

(1978) 11 DEL CK 0013

In the Delhi High Court

Case No : Company Appeal No. 644 and 645 of 1977

Anil Kumar Sachdeva

APPELLANT

Vs

Four A Asbestos (P) Ltd.

RESPONDENT

Date of Decision : 22-11-1978

Acts Referred:

Citation : (1980) 50 CompCas 122 : (1979) 1 ILR Delhi 335

Hon'ble Judges : S. Ranganathan, J

Bench : Single Bench

Advocate : B.J. Nayar, Mohinder Narain, Manju Malhotra and Nand Kishore, for the Appellant;

Judgement

S. Ranganathan, J.

(1) M/S. Four "A" Asbestos Private Ltd., (hereinafter referred to as the "company") was ordered to be wound up by the order of Kapur, J., dated November 22, 1976 in CP. 33/76. This order was passed ex parte because there was no appearance on behalf of the company.

(2) These two application

(3) The applications are opposed on several grounds but at the present moment I am concerned only with the preliminary objection which has been raised on behalf of the petitioning creditor and Official Liquidator that the application for setting aside the ex parte winding up order is not maintainable.

(4) The objection raised is that the winding up order has been passed, though ex parte, after considering the averments contained in the petition. Moreover, the petition had been earlier admitted and notice of admission had also been published in two newspapers as well as in the official gazette. The company having been ordered to be wound up and the Official Liquidator having taken charge of the affairs of the company, the contention is that" this process is irreversible. It is argued that the order for winding up operates not only against

the company and its shareholders but also against the various other persons including the creditors and former officers of the company and that an order setting aside the winding up order will have serious repercussion particularly in regard to the question of limitation. It is also argued that after the company has been wound up the only person who can claim to represent the company is the Official Liquidator and it is contended that these applications which purport to have been filed on behalf of the company, in liquidation, by a former Director of the company are not competent. It is also pointed out that earlier two of the former Directors of the company (including the one who has presented this application) had filed company application No. 148/77 which had been dismissed and that the same relief is now being sought for by the same persons in the name of the company and that this should not be permitted.

(5) On the other hand, Shri Bikramjit Nayyar appearing on behalf of the applicants relied upon the judgments of Kapur J., in the case of Globe Motors (Workshop) Limited v. M/s. Sanhi Motors & others (C. A. 296/74 in C.P. 35/71) (1) and in K. C. Sethi etc. v. Bir Bahadur Singh and Co. Private Ltd. (C.A. 18/74 in C.P. 10/73) (2) by which ex parte winding up orders had been set aside by this Court. He also submits that even after the liquidation of the company there are certain residuary rights in the former Directors of the company which enable them to represent to the Court the grievances of the company and that this application is clearly maintainable.

(6) I am of opinion that the contention of Shri Nayyar is well founded. In the earlier two matters referred to above, Kapur J., has, after considering the various aspects involved, set aside the ex parte orders of winding up. He has pointed out that whatever might be the consequences of the winding up order the provisions of the CPC govern the trial of such a matter before the Court. Even otherwise the power to dismiss a matter in default for non-appearance of the applicant or petitioner and the power to pass an ex parte order must carry a corresponding power in the Court to set aside the ex parte order so passed. It has also been held that although in law the company is represented by the Official Liquidator for all purposes, the principle would not apply when the order appointing the official liquidator is itself under challenge. In this respect, the principle to be applied would be similar to that which would apply in the case of an insolvent who is represented by the Official Receiver after his insolvency has been ordered but can nevertheless represent himself for the purposes of challenging the order or for setting aside the ex parte order.

(7) In my opinion, these two judgments of Kapur J., cover the present case and I also entirely agree, with respect, with the observations made by the learned Judge. Shri Mahinder Narain appearing for the petitioning creditor tried to distinguish the two orders of Kapur J. on the basis of the facts and circumstances in which those orders were set aside but while these facts and circumstances would be relevant to consider the question of setting aside the ex parte order on the merits they would have no relevance so far as the issue of maintainability of

the petition is concerned. Shri Mahinder Narain also referred to the decisions of S. R. Das, J. (as he then was) in Air 1949 Cal 69 In the matter of East India Cotton Mills Ltd. At page 82 the learned Judge observed, after distinguishing the cases cited for the petitioner to have the ex parte order set aside as follows :

"I have not been referred to any case where a person who is not a party to a proceeding has been permitted to ask the Court in exercise of its inherent powers to set aside an ex parte order made therein. The doctrine of public policy is to be applied with extreme caution and cannot be invoked in aid of proceeding which is not founded on sound legal principles and is not supported by any known rule of practice or procedure. I decline to invent novel inherent power, particularly when the petitioners have, on a proper case being made out, the right to apply for staying of winding up proceedings under S. 173. Companies Act."

(Italicised mine). That was a case in which the winding up order was sought to be set aside by a total stranger. That apart though the present application refers to Rule 9 of the Company (Court) Rules, the contents of Rule 6 of the said Rules which adopt the practice and procedure of the Court and the provisions of the CPC would also be relevant. As pointed out by Kapur, J., if the provisions of CPC are applicable, there is no reason why the provisions of Order IX Rule 13 should not apply in an appropriate case. Of course, at this stage, I am. not concerned with the merits of the application but only with the question of its maintainability.

(8) Shri Mahinder Narain then argued that this must also be treated as a case in which the winding up order is being sought to be set aside by a stranger because once a winding up order has been passed it is only the Provisional Liquidator or the Official Liquidator who can represent the company and the Directors thereafter have no power of authority to represent the company. Therefore, the present petitioners, he argued, are practically in the position of strangers. I am unable to accept this contention. It is true that after the winding up order is passed the powers of the Directors cease but there are still certain residuary powers in the Directors. For example, the former Directors of. the company would certainly be entitled to prefer an appeal against the order of winding up. If that be so, I am unable to see why the same authority will not be available to the Directors to seek an ex parte order for winding up being set aside. The decision in *Re Union Accident Insurance Co. Ltd.* 1972 (1) All ELR 1105 also supports this conclusion. Plowman J. observed:

"The respondents" submission was that the appointment of a provisional liquidator automatically put an end to the authority of the company"s directors to instruct solicitors and counsel to represent it and that the solicitors purporting to act on its behalf were, Therefore, liable to pay the respondents" costs personally. It is of course well settled that on a winding up the board of directors of a company becomes functus official and its powers are assumed by the liquidator, and my attention was drawn to *Re Mawcon Ltd.* where Pennycook J., stated in effect that the appointment of a provisional liquidator had the same result. No

doubt that is so, but it is common ground that notwithstanding the appointment of the provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding up order is made, to appeal against that order."

These observations clearly show that the Board of Directors have some residuary powers even after the appointment of a Provisional Liquidator and after winding up order. I am, Therefore, unable to accept Shri Mahinder Narain's contention that an application by a former Director should be treated as on the same footing as an application by a stranger.

(9) I may also refer to a decision reported in Xlv Law Times (NS) 676(5) in the case of The Aston Hull Coal and Brick Company Limited. In this case the company had been ordered to be wound up ex parte and Kay J though with some reluctance, followed the order of Chitty J. in an earlier case and set aside the ex-parte order. This case indicates that the" notion of setting aside a winding up order, is not in any way unusual or impractical.

(10) For the above reasons I am in entire agreement with Kapur J., and hold that C.A. 645/77 seeking to set aside the winding up order is maintainable. In view of these conclusions both this application as well as C.A. 644/77 will be posted for hearing on merits on December 13,1978.