

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR. JUSTICE ANIL K.NARENDHAN

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

Co.Appeal.No. 16 of 2015 ()

APPELLANT(S)/APPLICANT:

M/S.FLAKT (INDIA) PRIVATE LIMITED
(FORMERLY FLAKT(INDIA) LIMITED,)
NOW KNOWN AS FLAKTWOODS (ACS) INDIA PVT.LTD.
HAVING REGISTERED OFFICE AT 147
POONAMALLEE HIGH ROAD, VILLAGE NUMBAL,
CHENNAI - 600077 AND ITS CORPORATE
OFFICE AT BUDGE TRUNK ROAD, MAHESHTALA
KOLKATA-700141 AND ONE OF ITS OFFICE PLOT NO.1-61 & 62
GROUND FLOOR BACK PORTION AND 1ST FLOOR, SITE 5
SURAJPUR INDUSTRIAL AREA, KASNA, GREATER NOIDA 201 306
UTTAR PRADESH
REPRESENTED BY THE POWER OF ATTORNEY HOLDER AND
COMPANY SECRETARY - PRASENJIT KALITA.

BY ADVS.SRI.JOSEPH RONY JOSE
SRI.E.A.JOSE
SMT.JYOTHI ABRAHAM

RESPONDENT/RESPONDENT:

M/S.24 ASSURED SERVICES PRIVATE LTD
53/2339, 11TH CROSS ROAD, GIRINAGAR
KADAVANTHRA, KOCHI - 682 020
REPRESENTED BY ITS MANAGING DIRECTOR MR.VINOO KURIAN DEVASSIA.

R BY SRI.M.A.ABDUL HAKHIM

THIS COMPANY APPEAL HAVING COME UP FOR ADMISSION ON 23-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMACHANDRA MENON & ANIL K. NARENDRAN, JJ.

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**Company Appeal No. 16 of 2015**

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Dated, this the 23rd day of December, 2015

JUDGMENT

Anil K. Narendran, J.

This appeal under Section 483 of the Companies Act, 1956 is against the order dated 21.10.2015 of the learned Company Judge of this Court in Co.Appl. Nos.341 and 342 of 2015 in Co.Pet. No.54 of 2011.

2. We heard the arguments of the learned counsel for the appellant and also the learned counsel appearing for the respondent.

3. Co.Pet. No.54 of 2011 was filed by M/s.Flakt (India) Private Limited (hereinafter referred to as 'the appellant company') seeking an order to wind-up M/s.24 Assured Services Private Limited (hereinafter referred to as 'the respondent company'), a company registered under the Companies Act having its Registered Office within the jurisdiction of this Court. The said Company Petition was dismissed for default on 23.7.2014, on account of non-

appearance of the learned counsel who was representing the appellant company.

4. After dismissal of the Company Petition, the appellant company filed Co.Appl. No.341 of 2015 under Rule 9 of the Companies (Court) Rules, 1959 seeking an order to set aside the order dated 23.7.2014 dismissing Co.Pet. No.54 of 2011 for default and to restore it to file. The said application was accompanied by Co.Appl. No.342 of 2015 filed under Section 5 of the Limitation Act, 1963 seeking an order to condone the delay of 349 days in filing the former application.

5. The respondent company opposed Co.Appl. Nos.341 of 2015 and 342 of 2015 by filing counter affidavits. After hearing both the sides, the learned Company Judge by the order dated 21.10.2015 dismissed Co.Appl. No.342 of 2015 stating that, the affidavit accompanying the aforesaid application does not contain any satisfactory explanation for the delay. In view of the dismissal of Co.Appl. No.342 of 2015, the learned Company Judge dismissed Co.Appl. No.341 of 2015 as time barred.

6. The learned counsel for the appellant company would

contend that, in view of the provisions contained in Rule 100 of the Companies (Court) Rules, the dismissal of a Company Petition for default is legally unsustainable and the learned Company Judge ought to have issued notice to the appellant company intimating non-appearance of its counsel. The learned counsel would contend further that, the former counsel who represented the appellant company in Co.Pet. No.54 of 2011 failed to disclose the reason for his non-appearance on 17.7.2014 and 23.7.2014, when the Company Petition was listed before the learned Company Judge. It was in that context, the appellant company has stated in the affidavit accompanying the application that, its counsel could not represent the matter before Court on those posting dates 'for reasons best known to him'.

7. Per contra, the learned counsel for the respondent company would contend that, in the absence of satisfactory explanation for the delay, the learned Company Judge was perfectly justified in dismissing both the applications.

8. Firstly, we shall deal with the contention raised by the learned counsel for the appellant company with reference to Rule

100 of the Companies (Court) Rules.

9. Rule 96 of the Companies (Court) Rules deals with admission of petition and directions as to advertisement. As per Rule 96, upon the filing of the petition for winding-up, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof 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. Rule 96 also provides that, the Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition. Thus, when a petition for winding-up is posted before the Court for admission, the Judge may either; (i) issue notice to the company to show cause why the petition should not be admitted; or (ii) admit the petition and fix a date for hearing and issue a notice to the company before giving direction about advertisement of the petition; or (iii) admit the petition, fix a date of hearing of the petition and order that the petition be advertised and direct that the petition be served upon persons specified in the order.

10. Rule 99 of the Companies (Court) Rules, which deals with advertisement of petition, states that, subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of the Rules and the advertisement shall be in Form No.48. Rule 24 of the Rules deals with the mode and manner in which a petition has to be advertised. Sub-rule (1) of Rule Rule 24 provides that, where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or the Rules otherwise provide, be advertised not less than 14 days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge. Sub-rule (2) of Rule 24 provides further that, except in the case of a petition to wind-up a company the Judge may, if he thinks fit, dispense with any advertisement required by these Rules. Sub-rule (2) of Rule 24 therefore mandates that, a petition for winding-up cannot be placed for

hearing before the Court unless the petition is advertised.

11. In **National Conduits (P) Ltd. v. S.S. Arora [AIR 1968 SC 279 : 1967 (37) CC 786]** a Three-Judge Bench of the Apex Court, in the context of Rules 24 and 96 of the Companies (Court) Rules held that, when a petition is filed before the High Court for winding-up of a company under the order of the Court, the High Court (i) may issue notice to the Company to show cause why the petition should not be admitted; (ii) may admit the petition, fix a date for hearing, and issue a notice to the Company before giving directions about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order. The Apex Court held further that, 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 sub-rule (2) of Rule Rule 24. But that is not to say that as soon as the petition is admitted, it must be advertised. In answer to a notice to show cause why a petition for winding-up should not be admitted, the

company may show cause and contend that the filing of the petition amounts to an abuse of the process of the Court. If the petition is admitted, it is still open to the company to move the Court that, in the interest of justice or to prevent abuse of the process of Court, the petition be not advertised. Such an applications may be made where the Court has issued notice under the last clause of Rule 96, and even when there is an unconditional admission of the petition for winding-up. The power to entertain such an application of the company is inherent in the Court under Rule 9 of the Companies (Court) Rules.

12. In **Cotton Corporation of India Ltd. v. United Industrial Bank Ltd. [1983 (4) SCC 625 : 1984 (55) CC 423]** the Apex Court had occasion to consider various statutory safeguards against admission and advertisement of a petition for winding-up of a company, contained in the Companies Act and the Companies (Court) Rules. After referring to Rule 96 of the said Rules, the Apex Court held in Para.22 (@Page 642 of SCC) that, Rule 96 provides that, 'upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the

petition and fixing a date for the hearing thereof 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. The Judge may, if he thinks fit, direct notice to be given to the Company before giving directions as to the advertisement of the petition.' It would appear at a glance that the petition has to come up in Chambers before the Company Judge and not in open Court, and the Rule confers a discretionary power on the Judge not to give any directions at that stage but merely issue a notice to the company before giving directions. If upon receipt of such notice the company appears and satisfies the Judge that the debt is bona fide disputed or the presentation of the petition is mala fide, actuated by an ulterior motive, or abuse of the process of the Court certainly the Judge may decline to admit the petition and may direct the party presenting winding-up petition to prove its claim by a suit or any other manner.

13. In Cotton Corporation of India Ltd.'s case (supra) the Apex Court held further that, winding-up petition is not a recognised mode for recovery of debt and if the company is

shown to be solvent and the debt is bona fide disputed, the Court generally is reluctant to admit the petition. Therefore, the power is conferred on the Judge before whom the petition comes up for admission to issue pre-admission notice to the company so that the company is not taken unawares and may appear and point out to the Judge that the petitioner is actuated by an ulterior motive and presentation of the petition is a device to pressurise the company to submit to an unjust claim. This is a sufficient safeguard against mala fide action and the company would not suffer any consequences as apprehended, and the company can as well appear and ask for stay of further proceeding till the petitioner creditor proves his debt by a regular suit. Therefore, 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.

14. Rule 100 of the Companies (Court) Rules deals with the application for leave to withdraw petition for winding-up. Sub-rule (1) of Rule 100 provides that, a petition for winding-up

shall not be withdrawn after presentation without the leave of the Court. Sub-rule (2) of Rule 100 provides further that, an application for leave to withdraw a petition for winding-up which has been advertised in accordance with the provisions of Rule 99 shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition. Therefore, sub-rule (1) of Rule 100 contemplates leave of the Court for the purpose of withdrawal of a petition for winding-up, after its presentation. If the petition for winding-up has already been advertised, as per sub-rule (2) of Rule 100, the application for leave to withdraw such petition shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition. The provisions under sub-rule (1) of Rule 100 will be attracted once the petitioning creditor or contributory makes an application, at the pre-admission stage, seeking leave of the Court to withdraw a petition for winding-up, on his claim or dispute with the company being satisfied or settled out of Court. In order to ascertain whether the leave sought for can be granted, the Court has to consider the various facets of the case. On the other hand,

the object of sub-rule (2) of Rule 100 is to enable any other creditor or contributory of the company, who wish to support the petition for winding-up, to appear in Court either in person or through his advocate, at the date fixed for hearing in the advertisement, in order to support the petition for winding-up, even if the original petitioning creditor or contributory wishes to withdraw the same or have it dismissed, at the post-admission stage. Thus, even if the claim or dispute with the original petitioning creditor or contributory is satisfied or settled out of Court and he is induced to withdraw the petition for winding-up, sub-rule (2) of Rule 100 enable any other creditor or contributory of the company to support the said petition, by filing an application for substitution under sub-rule (3) of Rule 101.

15. Rule 101 of the Companies (Court) Rules deals with substitution of creditor or contributory for original petitioner. Rule 101 reads thus;

"101. Substitution of creditor or contributory for original petitioner:- where a petitioner, -

(1) is not entitled to present a petition, or

(2) fails to advertise his petition within the time prescribed by the rules or by order of Court or such extended time as

the Court may allow, or

(3) consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned or fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned, or

(4) if appearing, does not apply for an order in terms of the prayer of his petition, or,

where in the opinion of the Court there is other sufficient cause for an order being made under this rule, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the Court, would have a right to present a petition, and who is desirous of prosecuting the petition.”

16. Going by sub-rule (3) of Rule 101, where a petitioner, who filed a petition for winding-up, consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned or fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned, the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who, in the opinion of the Court, would have a right to present a petition, and who is

desirous of prosecuting the petition. However, for the Court to exercise the power of substitution as contemplated under Rule 101, any such creditor or contributory, has to come forward, expressing his desire to prosecute the petition for winding-up, by substituting him as petitioner in the said petition. Rule 102 of the Rules, which deals with the procedure on substitution, provides that, on such substitution the amended petition shall be deemed to have been presented on the date on which the petition was originally presented.

17. Turning to the facts of the present case, Co.Pet. No.54 of 2011 filed by the appellant company is one under clause (e) of Section 433 of the Companies Act, seeking an order to wind-up the respondent company, on the ground that the said company is unable to pay its debts. In the said Company Petition, the learned Company Judge issued notice to the respondent company. The learned Company Judge, therefore, issued notice to the respondent company before admitting the Company Petition and giving any directions as to advertisement of the said petition. On receipt of notice, the respondent company entered appearance

and filed its counter affidavit. Thereafter, the Company Petition was being adjourned for filing reply affidavit by the appellant company. On 17.7.2014 and 23.7.2014, when the case was called for hearing, there was no representation for the appellant company and as such the learned Company Judge dismissed the Company Petition for default.

18. As we have already noticed, the provisions under sub-rule (1) of Rule 100 of the Companies (Court) Rules will be attracted only when the petitioning creditor or contributory makes an application, at the pre-admission stage, seeking leave of the Court to withdraw a petition for winding-up; and the provisions under sub-rule (2) of Rule 100 will be attracted when such an application is made in the post-admission stage. Neither sub-rule (1) nor sub-rule (2) of Rule 100 put an embargo on the power of the Court to dismiss a petition for winding-up for default, at the pre-admission stage, due to non-appearance of the counsel for the petitioning creditor or contributory. Similarly, sub-rule (3) of Rule 101 only enables any other creditor or contributory who, in the opinion of the Court, would have a right

to present a petition, and who is desirous of prosecuting the petition, to be substituted as petitioner, where a petitioning creditor or contributory who filed the petition for winding-up, consents to withdraw the petition, or to allow it to be dismissed, or the hearing to be adjourned or fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof, or any day to which the hearing has been adjourned. Sub-rule (3) of Rule 101, therefore, put no embargo on the power of the Court to dismiss a petition for winding-up for default, at the pre-admission stage, due to non-appearance of the counsel for the petitioning creditor or contributory.

19. The provisions referred to above only enable any other creditor or contributory of the company, who is desirous of prosecuting the petition, to proceed with the petition for winding-up in case the original petitioning creditor or contributory is reluctant; meaning thereby that, at post-admission stage, even if the petitioning creditor's claim is paid off privately or the dispute with the petitioning contributory is settled out of Court, his exclusion from the proceedings for winding-up would be of no

consequence, in case any other creditor or contributory, who is desirous of prosecuting the petition, is substituted as petitioner. Therefore, the conclusion is irresistible that, neither Rule 100 nor Rule 101 of the Companies (Court) Rules put an embargo on the power of the Court to dismiss for default, a petition for winding-up, at the pre-admission stage, due to non-appearance of the counsel for the petitioning creditor or contributory.

20. Now we shall deal with the facet of delay. As we have already noticed, on 17.7.2014 and 23.7.2014, when Co.Pet. No.54 of 2011 was called for hearing at the pre-admission stage, there was no representation for the appellant company and as such the Learned Company Judge dismissed the Company Petition for default. After dismissal of the petition, the appellant company filed Co.Appl. No.341 of 2015 seeking an order to set aside the order dated 23.7.2014 dismissing the Company Petition for default and to restore it to file. The said application was accompanied by Co.Appl. No.342 of 2015 seeking an order to condone the delay of 349 days in filing the former application. The respondent company opposed both the applications, by filing

counter affidavits, and the learned Company Judge by order dated 21.10.2015 dismissed Co.Appl. No.342 of 2015 stating that, the affidavit accompanying the aforesaid application does not contain any satisfactory explanation for the delay. In view of the dismissal of the said application, the learned Company Judge dismissed Co.Appl. No.341 of 2015, as time barred.

21. A reading of the affidavit in support of Co.Appl. No.342 of 2015 would show that, the reason stated therein for non-appearance of the learned counsel for the appellant company on 17.7.2014 and 23.7.2014, when the petition was listed before the learned Company Judge is that, its counsel could not represent the matter before Court on those posting dates 'for reasons best known to him'. The delay of 349 days in filing Co.Appl. No.341 of 2015 is explained in the affidavit in support of Co.Appl. No.342 of 2015 by stating that the appellant company was unaware of the dismissal of the petition for default. However, the affidavit does not show when exactly the appellant company came to know of the dismissal of the petition for default. The learned counsel for the appellant company would contend that, the former counsel

who represented the company failed to disclose the reason for his non-appearance on 17.7.2014 and 23.7.2014, when the petition was listed before the learned Company Judge, and it was in that context, the appellant company has stated in the affidavit that, its counsel could not represent the matter before Court on those posting dates 'for reasons best known to him'.

22. In **Collector, Land Acquisition v. Katiji (1987 (2) SCC 107)** the Apex Court held that, the legislature has conferred power to condone delay by enacting Section 5 of the Limitation Act, 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on merits. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice, that being the life-purpose for the existence of the institution of Courts.

23. In **Esha Bhattacharjee v. Raghunathpur Nafar Academy (2013 (12) SCC 649)** the Apex Court summarised the principles applicable while dealing with an application for condonation of delay. Paras.21 and 22 of the judgment read

thus;

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.2. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to

encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some

acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

24. As borne out from the affidavit in support of Co.Appl. No.342 of 2015, there had been some communication gap between the appellant company and its former counsel. Since nothing was heard from the former counsel regarding the

Company Petition, online search was made to know the status of the case. Then only, the appellant company came to know about the disposal of the case. In the counter affidavit filed to Co.Appl. No.342 of 2015, the respondent company has no case that the explanation offered by the appellant company for the delay in filing Co.Appl. No.341 of 2015 is concocted or the grounds urged in the said application are fanciful.

25. The fact however remains that, if the respondent company had been promptly verifying the proceedings of the case from the counsel engaged by it, the dismissal of the Company Petition for default could have been avoided. We also notice that, the affidavit in support of the application for condonation of delay has been drafted in a casual manner harbouring the notion that the Courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system. In that view of the matter, we hold that the delay of 349 days in filing Co.Appl. No.341 of 2015 can be condoned only on terms.

26. Accordingly, we condone the delay of 349 days in filing

Co.Appl. No.341 of 2015 on the appellant company paying a sum of Rs.5,000/- as cost to the Kerala State Legal Services Authority, within a period of two weeks from the date of receipt of a certified copy of this judgment.

27. On such payment being made, Co.Appl. Nos.341 and 342 of 2015 will stand allowed and Co.Pet. No.54 of 2011 will stand restored to file, by setting aside the order of dismissal dated 23.7.2014.

The Company Appeal is disposed of as above.

Sd/-
P. R. RAMACHANDRA MENON,
JUDGE

Sd/-
ANIL K. NARENDRA,
JUDGE

kmd

True copy

P.A.to Judge