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

Date of Decision : 10th August, 2015.

\+ **CO.APP. 54/2014 & CM APPL. 15738/2014**

ANAND KRISHNA JOHARI ..... Appellant

Through : Mr. P. Nagesh & Mr.Anand M. Mishra, Advocates.

versus

REGISTRAR OF COMPANIES, DELHI & HARYANA & ORS. ..... Respondents

Through : Ms. Anjana Gosain, Advocate for R1. Mr. Rajiv Bahl, Advocate for O.L.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE I.S.MEHTA

GITA MITTAL, J (ORAL)

1. The appellant has assailed the order dated 21st January, 2014 passed in the company application No. 1261/2007 filed in Company Petition No. 354/2001. This application was filed by the present appellant/ Sh. Anand Krishna Johri under Rule 6 read with Rule 9 of the Companies (Court) Rules, 1959 seeking setting aside of an order dated 14th September, 2005 passed by the Company Court directing the final winding up of the company, M/s Cyberspace Limited (hereinafter referred to as 'company').

2. To the extent necessary, essential facts of the case are noted hereunder. Winding up proceedings were initiated against the company by

way of Company Petition No. 354/2001 filed by the Registrar of Companies ('ROC' for brevity) under Sections 433 (f) & 439 (e) of the Companies Act, 1956. This petition was based on a report of the Central Bureau of Investigation which had carried out searches and investigation and concluded that the company had mis-appropriated the monies belonging to several investors aggregating to Rs.11.46 Crores.

3. The winding up petition was admitted by the Court by the order dated 12th October, 2004. By the same order, the publication of citations in two newspapers was directed. The Official Liquidator attached to the Company Court was appointed as the Provisional Liquidator and was authorized to seize and take into his charge the assets, books of accounts and other records of the company.

4. We are informed that the citations of the publication of the winding up proceedings of the company were published in 'The Statesman' (English) and 'The Jansatta' (Hindi).

5. On 14th September, 2005, the final winding up order of the company was passed when it was observed that none had represented the company despite the publications. The Company Court held that in these circumstances it would be just and equitable to wind up the company. Intimation of the final winding up order was directed to be sent to the ROC for deletion of the name of the company.

6. In this background, in November, 2007, Company Application No.

1261/2007 came to be filed by the appellant/Anand Krishna Johri seeking recall of the ex parte winding up order and dismissal of the company petition. This application was dismissed on 27th April, 2012 by the Company Court holding that winding up order could not be recalled. However, an opportunity was given to the ex-director by the same order to the appellant to file a scheme for revival of the company in liquidation.

7. The order dated 27th April, 2012 was set aside by the Division Bench by its order dated 4th September, 2012. Company Application No. 1261/2007, as a result, came to be restored on 15th October, 2012 to its original number directing the appellant to file supplementary affidavits to explain the reasons accountable for the delay in seeking the recall of the winding up order. We extract hereunder, the explanation given by the appellant responsible for the delay in filing the application as noted by the learned Single Judge as under:-

> (i) in the Company Petition 354/2001, the appellant was not made the respondent, even though, he was the single largest equity holder and a founding director of the company;
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> (ii) the appellant was for this reason, not aware of the winding up proceedings in this court;
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> (iii) the appellant was incarcerated in Lucknow from March 2005 to 15th July, 2007 and did not have access

to the newspapers published in Delhi, which prohibited him from learning about the winding up proceedings as well;

(iv) the appellant was transferred to jail in Bombay which further rendered it difficult to learn about the winding up order;

(v) the appellant was released from the custody on bail on 15th July, 2007, when he came to learn about the final winding up order and consequently in November, 2007, he took the steps to recall the same;

8. The learned Single Judge took up this application for consideration and rejected the same by a decision dated 21st January, 2014, which has been impugned herein. We have been taken through the record of the case. Company Application No. 1261/2007 has been rejected primarily on the ground that the appellant was unable to explain the delay in seeking the recall of the winding up order. It is noted that apart from the appellant and his wife, there were seven other directors who could have taken steps on behalf of the company. The learned Single Judge was therefore, of the view that one of the other directors could have moved for recall of the order.

9. The learned Single Judge has also noted that the company was represented by counsel in the winding up proceedings and that upto 2nd August, 2004, the counsel had appeared in the matter. It was only thereafter

that there was no representation on behalf of the company.

10. The impugned order notes that the order of provisional winding up and appointment of provisional liquidator was passed in the case on 12th October, 2004 when the appellant was not incarcerated and therefore, the appellant had ample opportunity to resist the winding up proceedings. In these circumstances, the learned Single Judge observed that the diligence shown by the appellant after his release on bail on 15th July, 2007 can be of no benefit and the Company Application No. 12612007 was rejected being devoid of merits.

11. Mr. P. Nagesh, learned counsel appearing on behalf of the appellant has drawn our attention to the Company Application No. 1261/2007. The application points out that the M/s Cyberspace Limited was a company which was incorporated under the Companies Act, 1956 on 26th May, 1984 under the name and style of Green Field Leasing & Housing Limited. Till the year, 1999, the company has functioned as a finance company and thereafter, changed its name and objects and became a software company. The Board of the company was reconstituted to include globally recognized software professionals.

12. The detailed submissions on the merits of the case have been made. Mr. P. Nagesh, learned counsel appearing on behalf of appellant has submitted that the appellant has contested every allegation made by the Central Bureau of Investigation (CBI) in the report No. 6675/3/8 dated 23rd August, 2001 made to the ROC alleging mis-utilization of investors' fund by

the appellant. It has been pointed out that based on this report only the CBI made recommendation dated 23rd August, 2001 for the winding up of the company to the ROC, New Delhi.

13. Apart from the technical objections including the mis-joinder of parties and non-joinder of necessary parties including the appellant, detailed submissions as to why the case of winding up of the company under Section 433 (f) of the Companies Act has not been made out by ROC and that the revival of the Company is in the interest of its stake holders have been pressed before us. It is also urged by Mr. P. Nagesh, learned counsel for the appellant that so far as the case of the Central Bureau of Investigation is concerned, despite the filing of the chargesheet as back as in the year, 2001, even the charges have not been framed in the matter till date. In order to support his bonafide, it has been pointed out by Mr. P. Nagesh, that the appellant has duly submitted the statement of affairs of the company before the Official Liquidator.

14. Before us, it is being urged by learned counsel for the respondent that the order of learned Single Judge was justified keeping in view the delay in filing the application under consideration. However, it is not disputed before us that there is no statutory provision of limitation prescribed to decide such an application.

15. The above narration of the facts and circumstances of the case which were placed before the learned company court, would show that undoubtedly, the application which was filed in November, 2007 seeking

recall of the order dated 14th September, 2005 was belated. The appellant had put together his peculiar circumstances responsible for the delay in filing the application. However, it cannot be lost sight of the fact that the appellant stood implicated under the criminal proceedings since the year 2001 and there is substance in the submission made before us that the appellant's energies were devoted to sorting out the criminal prosecution in which he was also incarcerated for a period of two years. In any case, it is well settled that the delay by itself would not shut down the doors of the court to a person where such a delay can be compensated by way of imposition of costs.

16. So far as winding up proceedings are concerned, the winding up orders are the last resort which are passed only after the court concludes that it is just, convenient and essential to wind up the company. Otherwise, every effort is made to ensure that the running business of a company continues in accordance with law. The appellant before us has attempted to place certain essential facts before the court in support of its submission that sub-section (f) of Section 433 and Section 439 (e) of the Companies Act were not satisfied and that the present case was not a fit case for initiation of the winding up proceedings against the appellant's company.

17. Mr. P. Nagesh has drawn our attention to the order dated 4th September, 2012 passed by the Division Bench in Company Appeal No. 66/2012, whereby, the order dated 27th April, 2012 of the learned Company Judge rejecting the recall application of the winding up order was set aside, the provisional winding up order still remained and it was observed that the

statement of affairs of the company be made before the learned Company Judge who may take appropriate action in the matter.

18. We find that in the impugned order dated 21st January, 2014, the direction made on 27th April, 2012 has been repeated. This is obviously an error given the clear directions of the Division Bench in its order dated 4th September, 2012 and could not have been passed.

19. It is further pointed out that in the course of the winding up proceedings, the Official Liquidator has recovered a sum of Rs.45 Lakhs, which are lying to the credit of the company. Furthermore, in view of the public notices published in the Newspapers with regard to the winding up proceedings, only five creditors had submitted a total claim of Rs. 1,66,846/- It is submitted that the appellant had deposited this amount in this court to meet his liabilities. The submission is that there are seven other creditors who have approached the Official Liquidator, however, their claims aggregating approximately to Rs.23 lakhs are neither admitted nor legally recoverable. In any case, there are adequate funds amounting to a sum of Rs. 45 lakhs to the credit of the company available with the Official Liquidator for meeting these liabilities.

20. Learned counsel for the respondent submits that in the chargesheet filed by the CBI, it has been alleged that an amount to the tune of Rs. 11.46 crores have been collected from the creditors are diverted by the appellant to sister concerns and other ancillary concerns.

21. Our attention is drawn to the order dated 20th November, 2013 issued by the Sub-Judicial Magistrate, CBI, Lucknow directing the prosecution to file a correct list of investors based on details obtained from both the liquidators at Allahabad and New Delhi or from any other legal source as soon as possible and also the details of all those investors who are yet to receive the money due from the appellant. It is submitted by Mr. P. Nagesh, learned counsel appearing for the appellant that no such details have been furnished till date. Mr. Nagesh would submit that there is substance in grievance of the petitioner that the figure reached by the CBI is not correct.

22. It is submitted by Ms. Anjana Gosain, learned counsel appearing on behalf of respondent No. 1 and Mr. Rajiv Bahl, learned counsel appearing for Official Liquidator that the winding up proceedings were initiated only on the report of the CBI and that the proceedings were initiated under Section 433(f) and 439(e) of the Companies Act. This by itself would not fulfil the requisite satisfaction of provisions contained under sub-section (f) of Section 433 of the Companies Act so as to enable the company court to direct and initiate the winding up of the company.

23. In any case, the only prayer before us on behalf of the appellant is that the company application No. 1261/2007 be considered by the company court on merits. This prayer appears to be justified in the totality of facts and circumstances of the instant case noted above and in view thereof, we hereby recall the order dated 21st January, 2014 passed by the learned Single Judge, subject to the payment of costs of Rs.20,000/- to each of the Registrar of Companies and the Official Liquidator within a period of two weeks from

today. The proof of payment of costs shall be placed before the Registry.

24. The company application No. 1261/2007 shall be placed for consideration on merits for directions before the Company Judge on 3rd September, 2015.

25. It is further observed that the application shall be considered on the merits of the rival contentions raised by the parties and shall not be rejected only on the ground of delay.

24. It is made clear that nothing contained in this order is an expression of opinion on the merits of the appellant's contentions. It is also made clear that it shall be open to all the parties to raise all the pleas available to them in law before the learned Company Judge for proper adjudication of the application.

26. This appeal and the application are allowed in the above terms.

GITA MITTAL
(JUDGE)

I.S.MEHTA
(JUDGE)

AUGUST 10, 2015
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