alleging that the Appellant Company is liable to be wound up under Sections 433(c), (e) and (f) read with Section 434(1)(a) and (c) of the Companies Act, 1956 (hereinafter referred to as the “ Act”). The Respondents are admittedly shareholders of the Appellant Company and the Respondent No.1 also claims to be a creditor of the Company. By an order dated 16.02.2009, the learned Company Judge admitted the winding up petition and ordered the Appellant Company to be wound up, simultaneously appointing the Official Liquidator as Liquidator of the Company and directing him to take over all the assets and records. The Court also directed the citation to be published in the relevant newspapers.

4. Aggrieved by the aforesaid, the Appellant filed a Company Appeal being Company Appeal No.19/2009 before a Division Bench of this Court. The Division Bench, vide its order dated 07.01.2013, allowed the said appeal, set aside the order of the learned Company Judge dated 16.02.2009 and remanded the matter to the Company Judge with a direction that the Company Petition be disposed of in accordance with law. Liberty was also given to the Appellant Company to move an application under Rule 9 of the Companies (Court) Rules, 1959 within 7 days for dispensing with the issuance of citation.

5. In order to appreciate the reasons which prevailed upon the Division Bench in passing the aforesaid directions, we reproduce hereunder the relevant extract of the order of the Division Bench dated 07.01.2013:

“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.

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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 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."

6. It is not in dispute that the Appellant Company did not feel compelled to file an application seeking dispensation of the advertisement of the admission of the petition. Since no such application was filed within the period of 7 days granted for the aforesaid purpose, the Respondents filed an application (CA No.84/2013) seeking publication of the citation. The Appellant Company thereupon filed an application (CA No.90/2013) seeking restoration of the possession of the registered office of the Appellant Company on the ground that the winding up order dated 16.02.2009 had been set aside by the Division Bench. Both the applications were contested and were eventually disposed of by a common order dated 27.02.2013. By the said order, the Court, while allowing the prayer of the Appellant Company and directing restoration of the possession of the registered office of the Appellant Company and the records of the company to its Directors, rejected the contention of the Respondents that the directions issued to the Official Liquidator to

take over the possession of the Appellant Company had not been set aside by the Division Bench. Liberty was, however, granted to the Respondents to seek a clarification from the Division Bench in this regard.

7. As a result of the aforesaid, the Respondents filed Company Appeal No.21/2013 before a Division Bench of this Court impugning the order dated 27.02.2013. The Division Bench disposed of the said appeal by an order dated 18.03.2013 by permitting the Petitioners to seek clarification from the Division Bench which passed the order dated 07.01.2013.

8. The Respondents thereupon filed a Review Petition being Review Petition No.116/2013 before the Division Bench which passed the order dated 07.01.2013 in Company Appeal No.19/2009 extracted hereinabove. The said Review Petition was disposed of by an order dated 05.04.2013. The relevant extract of the order dated 05.04.2013 is for the sake of facility reproduced hereunder:

“This Court has considered the submissions and also the judgment dated 16.02.2009. As is evident from the discussion in the final judgment of the Division Bench dated 07.01.2013, the point which persuaded the Court to set aside the earlier Single Judge's order (dated 16.02.2009) was the rolled up procedure adopted by him in discussing the merits of the case, not advertising the proceedings and straightaway directing winding up. The Court did not, however, comment and decide the merits of the observations of the learned Single Judge which undoubtedly point to the fact that the petition needed to be admitted. In these circumstances, the final direction contained in paragraph 8 is clarified

appropriately; it stands modified to the effect that the judgment and order dated 16.02.2009 to the extent it records findings and prima facie observations warranting admission of the petition would stand.

No further clarification is required. The said judgment dated 7.1.2013 shall be read in the light of the present clarification.

The review petition is disposed of in the above terms.”
(emphasis supplied)

9. The aforesaid order led to the filing of three applications, one by the Respondents and two by the Appellant Company. The Respondents in their application (CA No.898/2013) sought appointment of the Provisional Liquidator and publication of the citation. As a counterblast, the Appellant Company filed two applications, being CA No.2159/2013 for bringing on record additional documents and CA No.2160/2013 for cross-examination of the Respondent No.1 (Petitioner No.1 in the Company Applications).

10. The learned Company Judge by his order dated 17.01.2014 rejected the prayer in CA No.2159/2013 observing that the additional documents which the Appellant had relied upon had already been considered by the Court while passing the order dated 16.02.2009 and nothing new was sought to be agitated by the Appellant Company.

11. CA No.2160/2013 met with a similar fate with the following observations:

“26. In the aforesaid conspectus of the facts and in my perception it seems to me that the present application filed under Order XIX, Rule 2 of the

*CPC read with Rule 9 of the CCR, 1959 is an afterthought and has been filed only to prolong or delay the proceedings relating to the winding-up. No case has been made out by the respondent-company as to why the Court should exercise the discretion in its favour. I have considerable doubt regarding the bona fide of the respondent-company in filing the present application in C.A. No.2160/2013. It has made the same or substantially the same allegations which it made in the winding-up proceedings resulting in the admission order passed on 16.02.2009. No such pleas or allegations were made in the appeal filed against the admission order dated 16.02.2009 which appeal in any case was only against the rolled up procedure followed by the learned Company Judge, and which did not question the admission order on merits. **The order of the Division Bench dated 05.04.2013 passed in the review petition filed by the petitioners attained finality; this Court clarified that the admission order made by the learned Company Judge would remain undisturbed and it was only the question of appointing the provisional liquidator and advertisement of the winding-up proceedings that will have to be decided by the learned Company Judge.** Thus even after the merits of the admission order became final, the respondent-company is making a last ditch or desperate attempt to stall the proceedings by making the present application seeking to enforce the attendance of petitioner No.1, taking advantage of some orders passed by the disciplinary committee of the ICAI in the case of the petitioner No.1. Such a conduct on the part of the respondent-company cannot be countenanced.*

27. For the aforesaid reasons I do not think I would be justified in issuing notice to the petitioners in C.A. No.2159/2013 and 2160/2013 filed by the

respondent-company. The applications are dismissed in limine.” (emphasis supplied)

12. As regards the application filed by the Respondents (CA No.898/2013) for appointment of the Provisional Liquidator and publication of the citation, the learned Company Judge after meticulously examining the chequered history of the case and reproducing extracts from the order of the Division Bench dated 05.04.2013 passed in Review Petition No.116/2013 (reproduced hereinabove) and the relevant factual observations made by the learned Single Judge with regard to the admission of the winding up petition in his order dated 16.02.2009, which in order to avoid prolixity we desist from reproducing again, by the impugned order directed the advertisement of admission to be issued by the Respondents and appointed the Official Liquidator as Provisional Liquidator to take charge of the assets and records of the Company. It is this order of the learned Company Judge which is sought to be assailed before us on the ground that there has been a miscarriage of justice as the impugned order is against the principles of natural justice. It is sought to be urged that the Appellant Company ought to have been afforded further time for addressing arguments by the learned Company Judge, which it was denied. It is also sought to be contended that the orders passed by the learned Single Judge dated 17.01.2014 rejecting the application of the Appellant for cross-examination of the Respondent No.1 are erroneous and cross-examination ought to have been allowed by the learned Company Judge. With regard to this contention, suffice it to note that no appeal

was filed by the Appellant Company against the aforesaid order dated 17.01.2014 nor has the said order been assailed in the present appeal, except circuitously at the time of hearing. This apart, no such pleas or allegations were made in the appeal filed against the admission order dated 16.02.2009 and which did not question the admission order on merits. In any event, the Division Bench vide its order dated 05.04.2013 passed in the Review Petition put a quietus to the whole matter by clarifying that the admission order made by the learned Company Judge would remain undisturbed. Thus, the prima facie observations made by the learned Single Judge in his order dated 16.02.2009 with regard to the admission of the petition attained finality and there remained no scope for overturning the said findings.

13. With regard to the grievance of the Appellant Company that the learned Company Judge was not within his rights to issue orders for advertisement of the citation of the Company and appointment of the Official Liquidator as Provisional Liquidator to take charge of all the assets and records of the Company, learned counsel appearing for Appellant Company has been unable to point out to us any infirmity or error in the said order.

14. Notwithstanding, we have painstakingly examined the order and are unable to find any reason for setting aside the same. At the risk of repetition, we reiterate that the Division Bench had clarified by its order dated 05.04.2013 passed in Review Petition No.116/2013 that the prima facie observations with regard to the admission of the winding up petition would stand. The relevant extract reads as under:-

“In these circumstances, the final direction contained in paragraph 8 is clarified appropriately; it stands modified to the effect that the judgment and order dated 16.02.2009 to the extent it records findings and prima facie observations warranting admission of the petition would stand. No further clarification is required. The said judgment dated 07.01.2013 shall be read in the light of the present clarification.”

15. In the aforesaid backdrop, we are constrained to hold that we find no flaw in the findings of the learned Company Judge which are to the effect that in view of the categorical findings and observations of the predecessor Company Judge recorded in his order dated 16.02.2009 and the further order dated 05.04.2013 passed by the Division Bench in Review Petition No.116/2013 expressly clarifying that the findings in relation to the admission of the petition would continue to stand, the contention of the Appellant Company that the order dated 05.04.2013 could not be interpreted to mean that the winding up petition stood admitted, cannot be countenanced.

16. Undoubtedly, the order dated 16.02.2009 was challenged by the Appellant before the Division Bench in Company Appeal No.19/2009 but the said appeal was limited to the procedure to be adopted after the admission of the winding up petition. The merits of the findings which led to the admission of the petition were not assailed in the said appeal nor in fact were considered by the Division Bench. The opening sentence of the order of the Division Bench dated 07.01.2013 further clarifies this, which is reproduced hereunder:

“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.”

17. Subsequent thereto, as already stated by us, by its order dated 05.04.2013, in Review Petition, the Division Bench made it abundantly clear that the findings of fact made by the learned Single Judge in his order admitting the Company Petition and observations on the merits had not been disturbed and would stand, and which undoubtedly point to the fact that the petition needed to be admitted. Thus, the contention sought to be raised before us that the order dated 16.02.2009 passed by the learned Company Judge was set aside by the Division Bench by an order dated 07.01.2013 with the observation that the question of admission of the petition must be decided afresh, is specious to say the least. We have carefully perused the order dated 07.01.2013 and we are unable to deduce therefrom anything which comes to the rescue of the Appellant Company. In any event, it is stated at the risk of repetition that the said order was clarified by the Division Bench by its subsequent order dated 05.04.2013 wherein the Division Bench categorically observed that the point which persuaded the Court to set aside the earlier Single Judge’s order dated 16.02.2009 was the rolled up procedure adopted by him in discussing the merits of the case, not advertising the proceedings and straightaway directing winding up. The intent was not to comment and decide upon the merits of the observations of the learned

Company Judge “*which undoubtedly point to the fact that the petition needed to be admitted.*”

18. In the aforesaid scenario, in our view, the learned Single Judge rightly observed that there was no reason why advertisement should be deferred, more so as the Appellant Company had not availed of the opportunity granted to it by the Division Bench to move an application for deferment of the advertisement of the petition. Even otherwise, there did not appear to be any special circumstances which would warrant deferment or suspension of the publication of advertisement. The petition was filed as far back as in the year 2005 and the Appellant Company had sufficient opportunity to settle the claims of the Respondents. Deferment of publication of advertisement to enable the Appellant to pay to the Respondent the admitted dues was thus no longer warranted, and as a matter of fact publication was immediately called for. Likewise, the prayer for appointment of the Official Liquidator as a Provisional Liquidator to take charge of all the assets and records of the Company was merited given the prima facie findings in the order dated 16.02.2009 wherein this Court had elaborately dwelt upon the details of the manner in which the affairs of the Company were being mismanaged by its Directors and the material on record to show that there was justifiable lack of confidence in the conduct and management of the Company’s affairs which completely lacked in probity.

19. We find no merit in the present appeal which appears to us to be only an attempt to protract the proceedings. The lack of bonafides of the Appellant Company are more than apparent from the record.

We would also be failing in our duty if we do not observe that the grievance of the Appellant Company that it was not appropriately heard by the learned Company Judge is completely unwarranted and belied by the records.

20. Resultantly, we dismiss this appeal. There will however be no order as to costs. CM No.7626/2014 also stands disposed of.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

July 8th, 2014
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