

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

**APPEAL NO.332 OF 2018
IN
COMPANY APPLICATION NO.57 OF 2018
IN
COMPANY PETITION NO.65 OF 2015**

Yogesh Dhirajlal Shah : Appellant (Orig. Applicant)

Vs.

Nainil International
A Proprietary Concern of
Mrs. Rupa Jignesh Shah
Through its
Constituted Attorney
Ms. Pallavi Kapadia & anr.

: Respondents.
(No.1 Orig. Petitioner &
No.2 Orig. Respondent)

**WITH
NOTICE OF MOTION NO.748 OF 2018
IN
APPEAL NO.332 OF 2018**

Mr. Akshay Doctor i/by Mr. Pankaj Shah for the
Appellant/Applicant.
Mr. Rushabh Sheth for Respondent No.2 – Official Liquidator.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.
DATE : 04th NOVEMBER, 2023**

P.C. :

1. The present Appeal impugns an order dated 1st
August 2018 by which the captioned Company Application filed

by the Appellant for recall of an order dated 14th December 2017, came to be dismissed.

2. The captioned Company Petition was filed by Respondent No. 1 (Petitioner Company) against Devanshi Impex Pvt. Ltd. (Respondent Company) for winding up on the ground that the Respondent Company was unable to pay its debts. Since on 14th December 2017 when the Company Petition was placed for final hearing none appeared on behalf of the Respondent Company, the Respondent Company was directed to be wound up by and under the orders of this Court and Respondent No. 2 (Official Liquidator) was appointed as Liquidator of the Respondent Company .

3. Mr. Doctor learned counsel appearing on behalf of the Appellant invited our attention to the order dated 14th December 2017 and pointed out that the same was passed *ex-parte* since on that date the then advocate for the Respondent Company did not appear. He then invited our attention to paragraph 4 of the

said order and pointed out therefrom that the learned Single Judge had proceeded to pass the order of winding up solely on the basis of the *prima facie* observations made in the order admitting the Company Petition. He submitted that there was no other reasoning given for passing the said order.

4. Mr. Doctor then took pains to point out that the then advocate for the Respondent Company had consistently appeared on all the previous occasion but had only failed to remain present only on the date on which the order of winding up came to be passed. He submitted that it was for these reasons that the captioned Company Application was filed for setting aside the order dated 14th December 2017. He submitted that all that the Appellant was seeking was an opportunity to contest the captioned Company Petition on merits and nothing more.

5. Mr. Doctor then invited our attention to the Affidavit in support of the said Company Application and pointed out the

Appellants became aware of the said order of 14th December 2017 only on 3rd January 2018 on receipt of three notices from the office of Respondent No.2. He further pointed out that the Appellant had thereafter filed the captioned Company Application immediately on 20th January 2018. He then, additionally placed reliance upon the Additional Affidavit dated 6th September 2023 filed in the present Appeal, and pointed out therefrom that the Appellant had also explained the reason as to why the erstwhile advocate of the Respondent Company was not present on 14th December 2017. He pointed out that the Company Petition had been admitted on 9th March 2017 and was made returnable on 2nd May 2017, on which date the Company Petition was not taken up for hearing. He submitted that the matter came up for the first time on 14th December 2017 when the order of winding up came to be passed. He submitted that it was only when the order of winding up was brought to the notice of the Appellant pursuant to the notices received from Respondent No.2, that the Appellant confronted with his previous advocate as to why he had failed to appear. Mr. Doctor pointed out that thereafter some

disputes arose between the erstwhile advocate and the Appellant which necessitated the Appellant to engage the present advocate to prosecute the captioned Appeal and the Interim Application. He submitted that the Appellant had infact pursuant to the orders dated 30th January 2018 and 6th June 2018 of the learned Single Judge of this Court filed further Affidavits dated 3rd February 2018 and 6th July 2018 setting out the circumstances in which the erstwhile advocate had failed to appear. Mr. Doctor then submitted that today all that the Appellant was seeking a fair opportunity to contest the captioned Company Petition and to be heard before any order for winding up could be passed.

6. Mr. Doctor then submitted that Petitioner Company was clearly not keen on prosecuting/contesting the present Appeal or for that matter the Company Petition. In support of his contention, he placed reliance on the fact that the Petitioner Company had in addition to the captioned Company Petition also filed a Civil Suit for recovery of the very same amount claimed as the unpaid debt in the captioned Company Petition. Mr. Doctor

submitted that on 9th January 2020, the learned Single Judge hearing the Company Petition had then directed Respondent No.1 to deposit a sum of Rs.1,00,000/- with the office of Respondent No.2 if Respondent No.1 was indeed desirous of pursuing the said suit. He submitted that Respondent No.1 had not only chosen not to deposit the sum of Rs.1,00,000/- but subsequently on 7th May 2022 withdrawn the said Civil Suit. Basis this, he submitted clearly that Respondent No.1 had no subsisting claim against the Respondent Company and was not desirous of prosecuting the captioned Company Petition. He thus submitted that no prejudice would be caused if the Appellant was granted an opportunity to contest the same on merits. He then pointed out that no substantial steps had been taken pursuant to the order dated 14th December 2017 since the Appellant had on 13th February 2019 obtained a stay of the same. Given this fact he submitted that this Court be pleased to set aside the Impugned Order and remit the Application back to the learned Single Judge and the same be heard on merits.

7. Mr. Sheth learned counsel appearing on behalf of Respondent No.2 – Official Liquidator submitted that Respondent No. 2 had pursuant to the order of winding up called upon the Ex Directors of Respondent Company to file their statement of affairs. He submitted that despite this the ex-directors had failed and neglected to do so. He then submitted that Respondent No. 2 could not take any further steps since the Appellants had obtained a stay of the liquidation proceedings which continued till date. Mr. Sheth then submitted that in the event the present Application was allowed and the Impugned Order was set aside, then Company Petition No. 751 of 2015 and Company Petition No.380 of 2015 would also have to be restored to file since the same had been disposed of in view of the order dated 14th December 2017.

8. We have heard the learned counsel for the Appellant and Respondent No.2. Respondent No.1 has not appeared. This Court had by an order dated 5th August 2022 recorded the steps taken by the Appellant to serve Respondent No.1 and had

thereafter directed that the Appeal be proceeded with.

9. We must note that the Impugned Order came to be passed since the Learned Single Judge was not satisfied with the reasons set out by the Appellant. We had thus permitted the Appellant to file an Additional Affidavit in the present Appeal to explain the reasons more particularly for the absence of the Respondent Companies erstwhile advocate. The Appellant has done so and we also find that the Appellant ought to have been more forthright in its previous Affidavits. However, we cannot lose sight of the fact that the erstwhile advocate of the Petitioner Company had on all occasions prior to the order of winding up, appeared and contested the matter. The Petitioner Company has also not appeared and opposed the present Appeal.

10. Additionally, we find that the Petitioner Company appears to have abandoned its claim for recovery of the amount which was claimed as a debt in the Company Petition. Admittedly no steps in liquidation have been taken since the passing of the order of winding up. Hence, given all these

factors, we find that the interest of justice, equity and good conscience would be served if the present Appeal is allowed, and the Appellant is granted an opportunity to contest the captioned Company Application on merits. However, the same must be subject to payment of costs. Hence, we pass the following order, viz.

:ORDER:

- i] The Appeal is allowed, and the Impugned Order dated 1st August 2018 is set aside subject to the Appellants making payment of a sum of Rs.50,000/- (Rupees Fifty Thousand only) as costs which shall be paid as and by way of donation to the Shanti Avedna Sadan, 216 Mount Mary Road, Bandra (West), Mumbai 400050 (contact No.+91-22-26427464, +91-22-26451702) within a period of four weeks from today. The Bank Account details of Shanti Avedna Sadan are as under :-

Account Name	SHANTI AVEDNA SADAN
Bank A/c No.	50100558420612
IFSC Code	HDFC0000442
A/c Type	Savings
Bank Name	HDFC Bank
Branch Name	Bandra West, Hill Road, Mumbai.

- ii] In the event the Appellant makes such payment of costs and furnishes due proof thereof to the satisfaction of the Company Registrar of this Court, the Company Application shall be heard and disposed of on merits uninfluenced any observations that are made in this order.
- iii] The captioned Appeal is accordingly disposed of.
- iv] In view of disposal of the captioned Appeal, Notice of Motion No.748 of 2018 does not survive and the same is also disposed of.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)