

**In the High Court of Judicature at Hyderabad
for the State of Telangana and the State of Andhra Pradesh**

OSA No.30 of 2017

Between:

M/s.Avon Lifesciences Limited
Medak District rep. by its Director

... Petitioner

and

M/s.Ashika Credit Capital Ltd.
Kolkata, rep. by its authorized rep.
Ms.Subidha Saraf.

...Respondent

Date of Judgment Pronounced: 24.04.2018

Submitted for Approval:

The Hon'ble Sri Justice C.V.Nagarjuna Reddy

and

The Hon'ble Sri Justice D.V.S.S.Somayajulu

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|--|--------|
| 1. Whether Reporters of Local newspapers may be allowed to see the judgments ? | Yes/No |
| 2. Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment ? | Yes/No |

(C.V.Nagarjuna Reddy, J)

(D.V.S.S.Somayajulu, J)

*** The Hon'ble Sri Justice C.V.Nagarjuna Reddy**

and

The Hon'ble Sri Justice D.V.S.S.Somayajulu

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! Counsel for the petitioner: **Mr.R.Raghunandan**
for Mr.D.Narendar Naik

^ Counsel for the respondent: **Mr.Vikram Pooserla**

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? Cases cited:

(1988) 63 CompCas810 (MP)
AIR 2002 HP 113

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Counsel for the Petitioner: Mr.R.Raghunandan
for Mr.D.Narendar Naik

Counsel for the respondent: Mr.Vikram Pooserla

The Court made the following:

Judgment: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This Original Side Appeal is filed against Order, dated 17-08-2017, in CP.No.184 of 2016, whereby the learned Company Judge, while admitting the Company Petition filed by the respondent for winding up of the appellant-Company for not being able to pay the debt, appointed the Official Liquidator as the Provisional Liquidator.

At the hearing, Mr.R.Raghunandan, learned Senior Counsel representing Mr.D.Narendar Naik, learned Counsel for the appellant, has fairly submitted that the appellant is not intending to press the Appeal to the extent it pertains to admission of the Company Petition. He further submitted that the order appointing the Official Liquidator as the Provisional Liquidator cannot be sustained for two reasons *viz.*, (i) that the Petition for appointment of Provisional Liquidator can be entertained and an order thereon can be passed only after the admission of the Company Petition, but not along with the admission; and (ii) that neither any notice was issued nor any reasons, for dispensing with such

notice or for appointing the Provisional Liquidator, have been assigned.

In support of his submissions, the learned Senior Counsel has relied upon Sub-Sections (1) and (2) of Section 450 of the Companies Act, 1956 r/w Rule 106 of the Companies (Courts) Rules, 1959, and the Judgments in **Kailash Prasad Mishra and others vs. Medwin Laboratory P.Ltd. and others.**¹ and **Himachal Grameen Sanchayka Ltd. and Anr.**²

Mr.P.Vikram, learned Counsel for the respondent, sought to sustain the order of the learned Single Judge.

A perusal of the order under Appeal shows that, while admitting the Company Petition, for the reasons assigned therein for such admission, the learned Company Judge has appointed the Official Liquidator as the Provisional Liquidator to the appellant- Company.

¹ [1988] 63 CompCas810(MP)

² AIR 2002 HP 113

Sub-Sections (1) and (2) of Section 450 of the Act and Rule 106 of the Companies (Court) Rules, 1959 (for short 'the Rules') read as under:

“Section 450: Appointment and powers of provisional liquidator

(1) At any time after the presentation of a winding up petition and before the making of a winding up order, the [Tribunal] may appoint the Official Liquidator to be liquidator provisionally.

(2) Before appointing a provisional liquidator, the [Tribunal] shall give notice to the company and give a reasonable opportunity to it to make its representations, if any, unless, for special reasons to be recorded in writing, the [Tribunal] thinks fit to dispense with such notice.”

Rule 106: Appointment of Provisional Liquidator

(1) After the admission of a petition for the winding-up of a company by the Court, upon the application of a creditor, or a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a Provisional Liquidator, the Court, if it thinks fit, and upon such terms as in the opinion of the Court shall be just and necessary, may appoint the Official Liquidator to the Provisional Liquidator of the company pending final orders on the winding-up petition. Where the company is not the applicant, notice of the application for appointment of Provisional Liquidator shall be given to the company unless the Court, for special reasons to be recorded (in writing), dispenses with the notice.

(2) The order appointing the Provisional Liquidator shall set out the restrictions and limitations, if any, on his

powers imposed by the Court. The order shall be in Form No.49, with such variations as may be necessary.

Though Sub-Section (1) of Section 450 of the Act permits the Company Court to appoint the Official Liquidator as the Provisional Liquidator “at any time after the presentation of a winding up petition and before the making of a winding up order”, Rule 106 of the Rules is specific as to the stage at which such order could be passed. It clearly refers to the post admission of the petition for winding up of a Company as the stage for passing of an order upon such Application to be made by the creditor or contributory or the Company *etc.* Therefore, on the plain language of the above-reproduced provision, we are of the opinion that the order admitting the Company Petition and the order appointing the Provisional Liquidator cannot be passed contemporaneously and the latter order could be passed only on an Application filed by a party referred to in the abovementioned statutory provisions after admission of the Petition filed for winding up of the Company.

As regards the submission of the learned Senior Counsel that no notice was given before the Provisional

Liquidator was appointed, the learned Counsel for the respondent is unable to show that the learned Company Judge has issued any notice on the Application filed by the respondent for appointment of the Provisional Liquidator.

Sub-Section (2) of Section 450 of the Act ordains that the Court shall not only give the Company a notice but also a reasonable opportunity to it to make its representations against the appointment of the Provisional Liquidator before such appointment is made. In our opinion, Sub-Section (2) of Section 450 of the Act is incorporated with the avowed object of allowing the Company to make its representations before appointing a provisional liquidator, for, appointment of the Provisional Liquidator is drastic in nature like appointment of a receiver in respect of the property in a civil dispute. As rightly argued by the learned Senior Counsel, only for special reasons to be recorded in writing, issue of such notice can be dispensed with. Admittedly, no such reasons have been assigned for dispensing with such notice to the appellant.

Yet another reason for setting aside the order of the learned Company Judge appointing the Provisional Liquidator is that no reasons whatsoever have been assigned by the learned Company Judge for appointing the Provisional Liquidator.

In **Kailash Prasad Mishra and others** (1 supra), the Madhya Pradesh High Court held as under:

“Appointment of a provisional liquidator is a drastic measure and should not be resorted to except in special circumstances. Both on authority and on principle, a provisional liquidator is not, in general, appointed before the hearing of the petition for winding up unless the company is shown to be insolvent or unless the petition is prosecuted by the company itself or shown to be unopposed. Before the court takes this drastic step, it must be satisfied that such an order is absolutely necessary. The appointment of a provisional liquidator for a company would in effect put a stop to the business though ultimately the court may refuse to wind up. A company may have liabilities exceeding its assets, but still may have in particular circumstances the capacity to meet demands from creditors, i.e., it may be in a position to meet its liabilities as and when they arise. In such circumstances a provisional liquidator should not be appointed. A provisional liquidator shall also not be appointed where the appointment is clearly against public interest.”

In **Himachal Grameen Sanchayka Ltd. and Anr.**
vs. Reserve Bank of India (2 supra), the High Court of
Himachal Pradesh at Shimla held as under:

“It is, no doubt, true that an action of winding up of the company is a serious one and appointment of provisional liquidator ought to be taken carefully and cautiously. It is also correct that, as a rule, before appointing a provisional liquidator, the court shall issue notice to the company and afford reasonable opportunity of making a representation.”

Referring to the provisions of Section 450 of the Act,
the Court further held as under:

“....A bare reading of the above section makes it obligatory on the Company Judge to issue notice and afford opportunity to the company to make representation before appointment of provisional liquidator ‘unless, for special reasons to be recorded in writing, the court thinks fit to dispense with such notice’.

For the aforementioned reasons, the order of the learned Company Judge to the extent of appointing the Provisional Liquidator cannot be sustained and the same is, accordingly, set aside while confirming the order under Appeal to the extent of admission of the Company Petition. This Order, however, will not preclude the respondent from

pursuing the Application for appointment of Provisional Liquidator stated to have been pending.

Subject to the liberty given to the respondent as above, the Appeal is partly allowed to the extent indicated above.

As a sequel, Application Nos.902 and 1083 of 2017, filed by the appellant for interim relief, are disposed of.

(C.V.Nagarjuna Reddy, J)

(D.V.S.S.Somayajulu, J)

Date: 24-04-2018

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