

IN THE HIGH COURT OF BOMBAY AT GOA**COMPANY PETITION NO.19/2006**

M/s. Shekhar Electricals,
a sole proprietorship concern
through its Proprietor
Shri Shekhar Shirodkar,
having office at H.No.281/5,
Vagalim, St. Jose Amal,
Curtorim, Salcete, Goa.

.... Petitioner

V/s

M/s. Falcon Retreat Private Ltd.

.... Respondent

Shri V. Rodrigues, Advocate for the Petitioner.
Shri A.F. Diniz, Advocate for the Respondent.
Ms. Amira Razaq, Advocate for the Official Liquidator.
Shri S.P. Munj, Advocate for the EDC.
Shri S.N. Joshi, Advocate for the State Bank of India.

Coram:- NUTAN D. SARDESSAI, J.

**Reserved on :25th April, 2018
Pronounced on: 3rd May, 2018**

ORDER :

Heard Shri A.F. Diniz, learned Advocate for the Company under winding up whose contention was that an application for recall of the winding up order was maintainable and in that context relied in **Omprakash J. Mehra V/s. Official Liquidator of M/s. Surlex Diagnostic Ltd. [Company Application No.218 of 2012]**. He adverted to the said judgment and contended that winding up order once made could be revoked or recalled though it continues to subsist till it is revoked or recalled.

2. Shri V. Rodrigues, learned Advocate for the petitioner submitted that all the dues of the petitioner were settled by the company under winding up and there were no creditors to whom any accounts were due by the company under winding up. The petitioner had therefore to be permitted to withdraw the petition followed by an order of discharge of the Official Liquidator. Shri S.P. Munj, learned Advocate for the creditor EDC Ltd. submitted that all their dues were settled and therefore they had no objection for the recall of the winding up order and for the withdrawal of the petition. Shri S.N. Joshi, learned Advocate for the State Bank of India similarly submitted that all the dues of the Bank had been settled and besides the possession of the assets were never handed over to the Official Liquidator. Therefore, it was a fit case for the recall of the winding up order and for permitting the withdrawal of the petition.

3. Ms. A. Razaq, learned Counsel for the Official Liquidator submitted at the outset that the Official Liquidator was not opposing the revival of the company provided the person in charge of the company placed a scheme showing how the financial reconstruction of the company was contemplated. She adverted to the winding up order dated 26/06/2009 and the order dated 15/04/2011 in the Company Application No.38/2008 and placed reliance in **Meghal Homes Pvt. Ltd. V/s. Shree Niwas Girni K.K. Samiti [(2007) 78 SCL 482 (SC)]** in the matter of revival of a company under winding

up. **Om Prakash** (supra) did not deal with the revival of the company. The only concern of the Official Liquidator was that there was sufficient material before the Court to show the condition of the company under winding up and that it was not a ruse to escape the consequences of the winding up order. She placed further reliance in **Gujarat State Financial Services Ltd. V/s. Thapar Agro Mills Ltd. [(2013) 33 taxmann.com 466 (Delhi)]**, **Bengal Immunity Ltd. (In Liquidation) In re [(2014) 42 taxmann.com 76 (Calcutta)]** and **Goan Enterprises (P.) Ltd. V/s. Gautam Ramanbhai Patel [(2015) 56 taxmann.com 115 (Bombay)]** while ultimately concluding her argument that it was incumbent on the company under winding up to place material on record to justify the recall of the order for winding up.

4. Shri A.F. Diniz, learned Advocate for the company under winding up submitted that Section 391 of the Companies Act, 1956 applied only where the creditors/workers were before the Court which was not the case presently. Besides, no order of winding up was made despite the order of this Court dated 26/06/2009. Shri V. Rodrigues, learned Advocate for the petitioner in reply submitted that the judgment in **Meghal Homes** (supra) was clearly distinguishable, that Section 391 of the Companies Act, 1956 did not apply to the present case and besides there were only two creditors namely EDC and the State Bank of India which were settled by the Scheme of Redemption.

Moreover, this Court had to take note of the fact that the Official Liquidator had not opposed the revival of the Company under winding up and on all these grounds he had to be permitted to withdraw the petition.

5. i would consider their submissions, peruse the relevant records in the Company Petition and the judgments relied upon (supra) to better appreciate their contentions.

6. It is a mater of record that though a learned Single Judge of this Court (N.A. Britto, J.) vide his order dated 26/06/2009 had ordered the respondent company to be wound up and directed the Registrar to draw the winding up order in terms of Rule 37 of the Companies (Court) Rules, 1959, it was not seriously in dispute that no such order was drawn by the Registrar. It was otherwise submitted and to which there was no singular dispute particularly at the instance of the learned Counsel for the Official Liquidator that despite the publication of the notice in the local dailies, there were no other creditors forthcoming laying a claim against the company under winding up, EDC and the State Bank of India being the only two creditors since the time of publication somewhere in 2011. Therefore to all effects and purposes, the only creditors of the company under winding up apart from the petitioner were EDC and the State Bank of India whose dues had been fully and finally settled by the respondent

and affidavits filed to that effect. It is in that context that Shri Rodrigues, learned Counsel for the petitioner sought for permission to withdraw the petition while Shri A.F. Diniz, learned Counsel for the respondent sought to recall the winding up order and for the discharge of the Official Liquidator as nothing further survived in the proceedings.

7. **Omprakash** (supra), sought for the recall of the winding up order passed by this Court and for the dismissal of the petition. It was in that context that reliance was placed in **Sudarshan Chits (I) Ltd. V/s. O. Sukumaran Pillai & Ors. [1984 4 SCC 657]** in which the Apex Court had considered the scope and purpose of Section 446 (2) of the Companies Act in the following terms :-

“..... It is now well-settled that a winding-up order once made can be revoked or recalled but till it is revoked or recalled it continues to subsist”.

In that view of the matter, the learned Single Judge of the Bombay High Court considered the same in the factual matrix and ultimately held that a case was made out to recall the order of winding up as passed in the year 1999 and passed the order accordingly thereby discharging the Official Liquidator. In the facts of our case, the Official Liquidator had not even taken possession of the properties of the respondent which is an additional feature advantageous to the case of the respondent.

8. **Meghal Homes** (supra), were appeals arising out of the proceedings in the Company Court in the matter of M/s. Shreeniwas Cotton Mills Limited (SCML). It had run into difficulties and the creditors of the company made an application under Section 433 of the Companies Act for winding up the company and by an order dated 25/07/1984 the said company SCML was ordered to be wound up by the Company Court and the Official Liquidator took charge of its affairs. Nothing significant happened for a decade and on a report of the Official Liquidator, the Company Court passed an order dated 1/09/1994 directing the Official Liquidator to issue a public notice inviting applications for the revival of the textile mills and absorption of the workmen and to purchase the assets of the company. At that stage, one Rangnath Somani, a contributory, filed Company Application No.339 of 1994 seeking directions of the Company Court for holding a meeting of the creditors, contributories and other interested persons to consider a scheme proposed allegedly for the revival of the company. The application was opposed. The Company Court directed the convening of the requisite meeting to consider the proposed scheme and pending consideration thereof, the Company Court also withheld the proceedings pursuant to the public notice inviting offers.

9. In **Meghal Homes** (supra), the order of the Company

Court directing the convening of a meeting for the purpose of considering the scheme propounded was challenged in appeal by the workers' union and three of the parties who had submitted their offers in response to the advertisement issued by the Official Liquidator pursuant to the direction of the Company Court dated 1/09/1994. Notwithstanding the pendency of the appeals, a meeting was held and a scheme was approved by the creditors, contributors and workers and an application for sanctioning the scheme was also filed. In the meantime, the Division Bench of the High Court allowed the appeal on 4/04/1995 against the order dated 1/09/1994 and set aside the direction for convening a meeting to consider the scheme proposed. In the view of the Division Bench, the scheme proposed was not a bonafide one since it was not on the basis of any viability report regarding the revival of the company and there was a failure to disclose the latest financial position of the company. The Court also found that even on the showing of Rangnath Somani, the value of the land belonging to SCML was approximately ₹200 crores if unencumbered and that itself was a very conservative valuation. The Court was of the view that the intention behind presentation of the Scheme appeared to be to acquire the huge lands and other real estate belonging to SCML at a throwaway price ostensibly in the guise of reviving the mills but with no real intention of reviving it. This judgment is clearly distinguishable on facts where the issue of the scheme of the workers union and three parties apart from a

contributory were at large before the Company Court which had ordered the winding up of the company unlike the present case where even after the publication of the notice, the only creditors who were before the Court were EDC and the State Bank of India apart from the petitioner and none else. Therefore the contention of Ms. A. Razaq that **Omprakash** (supra) did not deal with the revival of the company would therefore not buttress her case in the factual matrix.

10. **Gujarat State Financial Services Ltd.** (supra) and **Bengal Immunity Ltd.** (supra) were in the context of the applicability of Section 391 of the Act which apparently does not apply to the case at hand. Hence, the departure. In **Goa Enterprises** (supra), the applicant had prayed for a recall of the order dated 21/03/2013 passed in the Company Petition which had been admitted and the petitioner had been directed to advertise the petition in terms of the rules. The respondent vehemently opposed the application for recall of the order denying the contents of the application on merits and also stating that the application was not maintainable, the order of winding up dated 21/03/2013 was not a decree, it was not their case that the statutory notice under Section 433 and 434 of the Act was not received or that there were no bonafide dues as admittedly declared and voluntarily stated in the audited balance sheet submitted to the Registrar of companies, which balance sheet was duly certified by the Chartered Accountant of the company. This was a case where the

petitioner sought for a recall of the winding up order on the grounds that the respondent had approached the Court with unclean hands by hiding various facts and making false statements, that the matter of listing of the Company Petition skipped the notice of the advocates of the applicant and the matter was taken up for admission and order for admission and advertisement of the petition came to be filed. This judgment is clearly distinguishable and it is not like the case under consideration where the petitioner is seeking the withdrawal of the Company Petition as not only its dues but also of the secured creditors have been duly satisfied by the company under winding up and the company under winding up seeking the recall of the order of winding up as it has no outstanding dues. Hence, the respectful departure.

11. Section 391 of the Act deals with the power to compromise or make arrangement with creditors and members. This provision on its cursory reading by itself would reveal that it can have no application to the facts of this case where apparently even despite the publication of notice there are no other creditors apart from EDC and the State Bank of India and the petitioner all of whom have affirmed on oath that their respective dues have been settled by the company under winding up. Hence applying the judgment in **Omprakash** (supra), in the factual matrix and that there were no dues remaining to be settled, i find that this is a fit case for recall of the winding up order dated 26/06/2009 and to permit the withdrawal of the petition.

Therefore the order of winding up dated 26/06/2009 is recalled and the petition is allowed to be withdrawn and as a sequel thereto and as nothing further survives in the petition, the Official Liquidator stands discharged from the proceedings.

NUTAN D. SARDESSAI, J.

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