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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO.454 OF 2017
WITH
NOTICE OF MOTION (L) NO.44 OF 2018
WITH
NOTICE OF MOTION (L) NO.2634 OF 2017
IN
COMPANY APPLICATION NO.735 OF 2015
IN
COMPANY PETITION NO.628 OF 2008

Shivkant Chaudhary ..Appellant.
V/s.
Dinesh Chandra Maingi ..Respondent.

Mr.Saeed Akhtar with Mr.Rehan Ansari and Ms.Pinny Pathan for the appellant.

Mr.A.M.Vernekar with Mr.Ramesh Gogawat i/b. Joby Mathews & Associate for the respondent.

CORAM: NARESH H.PATIL AND NITIN W.SAMBRE, JJ.

DATE : JANUARY 29, 2018

ORDER (PER NITIN W. SAMBRE, J.)

Heard respective counsel.

2. Geeta Marine Services Pvt. Ltd., a company registered

under the Companies Act, 1956 was sought to be wound-up and a Company Petition No.628 of 2008 was filed on behalf of the respondent on the ground that the company was unable to pay its debt which were to the tune of Rs.2,47,85,243/-.

3. After hearing the respective parties, the company petition was admitted on October 23, 2008 by the Company Court.

4. On March 19, 2009 in the Company Petition No.628 of 2008 for winding-up, the following order came to be passed :-

> *"1. This is a Petition for winding up of the Respondent company inter-alia on the ground that the company is unable to pay its debts. According to the Petitioner, the company is indebted to him in a sum of Rs.2,47,85,343/-. The Petition was admitted by an order dated 23.10.2008. The order deals with in detail the rival contentions. I am entirely in agreement with what is stated in the said order which though at the admission stage has considered all the facts and defences. In that view of the matter, I do not find it necessary to set out the same again. Suffice it to state that in any event an amount of about Rs.95.00 lacs has been admitted to be due and payable by the company to the*

Petitioner.

2. The Respondent company is absent. No further reply has been filed. The Petition has been advertised in accordance with the rules.

3. In the circumstances, the Company Petition is made absolute in terms of prayers (a) and (b).

5. The appellant before this Court is the ex-directorof the said company Geeta Marine Services Pvt. Ltd. (hereinafter referred to as the 'company' for the sake of brevity) took out an application being Company Application No.735 of 2015 in the said company petition with a prayer for grant of following reliefs :-

"*a) That the winding-up order dated 19th March 2009 be set aside or recalled;*

b) That the delay, if any, be condoned in the interest of justice;

c) such further and necessaryorders be passed, direction be given as this Hon'ble Colurt deem fit and proper in the facts and circumstances of the case. "

6. As the winding-up order of the company was passed on March 19, 2009, the appellant has also prayed for condonation of

delay as there is a delay of about 6 years and 4 months. This delay is sought to be explained by the present appellant based on pleading ignorance of the statutory provisions.

Apart from above, the application for setting aside order dated March 19, 2009 is based on the contention that no notice under Rule 28 of the Companies (Court) Rules,1959 (hereinafter referred to as 'the Rules' for the sake of brevity) was served upon the registered company or its directors. In the application, it is pleaded that the compliance under Rules 27 to 31 of the Rules, is held to be mandatory in the judgment of this Court in the matter of *Skol Breweries Ltd. & Anr. V/s. Sanman Distributors Pvt. Ltd.*[1]

7. The said application preferred by the appellant came to be rejected by the learned Company Judge vide its impugned order dated November 28, 2017. Hence this appeal.

8. Heard Mr.Saeed Akhtar for the petitioner and Mr.A.M. Vernekar for the respondent. The learned counsel for the appellant while questioning the judgment of the learned Company Judge

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1 **A.I.R. 1999 Bom 249**

would urge that the claim of the original plainiff for winding was admitted to the extent of Rs.95 lakhs, however clarified that the said amount was towards the security, as the accounts were not finally settled in between the parties. According to him, by filing affiavit-in-reply to the winding-up petition, the grounds were set out denying the liability to pay the amount of Rs.95 lakhs. He would then urge that in the proceedings under section 138 of the Negotiatiable Instruments Act, 1881, the respondent herein i.e. the original petitioner to the winding-up petition has admitted that there is no proof of payment of the aforesaid amount and as such, the liability was not established. According to him, the claim for Rs.4.5 crores is based on the cheque of Rs.95 lakhs, which was arising out of friendly transactions.

9. Our attention is invited to Rule 28 of the Rules and a specific plea is raised claiming that the provisions have been held to be mandatory by this Court in the matter of *Skol Breweries (cited supra)*. Non compliance thereof, viz. effecting service of notice in winding-up proceedings on the registered address of the company and its directors would amount to abuse of process of

law and render the entire winding-up proceedings vitiated. The learned counsel for the appellant in addition to above, would urge that even if there is a delay in filing the present application, the same needs to be condoned in view of a strong case in favour of the appellant substantial and injustice is caused to the appellant.

10. *Per contra*, the learned counsel for the respondent would also rely upon the judgment of the Apex Court in the matter of *Motilal Padampat Sugar Mills Co. Ltd. V/s. State of Uttar Pradesh*[2] so as to claim that the waiver is a question of fact which is to be properly pleaded and proved. In absence of plea of non-waiver, it cannot be inferred from the conduct of the appellant that the appellant has waived his right under Rule 28 of the Rules. According to the learned counsel for the respondent, it can be inferred that the appellant has waived his right, particularly when the appellant has not resisted the claim at proper stage and had kept mum for last more than six years. The learned counsel for the respondent would invite the attention of this Court to the various events which took place after initiation of the winding-up upon petition, which can be seen as under :-

2 **(1979) 2 SCC 409**

3.6.2008	Company Petition (L) No.471 of 2008 was filed.
27.6.2008	It was registered as Company Petition No.628 of 2008.
31.7.2008	The Court issued notice before admission in Company Petition.
16.10.2008	Mr.Lalit Jain advocate filed his Vakalatnama on behalf of respondent company Geeta Marine Services Pvt. Ltd. and filed reply.
23.10.2008	The Court had passed an order in the said Company Petition setting conditions for admission of company petition.
19.3.2009	The Court passed winding up order in the said Company Petition.
4.8.2009	In the office of Official Liquidator the first meeting took place and Minutes of meeting was signed.
15.7.2010	The Court passed order in the report dated June 22, 2010 filed by the Official Liquidator's for compliance or else adopt contempt proceedings.
20.7.2010	All the four individual ex-directors of Geeta Marine Services Pvt. Ltd. (In liquidation) filed their declarations before the Official Liquidator regarding assets of the company in reply to the letter dated 16.7.2010 sent by the Official Liquidator.
16.9.2010	In Official Liquidator's Report dated 31.8.2010

	the Court had directed to initiate Contempt proceedings as per clause (a) of the said Report.
31.3.2011	Geeta Marine Services Pvt. Ltd signed the Memorandum of Understanding 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 March 19, 2009.
15.7.2011	Letter was sent by 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).
5.3.2012	Advocates for ex-directors, Yash Associates submitted to Official Liquidator balance-sheets of Geeta Marine Services Pvt. Ltd. along with a letter.
12.3.2012	In Official Liquidator's Report No.99 of 2012, this Court passed an order permitting to engage lawyer for contempt proceedings against the ex-director of the company.
2.3.2012	In compliance of Order dated March 12, 2012, Advocates Yash Associates sent a letter to

	Official Liquidator submitting balance-sheets of Geeta marine Services Pvt. Ltd.
9.4.2012	In compliance of order dated 12.3.2012, S.V.Chaudhary filed an affidavit through SBG & Associates, Advocates for ex-director.
15.9.2012	Appeal (L) No.680 of 2012 filed by Geeta Marine Services was disposed on 22.11.2012.
29.11.2012	Official Liquidator filed Report No.442 of 2012/VI.
31.1.2013	In Official Liquidator's Report No.442 of 2012/VI, this Court passed an order permitting Official Liquidator to file complaint against ex-directors of company (in liquidation) under Section 454(5) of Companies Act.
6.2.2013	The Official Liquidator filed Complaint No.3 of 2013 under Section 454(5) of the Companies Act.
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.
9.5.2013	In both the applications, the court ordered to comply with office objections and also issued fresh summons to accused No.2 Sudhir S.Chaudhary in Complaint No.3 of 2013.

20.6.2013	The applications and complaint were made made returnable on August 1, 2013.
6.7.2013	An affidavit in reply to Official Liquidator's report No.442 of 2012/VI dated 29.11.2012 was filed by Mr.Shivkant V.Chaudhary ex-director of Company (in liquidation) opposing the said report.
8.8.2013	In both the applications and complaint, the Court has passed an order issuing process under complaint 3/2013 and issued summons under Section 542(1) and 543(1) of Companies Act.
3.10.2013	An Advocate was engaged by Mr.S.V.Chaudhary in both the applications and matter was adjourned to 24.10.2013.
24.10.2013	In Company Application (L) No.139 of 2013 and Company Application (L) NO.140 of 2013, this Court passed an order to serve notice on accused / respondent no.3 at his new address.
3.12.2013	An order was passed by the Court to serve the directors and the points of claim was attached to order and matter was adjourned to 7.1.2014.
5.12.2013	The Official Liquidator's Report No.442 of 2012/VI was disposed of by this Court with liberty to file afresh.
13.2.2014	All the 4 accused were issued notice by the Court to personally remain present on March 6,

	2014 in both the Company applications and in complaint.
10.4.2014	As per the undertaking given by Advocate Saeed Akhtar, the Court passed an order for compliance by May 7, 2014 and also waived service on all accused.
6.5.2014	In compliance of order dated 10.4.2014, affidavit was filed by S.V.Chaudhary stating 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.
7.5.2014	The Official Liquidator was sent a letter by Advocate Saeed Akhtar for serving affidavit of ex-director.
6.6.2014	Advocate Saeed Akhtar vide his letter to counsel for petitioner fowarded the second affidavit in reply filed by S.V.Chaudhary.
20.6.2014	The Court vide order in Complaint No.3 of 2013 directed the Official Liquidator to submit report on compliance of previous orders.
9.7.2014	Official Liquidator reported non compliance received by advocate of respondents in Court on 1.9.2014.
29.9.2014	Official Liquidator was informed by Mr.Shivkant V.Chaudhary through a letter to submit the files of the company.

27.11.2014	Iin reply to Official Liquidator's Report dated July 9, 2014, an affidavit was filed by S.V.Chaudhary through Advocate Saeed Akhtar.
12.12.2014	There was a meeting in the office of Official Liquidator and minutes of the same was recorded.
26.12.2014	Seeking an extension of time to file affidavit, Advocate Saeed Akhtar sent a letter to Official Liquidator Company Petition No.628 of 2008.
14.1.2015	Seeking extension of time for compliance S.V.Chaudhary, ex-director sent a letter to the Official Liquidator regarding Company Petition No.628 of 2008.
27.1.2015	The Official Liquidator sent a letter to Mr.Shivkant V.Chaudhary refusing extension of time for compliance.
12.2.2015	Advocate Saeed Akhtar submitted a revised Form 57 to Official Liquidator towards statement of affairs of company vide a letter.
18.2.2015	Advocate Saeed Akhtar sent a letter to the Official Liquidator submitting affidavit of ex-director of company (in liquidation) explaining observations made in meeting dated 12.12.2014.
19.3.2015	The Official Liquidator sent a letter to Shivkant V. Chaudhary asking him to hand over assets as per balancesheet.
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.

11. The learned counsel would further invite attention of this Court to the fact that the appellant kept mu m after the admission of the petition on October 23, 20008 and its final disposal on March 9, 2009. It is well within the knowledge of the appellant that winding-up up petition is decided in accordance with the provisions of the Companies Act and Rules framed thereunder. He submits that if the conduct of the appellant from October, 2008 till the filing of the application or in May 2015 is appreciated, by virtue of his conduct as reflected in the various events narrated hereinabove takes to the only inference that the statutory right is waived. According to the learned counsel for the respondent, in the matter of *Galada Power and Telecommunication Limited V/s. United India Insurance Co. Ltd. & Anr.*[3] the law laid down depicts that the statutory rights can always be waived as could be inferred from the conduct. According to him, paragraphs 15 and 16 of the judgment makes it amply clear that the conduct of the appellant's waiver can be easily construed and inferred. He

3 **(2016) 14 Supreme Court Cases 161**

would then urge that the ignorance of law or legal provisions cannot be held to be a ground for bringing the said action before this Court. According to him, since the appellant, ex-director of the company has personally atttended the winding-up proceedings either before this Court or before the Official Liquidator, by his conduct, he has waived the right as framed under Rule 28 of the Rules. As such, a prayer for dismissal of the appeal is made.

12. Considered rival submission.

13. This Court shall initially deal with the conduct of the appellant in the winding-up proceedings which were initiated almost 10 years back from today i.e. in 2008. From the narration of various events in the aforesaid date-wise chart particularly the events which took place *qua* filing a declaration on July 21, 2010 by the appellant and other directors, filing of the Memorandum of Understanding on March 31, 2011 by the appellant on behalf of the company with a consortium to salvage sunken vessel, initiation of miscellaneous proceedings against the appellant, filing of affidavit on April 9, 2012 by the appellant in compliance with the order dated March 12, 2012 in contempt proceedings, service of

summons on the appellant in Company Application (L) No.139 of 2013 and issuance of summons under section 542 and 543 of the Companies Act and compliance of the orders passed in the said proceedings takes this Court to the only conclusion that the appellant cannot be permitted to raise a plea of ignorance of provisions of law or ignorance of the statutory rights *qua* under Rule 28 of the Rules. Rather, the conduct of the appellant as reflected in the entire events speaks voluminous about the fact that he was aware of his right much less statutory right having taken consultations from the legal experts in the said proceedings. On the basis of above, the claim that the delay of more than 6 years is *bona fide* does not appear to be a reasonable submission. Rather, the conduct of the appellant being ex-director of the company acting contrary to the statutory provisions which prompted the Official Liquidator to initiate the proceedings of contempt, which reflects the intention of the appellant of complete disregard to the rule of law.

13. No doubt, the learned counsel for the appellant has relied upon the judgment of this Court in the matter of *Skol*

Breweries Ltd. (cited supra) and invited the attention to paragraphs 7, 8 and 9 of the said judgment, which read thus :-

“7. There is no dispute that on acceptance of the company petition, notice was issued to the company. Such notice was in the nature of show cause notice before admission. On 2-3-1995 when the matter came up for admission before this Court, Miss Sidhwa, advocate instructed by M/s. Mehta & Girdharilal, appeared and stated that she was unable to take instructions in the matter in view of the order passed by the City Civil Court, Bangalore, on 24-11-1994 and, therefore, she prayed for her discharge. After recording the said statement of Ms. Sidhwa, this Court admitted the company petition on 2-3-1995. No notice was waived by Ms. Sidhwa nor could it have been since she sought discharge. Company Court Rules provide issuance and service of notice on the company after admission of the company petition. Some of the Rule's relevant for the present purpose are Rules 27, 28, 29, 30 and 31 of theCompany Court Rules and the said Rules read thus :-

Rule 27 : "Notice of petition and time of service.-

Notice of every petition required to be served upon any person shall be in Form No. 6, and shall, unless otherwise ordered by Court or provided by these Rules, be served not less than 14 days before the date of hearing."

Rule 28 : "Service on company.-

(1) Where a petition is presented against a Company, it

shall be accompanied by a notice of the petition in the prescribed Form together with a copy of the petition for service on the company and an envelope addressed to the company at its registered office or its principal place of business and sufficiently stamped for being sent by registered post for acknowledgment. The Registrar shall immediately on the admission of the petition send the notice together with the copy of the petition to the company by registered post.

(2) Every petition and, save as otherwise provided by these Rules or by an order of Court, every application, shall, unless presented by the company, be served on the company at its registered office, or, if there is no registered office, at its principal or last known principal place of business, by leaving a copy thereof with an officer or employee of the company, and in case no such person is available, in such manner, as the Judge or Registrar may direct or, by sending a copy thereof by pre-paid registered office, at its principal or last know principal place of business, or to such person and at such address as the Judge or Registrar may direct. Where the company is being wound up, the petition or application shall also be served on the liquidator, if any, appointed for the purpose of winding-up the affairs of the company."

Rule 29 : "Petitioner to effect service.-

Save as otherwise provided by these Rules and subject to any directions of the Judge or Registrar, the petitioner, *applicant or any other person having the conduct of proceedings in Court, shall be responsible for the service of all notices, summons and other process and for the advertisement and publication of notices, required to be effected by these Rules or by order of Court.*"

Rule 30 : " Affidavit of service.-

(1) An affidavit or affidavits stating whether the petition has been advertised as prescribed by Rule 24 and whether the notices if any have been duly served upon the persons required to be served shall be filed not less than 3 days before the date fixed for hearing. Such proof of the advertisement or of the service, as may be available, shall be filed along with the affidavit.

(2) An affidavit of service on a company or its liquidator shall be in Form No. 7 or 8 as the case may be."

Rule 31: "Procedure on default of compliance as regards advertisement and service of notice.-

In default of compliance with the requirements of the Rules or the directions of the Judge or Registrar, as regards the advertisement and service of the petition, the petition shall, on the date fixed for hearing be posted for orders of the Judge and the Judge may either dismiss the petition or give such further directions as he thinks fit."

8. In Modem Dekor Painting Contracts Pvt. Ltd v. Jenson and Nicholson India Ltd. and another, reported in 1985 Comp Cas 675 Division Bench of this Court referred, considered and examined the aforesaid Rules and also Rules 95 and 96 of the Company Court Rules and held that service of notice on the company in a petition for winding up after admission has to be in accordance with Rule 28 of the Company Court Rules and that it is obligatory to have the notice of the company petition served on the company as required by Rule 28 of the Company Court Rules, 1959 and the said service should be effected in accordance with the provisions contained in the said Rules. In other words, the Division Bench of this Court ruled in unequivocal terms that the provisions of Rules, 27, 28 and 29 of the Company Court Rules are mandatory and the consequential effect of non-compliance of the provisions is dismissal of the winding up petition. The Division Bench of this Court in the aforesaid ruling held thus :-

"The main question that arises for determination in this appeal is whether it was obligatory upon the petitioning creditors to serve a notice individually upon the company and in the absence of such individual notice, what is to happen to the company petition for winding-up, and an incidental question that would arise for determination also in this appeal would be, whether there is any such thing as

deemed service in the Companies (Court) Rules, 1959. Unless it is shown that the rules in Pt. III, which has a caption heading winding-up by Court, exclude either by a specific provision in the rules or by necessary implication the rules contained in Pt. 1 of the Companies (Court) Rules, 1959, it cannot be said that the rules contained in Pt. I are not applicable to Pt. III of the Companies (Court) Rules."

"*The wording 'Form No. 6' of the petition show that notice in Form No. 6 is to be given only after the petition is admitted.....*"

"*Rule 28(1) requires that when a petition is presented against a company, it shall be accompanied by a notice of the petition in the form prescribed together with a copy of the petition for service of the company......*"

"*.....Therefore, the notice contemplated which is to be served by the Registrar after the winding-up petition is admitted.....*"

"*The next question is what is the effect of non-compliance of the notice as contemplated by Rules 27, 28 and 29 of the Companies (Court) Rules upon the company? The effect is as directed in Rule 31 of the Companies (Court) Rules, viz., that the petition will have to be posted for orders for dismissal of the petition or to pass such order as the Court may deem fit.*"

9. I have also no hesitation to hold that the procedure in the manner laid down under Rules 27 and 28 has to be mandatorily followed and complied with on admission of winding up petition save and except where at the time of admission of winding up petition, the company is represented by its advocate and the notice is waived or is dispensed with by the Court, otherwise notice to the company has to be issued and served in winding up petition in accordance with the provisions contained in the Company Court Rules. Failure to comply with the procedure as required under Rules 27 and 28 unless ordered otherwise by the Court may entail in dismissal of the company petition under Rule 31 and that also indicates the mandatory nature of Rules 27 and 28. The procedure contemplated by Rules 27, 28 and 29 cannot be permitted to be substituted by self invented procedure of sending intimation about the admission of winding up petition to the company by the petitioning creditor. Such exercise of intimation is no service in the eye of law on face of mandatory provisions of Rules 27 and 28.

14. It is also claimed that non compliance of the provisions of Rule 28 of the Rules renders the dismissal of the winding-up petition. It is to be noted that the learned Company Judge has went on recording and while dealing with the factual matrix of the

case in hand with that of narrated in the case of *Skol Breweries Ltd. (cited supra)*. The learned counsel for the appellant has also drawn support from the judgment of the Apex Court in the matter of Motilal *Padampat Sugar Mills Co. Ltd. (cited supra)* so as to claim that the waiver of statutory right can be inferred by conduct, in absence of pleadings and specific evidence to that effect. It is to be observed here that the claim put forth by the present appellant about non compliance of the provisions of Rule 28 of the Rules are sought to be raised for the first time after the period of 6 years of filing of the winding-up proceedings. The narration of the events which speaks of participation of the appellant in the winding-up proceedings and the subsequent proceedings thereafter can lead to the only conclusion of acquiescence or part acceptance of conduct submitting to the charge or to accept reluctantly without prejudice. By the confirmation as can be gathered from the conduct of the appellant narrated above, the tacit approval of the waiver can be inferred. Had it been the case that the appellant would have been deligent in raising the plea at the threshold either at the time of admission or at the time of winding-up petition, it could have been inferred that there was no tacit or other right handed over. Rather by the conduct of the appellant, acquiescence could be easily inferred. From the conduct of the appellant, it can be noticed that he had knowledge of his rights. However, all these years he has not taken any action. There are no circumstances brought to the notice of this Court which may take this Court to the conclusion that there were prevailing circumstances beyond the control of the appellant wherein he, for sufficient *bona fide* cause was handicapped, so as to claim enforcement of his lawful right.

15. From the pleadings of the respondernt, it can be specifically inferred that a plea of waiver was very much raised in the present proceedings and as such, the observations on the part of the learned Company Judge in drawing a conclusion that the appellant has waives his right *qua* notice under Rule 28 of the Rules is a reasonable one. The learned Company Judge, in our opinion, was right in making an observation that even if notice required under Rule 28 of the Rules is mandatory, such notice which was waived impliedly by the conduct. The appellant, as such, by his conduct reflected hereinabove was rightly held to have

waived notice under Rule 28 of the Rules. In this backdrop, the Court hardly notices any illegality which warrants interference.

16. The appeal is devoid of any merits and hence dismissed.

17. In view of the dismissal of the appeal, the Notices of Motion also stand dismissed.

(NITIN W.SAMBRE, J.) ***(NARESH H.PATIL, J.)***