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

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\+ **CO.APP. 7/2019 && CM 16517/2019 (stay)**

ASHOK KUMAR & SONS (HUF) ..... Appellant

Through: Mr. Sandeep P. Agarwal, Senior Advocate with Mr Rajesh Pathak, Advocates.

versus

BRAHMA CITY PRIVATE LTD. ..... Respondent

Through: None.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

O R D E R

% **09.04.2019**

Dr. S. Muralidhar, J.:

1. This appeal is directed against an order dated 5th February, 2019 passed by the learned Company Judge, transferring the Appellant's Company Petition No.319/2015 to the National Company Law Tribunal ('NCLT').

2. The facts necessary for the purposes of present appeal are that the Appellant on 26th October, 2012 booked a residential plot and deposited a sum of Rs.28,82,061/- by a cheque dated 26th October, 2012, drawn in favour of the Respondent. Further payments were made to the Respondent towards the plot and as on 23rd August, 2013, the Appellant had paid Rs.1,58,20,012/-, which was more than 50% of the price of the plot. According to the Appellant, it was subsequently learnt that the size of the plot allotted to him had been reduced by 20% leading the Appellant to ask

the Respondent to return the whole amount together with interest @ 12% per annum, by a letter dated 2nd August, 2014. According to the Appellant, the Respondent kept assuring about the return of the funds. The Appellant was stated to have then learnt of a judgment dated 5th February, 2015 passed by the High Court of Punjab & Haryana, cancelling the licenses granted to the Respondent for development of the housing project in Gurgaon. This apparently was affirmed by the Supreme Court by an order dated 13th March, 2015 when it dismissed the SLP filed by the sister concern of the Respondent.

3. The Appellant sent a legal notice dated 1st April, 2015 to the Respondent under Sections 433 and 434 of the Companies Act, 1956 demanding return of the aforementioned sum together with interest @ 12% per annum. Following this, the Appellant filed Company Petition No.319/2015 in this Court under Sections 433(e), 434 and 439 (b) of the Companies Act, 1956 seeking the winding up of the Respondent.

4. On 15th July, 2015 when the petition was listed before the learned Company Judge, the Respondent entered appearance and submitted that it apprehended issuance of notice in the winding up petition which may adversely affect it as it was a going concern, actively engaged in the business of property development. The Respondent undertook to file an affidavit indicating its willingness to abide by all the terms and conditions of the agreement.

5. Relevant to the present appeal, the relevant portion of the order passed by

the learned Single Judge notes that the Senior Advocate appearing for the Respondent, stated that “he has been instructed to appear in the matter after his client noticed the matter appearing in the cause list”. Later in the order, the learned Company Judge recorded the statement of the Senior Advocate on instructions that “his client shall file an affidavit setting down willingness of the respondent-company to also abide by all the terms and conditions of the agreement between the parties,...”. The learned Single Judge then recorded as under”

> “It is made clear that in view of the peculiar circumstances of this case, no notice to show cause as to why the respondent-company be not wound up is issued to the respondent at this stage.”

6. The winding up petition was listed on 3rd February, 2017 on which date the learned Single Judge directed the Respondent to file an affidavit, indicating the time by which the Respondent would hand over possession of the plot in question to the Appellant. Pursuant thereto, the Respondent filed an affidavit dated 12th July, 2017 stating that it would hand over possession of the plot booked by the Appellant within one a half years from the date of approval of the zonal plan by the Directorate of Town and Country Planning (‘DTCP’), Haryana. However, on 13th December, 2017, when the petition was listed, the Respondent relied upon a notification dated 7th December, 2016 of the Ministry of Corporate Affairs (‘MCA’) and contended that since the notice in the petition had not yet been issued, the Company Court did not have jurisdiction to adjudicate the petition any longer and it should be transferred to the NCLT.

7. The learned Single Judge heard arguments on this issue on 26th February

and 6th April, 2018 and reserved orders. Thereafter, the impugned judgment was passed on 8th February, 2019 in which the learned Single Judge relied upon the judgment of the Supreme Court in ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd. 2019 (2) SCALE 142*** and held that since no notice had yet been issued in the winding up petition and the Respondent had also not been asked to file a counter affidavit to the main petition to oppose its admission, the Company Court would not, in terms of Rule 26 read with Rule 27 of the Companies (Court) Rules 1959 ('1959 Rules'), have jurisdiction to retain the petition in view of Section 434 read with Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 ('2016 Rules').

8. Mr Sandeep P. Agarwal, learned Senior Counsel appearing for the Appellant, relied upon the judgment of the learned Single Judge of the Bombay High Court dated 11th April, 2017 in Company Petition No.136/2014 (***M/s Ashok Commercial Enterprises v. Parekh Aluminax Ltd.***), in which it was *inter alia* held that even service affected by a Petitioner on its own upon the Respondent was equivalent to service under Rule 26, and in such event, the petition need not be transferred to the NCLT. According to Mr Agarwal, this view of the Bombay High Court was upheld by the Supreme Court in ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.*** (*supra*). He also placed reliance of another judgment of the Bombay High Court dated 23rd December, 2016 in Company Petition No. 331/2016 (***West Hills Realty Private Ltd. v Neelkamal Realtors Tower Ltd.***).

9. The above submissions have been considered. Pursuant to the Insolvency and Bankruptcy Code, 2016, ('IBC'), the Companies Act, 2013 was amended in the manner specified in the 11th Schedule to the IBC. Section 434 of the Companies Act, 2013 was substituted to provide that the proceedings relating to the winding up of the companies shall be transferred to the NCLT "that are at a stage that may be prescribed by the Central Government". A further amendment took place to Section 434 with effect from 17th August, 2018 providing for filing of an application for transfer of the proceedings.

10. Pursuant to the above amendments brought about by the IBC, the 2016 Rules, were made. Rule 5 thereof provided for "transfer of pending proceedings of winding up on the ground of inability to pay the debts". Rule 5 (1) provided that a petition seeking winding up under Section 433 (e) of the Companies Act, would stand transferred to the NCLT "where the petition has not been served on the Respondent as required under Rule 26 of the Companies (Court) Rules, 1959". A further notification was issued on 29th June, 2017 substituting Rule 5 (5), the relevant portion of which reads as under:

> "All petitions relating to winding up of a company under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the! Code."

11. Rules 26 and 27 of the 1959 Rules read as under:

> "26. Service of petition -Every petition shall {e served on the respondent, if any, named in the petition and on such other persons as the Act or these rules may require or as the Judge or the Registrar may direct. Unless otherwise ordered, a copy of the petition shall be served along with the notice of the petition.
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> 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.
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> Provided always that such notice when by the Act or under these Rules is required to be served on the Central Government, the same shall, unless otherwise ordered by the Court, be served not less than 28 clear days before the date of hearing".

12. The above rules have to be read with Form-6, which is the format of the notice of the petition.

13. In ***M/s Ashok Commercial Enterprises v. Parekh Aluminax Ltd.*** (*supra*), the Bombay High Court held that the notice referred to under Rule 26 above was a 'pre-admission notice' and that all winding up petitions where 'pre-admission notices', were issued and served on the Respondent "will be retained in the High Court". This is exactly how the Supreme Court understood the ratio of the decision of the Bombay High Court in ***M/s Ashok Commercial Enterprises v. Parekh Aluminax Ltd.*** (*supra*). The Supreme Court also took note of a contrary view expressed by the Madras High Court in CP/364/2016 titled ***M/s. M.K. & Sons Engineering v. Eason Reyrolle Ltd.*** holding that a notice under Rule 26 was referable "to a post-admission position of the winding up petition." The Madras High Court accordingly

held that “only those petitions where a winding up order is already made can be retained in the High Court”. The Madras High Court relied on the expression ‘was admitted’ occurring in Form-6.

14. Having paraphrased the ratio of the judgment of the Bombay High Court and Madras High Court as above, the Supreme Court in ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.*** (*supra*) held as under:

> “16. We are of the view that Rules 26 and 27 clearly refer to a preadmission scenario as is clear from a plain reading of Rules 26 and 27, which make it clear that the notice contained in Form No. 6 has to be served in not less than 14 days before the date of hearing. Hence, the expression "was admitted" in Form No. 6 only means that notice has been issued in the winding up petition which is then "fixed for hearing before the Company Judge" on a certain day. Thus, the Madras High Court view is plainly incorrect whereas the Bombay High Court view is correct in law."

15. Mr. Agarwal submitted that the Supreme Court in ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.*** (*supra*) should be understood as having approved even the following observations of the Bombay High Court in ***M/s Ashok Commercial Enterprises v. Parekh Aluminax Ltd.*** (*supra*).

> "55. By an order dated 17th January 2017, this Court clarified the said order dated 23rd December 2016 that *sine qua non* for transfer of a winding up Petition to NCLT under the Companies (Transfer of Pending Proceedings) Rules, 2016, is non-service of a pending Petition. It is clarified that as per the service of the Petition, it is not necessary that the service must be effected only in pursuance of an acceptance of order. Any service effected on his own by the petitioner on the respondent is equivalent to service under Rule 26. The Petition in that case is not liable to be transferred to NCL T."

16. This Court is unable to agree with the above submission. The Supreme Court in ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.*** (*supra*) paraphrased the ratio of the judgment of the Bombay High Court in ***M/s Ashok Commercial Enterprises v. Parekh Aluminax Ltd.*** (*supra*) as holding that "all winding up petitions where pre-admission notices were issued and served on the respondent will be retained in the High Court". The Supreme Court did not hold that merely providing a copy of the petition to the Respondent, without a notice being issued, would satisfy the requirement of Rule 26 of the 1959 Rules.

17. A careful reading of Rule 26 shows that it is mandatory to serve a copy of the petition "along with the notice of the petition" with the exception being an order of the Court to the contrary. This is indicated by the opening words "unless otherwise ordered". In other words, the mandatory requirement is for issuance of a notice to the Respondent by the Court and service of the notice on the Respondent in Form-6. If this procedure is followed then the petition can be retained in the High Court.

18. In the present case, it is an admitted position that no notice was actually issued in the winding up petition to the Respondent. There was no occasion, therefore, for service of notice in Form-6 on the Respondent. The Appellant's contention that several hearings did take place before the learned Company Judge and therefore that in itself would tantamount to notice to the Respondent does not answer the mandatory requirement of Rule 26read with Rule 27 viz., that there a formal notice has to be issued (even if it is called a 'pre-admission notice') on the Respondent and such

notice has to be served upon the Respondent in Form-6. After ***Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.*** (*supra*), it is not possible to contend that notwithstanding notice not having been served on the Respondent in terms of Rule 26 of the 1959 Rules, the winding up petition should still be retained in the Company Court.

19. This Court accordingly finds no ground to interfere with the impugned judgment of the learned Single Judge. The appeal is accordingly dismissed. The pending application is also disposed of.

CM 16518/2019 (exemption)
20. Allowed, subject to all just exceptions.

CM 16519/2019 (delay)
21. For the reasons explained in the application, the delay in filing the appeal is condoned and the application is allowed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 09, 2019
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