IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.735 OF 2015
IN
COMPANY PETITION NO.628 OF 2008

Mr.Shivkant Chaudhary)....Applicant
V/s.
Mr.Dinesh Chandra Maingi)....Respondent

Mr.Saeed Akhtar a/w Ms.Pradnya Meshram and Ms.Pinny Pathak for the applicant.
Mr.A.M.Vernekar i/by M/s.Joby Mathew and Associates for respondent and for applicant in CA 532/2014 and CA 533/2014.
[Mr.Mahendhar Aithe-Company Prosecutor for Official Liquidator present].

CORAM : K.R.SHRIRAM,J
DATE : 28.11.2017

P.C.:-

1 This application is taken out on behalf of ex-director of respondent-company Geeta Marine Services Pvt. Ltd. to set aside/re-call the winding up order dated 19.3.2009, after condoning delay of 6 years and 4 months.

2 The facts in brief are as under :-

On 3.6.2008 Company Petition (L) No.471 of 2008 was filed and the same was registered on 27.6.2008 as Company Petition No.628 of 2008. On 31.7.2008 this court had issued notice before admission in Company Petition No.628 of 2008. On 16.10.2008

Advocate Lalit Jain has filed his Vakalatnama on behalf of respondent company - Geeta Marine Services Pvt. Ltd. and filed reply. On 23.10.2008 this court had passed an order in Company Petition No.628 of 2008 setting conditions for admission of company petition. On 19.3.2009 this court had passed winding up order in Company Petition No.628 of 2008.

On 4.8.2009 first meeting took place in the office of Official Liquidator and Minutes of meeting was signed. On 15.7.2010 this court passed order in Official Liquidator's Report dated 22.6.2010 for compliance else adopt contempt proceedings.

On 20.7.2010 individual declarations have been filed by all four ex-directors of Geeta Marine Services Pvt. Ltd. (In liquidation) before the Official Liquidator regarding assets of the company in reply to the Official Liquidator's letter dated 16.7.2010.

On 16.9.2010 this court had ordered in OL Report dated 31.8.2010 permitting Contempt proceedings as per clause-(a) of the Report.

On 31.3.2011 Memorandum of Understanding was signed by Geeta Marine Services Pvt. Ltd through Mr.Shivkant V.Chaudhary as director with a Consortium to salvage sunken vessel Ventura and received Rs.1 crore from consortium for operation. This was without disclosing that company was ordered to be wound up on 19.3.2009.

On 15.7.2011 Letter of ROC to Official Liquidator advising that obtaining modification of charge by Geeta Marine Services Pvt. Ltd. after winding up order was passed is fit case for initiating misfeasance proceedings against the Ex-directors of Geeta Marine Services Pvt. Ltd. (in liquidation).

On 5.3.2012 letter of Yash Associates Advocates for Ex-directors with balance-sheets of Geeta Marine Services Pvt. Ltd. was submitted to Official Liquidator.

On 12.3.2012 this court had passed order in Official Liquidator's Report No.99 of 2012 permitting to engage lawyer for contempt proceedings against the Ex-director of the company.

On 22.3.2012 letter was sent from Advocates Yash Associates to Official Liquidator submitting balance-sheets of Geeta marine Services Pvt. Ltd. in compliance of Order dated 12.3.2012.

On 9.4.2012 affidavit was filed by S.V.Chaudhary through SBG & Associates, Advocates for Ex-director in compliance of order dated 12.3.2012.

Appeal (L) no.680 of 2012 filed on 15.9.2012 by Geeta Marine Services was disposed on 22.11.2012.

On 29.11.2012 Official Liquidator had filed Report No.442 of 2012/VI.

On 31.1.2013 this court has passed an order in Official Liquidator's Report No.442 of 2012/VI permitting Official Liquidator to file complaint against Ex-directors of company (in liquidation) under Section 454(5) of Companies Act.

On 6.2.2013 Complaint No.3 of 2013 under Section 454(5) of the Companies Act was filed by the Official Liquidator.

On 15.3.2013 Company Application (L) No.139 of 2013 was numbered as Company Application No.532 of 2014 and Company Application (L) No.140 of 2013 was numbered as Company Application No.533 of 2014. On 9.5.2013 this court ordered in both the applications to comply with office objections and also issued fresh summons to accused no.2 Sudhir S.Chaudhary in Complaint No.3 of 2013. On 20.6.2013 both the applications and complaint made returnable on 1.8.2013 by this court.

On 6.7.2013 Mr.Shivkant V.Chaudhary Ex-director of Company (in liquidation) has filed an affidavit in reply to Official Liquidator's report No.442 of 2012/VI dated 29.11.2012 opposing the report. On 8.8.2013 this court has passed in both the applications and complaint issuing process under complaint 3/2013 and issued summons under Section 542(1) and 543(1) of Companies Act.

On 3.10.2013 Mr.S.V.Chaudhary has engaged an Advocate in both the applications and matter was stood over to 24.10.2013.

On 24.10.2013 this court had passed an order in Company Application (L) No.139 of 2013 and Company Application (L) NO.140 of 2013 to serve notice on accused/respondent no.3 at his new address.

On 3.12.2013 this Court had passed an order to serve the directors the points of claim attached to order and matter was stood over to 7.1.2014.

On 5.12.2013 this court had passed an order disposing of Official Liquidator's Report No.442 of 2012/VI with liberty to file afresh.

On 13.2.2014 this court issued notice to all the 4 accused to personally remain present in court on 6.3.2014 in both the Company applications and in complaint.

On 10.4.2014 this court ordered for compliance by 7.5.2014 as per the undertaking by Advocate Saeed Akhtar and also waived service on all accused.

On 6.5.2014 an affidavit was filed by S.V.Chaudhary stating compliance of order dated 10.4.2014 and for the first time filed Form 57 giving statement of affairs of the company. Copy of first affidavit in reply was served upon counsel for petitioner in court by Advocate Saeed Akhtar.

On 7.5.2014 letter was given from Advocate Saeed Akhtar to Official Liquidator for serving affidavit of Ex-director.

On 6.6.2014 2nd affidavit in reply filed by S.V.Chaudhary forwarded by Advocate Saeed Akhtar vide his letter to counsel for petitioner.

On 20.6.2014 this court passed an order in Complaint No.3 of 2013 directing Official Liquidator to submit report on compliance of previous orders.

On 9.7.2014 Official Liquidator reporting non-compliance received by advocate of respondents in court on 1.9.2014.

On 29.9.2014 Mr.Shivkant V.Chaudhary submitted a letter to Official Liquidator for submission of files of the company.

On 27.11.2014 affidavit was filed by S.V.Chaudhary in reply to Official Liquidator's Report dated 9.7.2014 through Advocate Saeed Akhtar.

On 12.12.2014 meeting took place in the office of Official Liquidator and minutes was recorded.

On 26.12.2014 letter was sent by Advocate Saeed Akhtar to Official Liquidator regarding Company Petition No.628 of 2008 seeking extension of time to file affidavit.

On 14.1.2015 letter was sent from S.V.Chaudhary Ex-director to the Official Liquidator regarding Company Petition No.628 of 2008 seeking extension of time for compliance.

On 27.1.2015 letter was sent by the Official Liquidator to Mr.Shivkant V.Chaudhary refusing extension of time for compliance.

On 12.2.2015 letter was sent to Official Liquidator by Advocate Saeed Akhtar submitting revised Form 57 towards statement of affairs of company.

On 18.2.2015 letter was sent by Advocate Saeed Akhtar to the Official Liquidator for submission of affidavit of Ex.Director of company (in liquidation) explaining observations made in meeting dated 12.12.2014.

On 19.3.2015 letter was sent by the Official Liquidator to Shivkant V.Chaudhary asking to hand over assets as per balance-sheet.

On 25.5.2015 the present Company Application (L) No.402 of 2015 was filed and registered as Company Application No.735 of 2015 on 24.7.2015.

3 It is the case of the applicant and the relief sought is the order passed on 19.3.2009 winding up the company should be re-called because notice as required under Rule-28 of Companies (Court) Rules 1959 was not served upon the company, serving such a notice was mandatory and failure to serve such notice was fatal to the

petition.

4 Counsel for the applicant relied upon a judgment of a single Judge of this court (R.M.Lodha,J as he then was) in [1]***Skol Breweries Ltd. & Anr. vs. Sanman Distributors Pvt. Ltd.***

5 According to Shri Akhtar counsel for original respondent, this court has held that non compliance of the mandatory provision in issuance and service of the notice under Rule 28 by itself is sufficient for setting aside the ex-parte winding up order. It was also submitted that the Court had held that omission or inaction on the part of the Company Registrar in due compliance cannot operate prejudicially to the interest of the company.

6 Mr.Vernekar counsel appearing for original petitioner submitted that though he respectfully agrees with the judgment in Skol Breweries (supra) on the mandatory nature of service under Rule 28, Mr.Vernekar also submitted that the court in Skol Breweries (supra) also observed that notice under Rule 28 can be waived and relying upon a judgment of the Apex Court in [2]***M/s.Galada Power and Telecommunication Ltd. V/s. United India Insurance Co. Ltd. & Anr.***, submitted that such a statutory right may also be waived by

1. AIR 1999 Bom. 249
2. 2016 SCC online 839

conduct of a party. In the further affidavit in reply, original petitioner has also taken specific plea of estoppel and waiver.

7 It will be necessary to keep in mind the facts that prevailed in the matter of ***Skol Breweries***. In ***Skol Breweries*** (supra) the company petition was accepted and notice was issued to the applicant-company. On 2.3.1995 when the matter came up for admission, the counsel who was appearing for the company appeared and stated that she was unable to take instructions from the company in view of an order passed by City Civil Court, Bangalore on 21.11.1994 and, therefore, she prayed for her discharge in the matter. This court after recording this fact, ordered admission of the company petition and its advertisement in 2 newspapers and the Maharashtra Government Gazettee for hearing of the company petition on 20.4.1995. However, the matter was posted for hearing on 25.4.1997. Nobody appeared on behalf of the company on that date and this court passed an ex-parte order of winding up and consequential order.

8 Soon thereafter, the applicant company took out company application No.364 of 1997 (since it is registered as 364 of 1997 and the winding up order was of 25.4.1997 it would be correct to assume that application was taken out soon after the order of winding up was

passed) praying for setting aside ex-parte winding up order dated 25.4.1997 and for consequential reliefs. It was based on these facts that the company application was heard and the court was pleased to observe that the requirements of Rules-27, 28, 29, 30 & 31 being mandatory in nature and the counsel for company, not having waived issuance of service and notice after admission of the petition, the ex-parte order of winding up of company has to be recalled and the court recalled the order.

9 What is required to be noted is that it is an accepted position that service under Rule 28 can be waived. Whether the waiver has to be express or implied by conduct, has to be seen. In my view, waiver even of statutory right can also be implied by conduct and I find support for this in the judgment of the Apex court in ***M/s.Galada Power*** (supra). It will be useful to reproduce paragraph nos.15 & 16 of this judgment.

> *"15 Yet again, in Krishna Bhadur v.Purna Theatre, it has been ruled that :-*
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> *"A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."*

16. In State of Punjab v. Davinder Pal singh Bhullar, a two-Judge Bench speaking about the waiver has opined :-

"41. Waiver is an International relinquishment of a right. In involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide Dawsons Bank Ltd. V. Nippon Menkwa Kabushiki Kalsha, Basheshar Nath V. CIT, Mademsetty Satyanarayana V.G.Yelloji Rao, Associated Hotels of India Ltd. v. S.b.Sardar Ranjit Singh, Jawswantsingh Mathurasingh v. Ahmedabad Municipal Corpn. Sikkim Subba Associates v. State of Sikkim and Krishna Bahadur v. Purna Theatre.)

42. This Court in Municipal Corpn. of Greater Bombay v. Dr.Hakimwadi Tenants Assn. considered the issue of waiver/acquiescence by the non-parties to the proceedings and held : (SCC p.65, paras 14-15)

14. IN order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case.

15. There is no question of estopped, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition."

10 Mr.Akhtar counsel for applicant relied upon a judgment of

the Apex court in [3]***Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and ors.*** to submit that the waiver is a question of fact and it must be properly pleaded and proved and no plea of waiver can be allowed to be raised unless it is pleaded; and secondly waiver means abandonment of a right and though it may be either express or implied by conduct, its basic requirement is that it must be an intentional act with knowledge. Mr.Akhtar submitted that the applicant was not aware that notice as required under Rule 28 has not been served and therefore, it cannot be stated that the applicant had knowledge and he had waived the same having knowledge of his rights. Even in this judgment of ***Motilal Padampat*** (supra) it is held waiver may be either express or implied by conduct.

11 If one considers the chronology of dates and events as narrated above, it is very easy to come to a conclusion that the applicant has impliedly waived by conduct issuance of notice under Rule 28. The applicant was aware that an order of winding up of the company has been passed on 19.3.2009. It is not the applicant's case that the applicant was not aware of a legal provision of Rule 28 under Company Courts Rules and of course that cannot be a defence because ignorance of law is not an excuse. But it is the case of the

3. (1979) 2 SCC 409

applicant that the applicant did not know that notice under Rule 28 has not been served. Nothing prevented the applicant or his then legal advisors to verify or take inspection of the records in the office of the Company Registrar and take out the application that is now taken out more than 6 years and 4 months after the order of winding up has been passed. It should be noted that the very first meeting on 4.8.2009 called by the Official Liquidator in his office was attended by the applicant who has also signed the minutes of the meeting. There are subsequent events where the applicant has personally attended. The applicant had engaged services of Yash Associates Advocates and Advocate Dilip Shukla etc. Applicant has now introduced a new advocate Shri Saeed Akhtar who himself has appeared in connected matters and from the chronology Mr.Akhtar has appeared for the first time on 10.4.2014. Still the current application has been taken out on 25.5.2015.

12 The purpose of notice under Rule-28 that is required to be sent by the Company Registrar is to inform the company that a petition against the company has been admitted so that the company can take steps to be defended effectively, primarily because at the stage of admission the court only forms prima facie or ex facie opinion. The law considered the situation where it is possible that the

company is not represented while the petition was admitted and therefore, to give one more opportunity to the company because an order winding up the company is a death knell to the company. Give an opportunity to the company to come and show cause as to why the petition should not be allowed and why company should not be wound up. In fact, when a company is represented at the time of admission, invariably orders are passed recording waiver by the company of notice under Rule 28.

13 In my view, even though the order of admission does not record waiver of notice under Rule 28, the company impliedly by its conduct has waived notice under Rule 28. It should also be noted that on 15.7.2010 an order has been passed in Official Liquidator Report dated 22.6.2010 for compliance or else to adopt contempt proceedings. On 20.7.2010, individual declarations have been filed by all 4 ex-directors of the company before the Official Liquidator regarding assets of company in response to the letter dated 16.7.2010 from the Official Liquidator and these declarations have also been signed by the applicant herein Mr.Shivkant V.Chaudhari. On 16.9.2010 an order dated 31.8.2010 in Official Liquidator Report has been passed permitting contempt proceeding as per prayer clause-(a) of the report. It should also be noted that even after the company

has been ordered to be wound up, on 31.3.2011 the applicant herein had signed Memorandum of Understanding on behalf of the company as director with a consortium to salvage sunken vessel Ventura and received Rs.1 crore from consortium. This was done by the applicant without disclosing company was ordered to be wound up on 19.3.2009. On 5.3.2012, one Yash Associates advocates for ex-directors submitted to Official Liquidator balance-sheets of company in liquidation. On 12.3.2012 this court passed an order in Official Liquidator Report No.99 of 2012 permitting to engage lawyer in the contempt proceeding against ex-director of the company. It should be noted that even Shri Akhtar who is now representing the applicant has appeared on numerous instances before this court and also corresponded with the Official Liquidator between 10.3.2014 and 25.5.2015 when the current application was taken out. One of the last communication from Mr.Akhtar is dated 18.2.2015 for submission of affidavit of ex-director of the company in liquidation explaining observations made in the meeting dated 12.12.2014 in the Official Liquidator's office.

14 In the circumstances, though the notice as required under Rule-28 of the Company Courts Rules is mandatory, such a notice can be waived expressly or impliedly by conduct. In my view, the

applicant/company impliedly by conduct has waived the notice required under Rule 28. Therefore, question of recalling the order of winding up on an application taken out after 6 years and 4 months of the winding up order being passed on the specious ground that notice under Rule 28 was not served, cannot be granted.

15 Application dismissed with costs. Applicant to pay sum of Rs.1,00,000/- as cost to the original petitioner by way of cheque drawn in favour of advocate on record for the original petitioner. Amount to be paid within two weeks from today.

Mr.Akhtar seeks stay of this order. Winding up order was passed on 19.3.2009. This application has been filed on 25.5.2015 and more than 2 & ½ years have passed since the application itself has been taken out. I have no intention to trip the winding up proceedings. Stay refused.

(K.R.SHRIRAM,J)