

(1996) 04 GUJ CK 0026

In the Gujarat High Court

Case No : Original Jurisdiction Appeal No. 7 of 1996 with Civil Application No. 14 of 1996 in Company Petition No. 25 of 1996

Ashok Fashions Ltd.

APPELLANT

Vs

Meghdoot Acid and Chemicals

RESPONDENT

Date of Decision : 03-04-1996

Acts Referred:

Companies (Court) Rules, 1959 — Rule 95
Companies Act, 1956 — Section 10, 2(11), 202, 433, 483

Citation : (1998) 91 CompCas 655

Hon'ble Judges : R.M. Doshit, J;B.C. Patel, J

Bench : Division Bench

Advocate : Kamal B. Trivedi and Rakesh Gupta, for the Appellant; B.R. Gupta and Sanjay Gupta, for the Respondent

Judgement

B.C. Patel, J.—The appellant, Ashok Fashions Ltd., has filed this appeal against the order passed by the learned company judge on February 29, 1996, in Company Petition No. 25 of 1996 whereby the learned company judge, after admitting the company petition, has directed public advertisement on or before March 8, 1996, in the Gujarati daily Gujarat Samachar and the English daily Times of India. It is further ordered that the final date of hearing to be notified would be March 30, 1996.

2. The respondent herein presented a company petition before the learned company judge praying for winding up of the appellant-company as in spite of statutory legal notice under the Companies Act, 1956, calling upon the appellant to pay the principal sum of Rs. 1,69,290 together with interest thereon at the agreed rate of 24 per cent. per annum the company has failed to honour the same. In the company petition, the respondent herein made the following averments on oath :

"2. The company above named, viz., Ashok Fashions Ltd. (hereinafter referred to as the company), is incorporated and registered under the Companies Act, 1956,

as a public company limited by shares.

The factory and office of the company is situated at opp. House of Kaydees, Narol, Ahmedabad-382 405.

The nominal capital, capital paid-up or credited as paid up of the company is as per the record available in that behalf with the Registrar of Companies, the necessary details whereof, if required, would be furnished to the court during course of the hearing of this petition.

The main objects of the company to be pursued by it on its incorporation, and other objects incidental or ancillary to the attainment of objects are as set forth in its memorandum of association. The petitioner shall furnish the necessary details in that regard as and when required by the court."

3. The learned company judge issued notice returnable on February 29, 1996. From the record it appears that the affidavit of refusal of service was filed by the respondent, and on the returnable date, the court admitted the petition and passed the order as aforesaid.

4. Mr. Kamal Trivedi, the learned advocate, submitted that the order of publication for winding up of the appellant-company is obtained by the respondent by suppression of material facts as well as by misrepresentation of important facts so as to invoke the jurisdiction of this court under the Companies Act. It was submitted that though it was within the knowledge of the respondent that the appellant-company is having its registered office at Calcutta, and under the Companies Act, the High Court of Judicature at Calcutta has the jurisdiction, by misleading the court to the effect that the record is available with the Registrar of Companies, Gujarat State, Ahmedabad, and by not disclosing that the registered office of the appellant-company is situated at Calcutta, it has obtained the orders.

5. The learned advocate further submitted that the Supreme Court of India, after consulting the High Courts, made rules in exercise of the powers conferred by sub-sections (1) and (2) of section 643 of the Companies Act and the rules are known as the Companies (Court) Rules, 1959 (hereinafter referred to as the "Rules"). As per sub-rule (13) of rule 2, the prescribed forms are included in the rules. Rule 95 of the said Rules mandates that a petition for winding up a company shall be in Form No. 45, 46 or 47, as the case may be, with such variations as the circumstances may require. Mr. Trivedi, learned advocate, submitted that clauses 2, 3 and 4 of the said Form No. 45 are very much relevant and if there is non-disclosure of the materials required to be disclosed as per the form prescribed under rule 95, the petition ought not to have been entertained. Clause 3 mandates that the applicant has to specifically state where the registered office of the company is situated. Clause 4 mandates that the petitioner must disclose as to what is the nominal capital of the company and how many shares it is divided into and the value of the shares. This clause also mandates that the petitioner has to disclose what is the amount of capital paid-

up or credited as paid-up. If the petition is filed by a creditor then over and above clauses 1 to 5 provided in the said Form No. 45, the creditor has to provide further details as per Form No. 46, such as the amount indebted to the petitioner, showing the consideration for the debt with particulars that the debt claimed is due. As provided in clause 7 of Form No. 46, the petitioner has to further show that the company failed and neglected to pay the debt or any part thereof inspite of notice of demand at its registered office by registered post, and has also to give details of such date of notice and date of service of the notice, etc. He submitted that if a company petition is filed by a creditor it must be in prescribed form as provided in the rules and the petitioner must disclose the materials which under the law are required to be disclosed and if such details are not disclosed, the petition should not be entertained.

6. The learned advocate for the appellant has produced on record a copy of the memorandum and articles of association of the appellant-company, wherein a copy of the certificate of incorporation is also incorporated. Reading the same, it is clear that the appellant company is registered at Calcutta on March 13, 1989. It is also clear therefrom that the appellant was earlier a private limited company but the word private has been deleted on January 9, 1992, under the signature of Assistant Registrar of Companies, West Bengal. Thus it is clear that the company is registered with the Registrar of Companies, West Bengal. This aspect is not disputed by the respondent. As a matter of fact, the respondent being aware about the fact that the company has its registered office at Calcutta addressed a statutory notice to the company under the Companies Act at its registered office at Calcutta. Hence, the respondent, knowing full well that the company has its registered office at Calcutta, has suppressed this fact and has come out with a case that record is available with the Registrar of Companies, Gujarat State, Ahmedabad, as if the company was registered with the Registrar of Companies, Gujarat State.

7. At this stage, Mr. B. R. Gupta rushed into the court and stated that he would like to withdraw the original company petition and the court need not give a reasoned order. He further stated that he may be permitted to withdraw the petition with liberty to file appropriate proceedings. He further stated that he would not argue the matter in view of the aforesaid statement. We are not inclined to grant this request. The matter was fully heard yesterday and it is improper to advance such a request at this stage, when the court is in the midst of dictating the order. The request is rejected.

8. Section 2(11) of the Act defines the word "court" and it reads as under :

"(11) the "court" means, -

(a) with respect to any matter relating to a company (other than any offence against this Act), the court having jurisdiction under this Act with respect to that matter relating to that company, as provided in section 10."

9. Section 10 of the Act reads as under :

"10.(1) The court having jurisdiction under this Act shall be -

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2)."

10. Thus, reading this section it is clear that for the purpose of jurisdiction of winding up of a company under the Companies Act, the High Court having jurisdiction at the place at which the registered office of the company is situate has the jurisdiction.

11. A question was raised that an appeal is not maintainable against the order of admission and the order passed for advertisement. In other words, is this order appealable ?

12. Section 483 of the Act provides for appeals from order, and it reads as under :

"483. Appeals from any order made, or decision given, in the matter of the winding up of a company by the court shall lie to the same court to which, in the same manner in which, and subject to the same condition under which, appeals lie from any order or decision of the court in cases within its ordinary jurisdiction."

13. Thus it is clear that the appeal against any order made or decision given in the matter of winding up of a company will lie to the same court. Apart from this, what would be the consequences of such an advertisement in a petition preferred by a creditor ? Is it a simple thing that the same court could be moved and order could have been obtained for stay ? In the instant case, the damage is already done, as the advertisement is already published. The learned advocate invited our attention to a judgment of the Bombay High Court in the case of Western India Theatres Ltd. Vs. Ishwarbhai Somabhai Patel, wherein the court held that section 202 of the Companies Act, 1913, confers an important and valuable safeguard in respect of orders made in the winding up of a company. The scheme of the Companies Act is that whereas with regard to other matters specific appeals are provided, u/s 202, every order and decision in winding up is made subject to appeal. But it does not follow that a purely procedural order made by a judge in a winding up is subject to appeal. Where on the face of the petition of winding up of a company no case for winding up is made out, instead of dismissing the petition, the company judge passes an order directing the petition to be advertised, the order is fraught with serious consequences to the company and is appealable. Thus in the instant case, it is clear that the order is appealable.

14. The learned advocate for the appellant submitted that this decision was considered and approved by the apex court in the case of Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, . In the case of Golcha Investment (P) Ltd. Vs. Shanti Chandra Barna, , the apex court held that an appeal against

the order directing advertisement of a winding up petition cannot be dismissed summarily but has to be admitted for hearing as a matter of course. Mr. Trivedi also relied on the decision of the apex court in the case of Smt. Arati Dutta v. Eastern Tea Estate (P.) Ltd. [1988] 64 Comp Cas 313 [1988] 64 Comp Cas 313 (SC) in this behalf.

15. In view of the aforesaid legal position it is clear that the appeal would lie against the impugned order.

16. It is required to be observed that the court is exercising the jurisdiction under the Companies Act, and, therefore, the provisions contained in the Companies Act would apply and that being a special statute, notice must be given under the provisions contained in the said Act, and must be served in the manner provided in the special statute.

17. Rule 28 refers to service on company which reads as under :

"28(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 . . ."

18. Reading sub-rule (1), it is very clear that notice to the company is to be served either at its registered address or at the principal place of business. In the company petition, the address of the registered office of the appellant-company is nowhere mentioned. It is nowhere stated that company has its principal office at Ahmedabad. It is also clear that notice is not served in the manner provided in the rules. Thus it is clear that process is not served on the appellant-company as per the rules and, therefore, it is no service.

19. Mr. Trivedi, the learned advocate, drew our attention to paragraphs 2, 3, 4 and 5 of the company petition quoted hereinabove. In the company petition, no details as required under the rules are given. Particularly, in paragraph 4, the petitioner stated that the details of nominal capital, capital paid-up and credited as paid-up of the company is as per the record available in that behalf with the Registrar of Companies, Gujarat State, Ahmedabad. Mr. Gupta, the learned advocate, stated that it might be a mistake. We would like to observe that in the petition in paragraph 4 originally, after the word "companies", there was a comma (,) and, thereafter, the words "Gujarat State, Ahmedabad", are typed. However, by pen the comma is converted into a full stop and the words "Gujarat State, Ahmedabad" are deleted by a stroke of the pen. This petition is on oath and when there are corrections in the petition made before affirmation, there must be initials by the person who administers the oath. The company petition with its records was perused. What is surprising in this petition is that a xerox copy of the affirmed petition is also annexed with the petition for service to the

other side, but in this copy, the aforesaid correction and deletion is not there. If the above referred to deletion was before affirmation, then while taking out a xerox copy, the same impression of deletion would be there. In the absence of the deletion in xerox copy it is clear that in the petition deletion was subsequent to affirmation. If it is a bona fide mistake, it could have been corrected at that stage, i.e., before the oath is administered or even thereafter. The learned advocate, after realising the mistake, either could have requested the court for amendment or could have filed a fresh affidavit indicating this defect. One thing is clear that in the petition, if we consider the deletion from paragraph 4 as genuine, then in the application before the learned company judge, the details about the registered office of the company are not stated. This is important and relevant because the High Court will exercise its discretionary powers if the registered office of the company is situated within its jurisdiction. Even if we take it that the deletion was before tendering the petition in the registry and after affirmation, no care is taken to indicate before the court as to where the company has its registered office. In either case, it appears to be a case of misrepresentation or false representation.

20. Mr. Gupta, the learned advocate, at this stage submitted that the correction by deletion was made before filing the petition in the court. When we put a pointed question to him, he has stated that the correction was done before swearing the petition and filing the petition in the court. The xerox copy of the petition also bears the signature and the stamp of affirmation but the aforesaid deletion is not there. From this, it is clear that the correction was not made before affirmation but it is made after affirmation. Therefore, Mr. Gupta is not right in his submission. We do not intend to hold an inquiry in this behalf but we are only indicating that the learned advocate should have seen that the records are correctly placed before the court.

21. In rule 95 of the rules referred to above, a format is prescribed wherein certain details are required to be given. These are with purposes, one of which is that the court shall first ascertain whether the court has jurisdiction to entertain the petition or not. The relevant details are not stated in the petition. With the deletion of the aforesaid words, the requisite details are not before the court. Details regarding the capital structure of the company is also not given. It is the duty of the petitioner to place necessary materials before the court as per the Rules.

22. What course is to be adopted by the company court after hearing the petitioner claiming to be a creditor of the company and that the company, though having served with a statutory notice has neglected to pay the amount and in spite of the notice, the company has chosen not to appear before the court ? There must be material produced by the creditor petitioner before the company court from which it can be found out that a company is a defunct company, it has closed its business, the labour force is already discharged and its manufacturing activities have been closed since long and there are no commercial activities. (If

there is temporary closure or temporary suspension, it is required to be borne in mind). These circumstances if present would indicate that there is no question so far as the company is concerned, to revive its operation and, therefore, there cannot be difficulty in admitting and advertising, because the company is not going to suffer any more as its position is not going to alter by the filing of such petition. If on the record sufficient material is placed to indicate that the company is a defunct company and the process is served in accordance with law, the court may adopt the course of even admitting the petition and straightaway directing the advertisement of the company petition.

23. It is also required to be borne in mind that machinery for winding up should not be permitted to be utilised merely as a means for realising its dues from the company. The winding up petition cannot be a substitute for filing a suit or any other remedy which may be available to a creditor in accordance with law. As held in the case of *Airwings (P.) Ltd. v. Victoria Air Cargo GmbH* [1995] 84 Comp Cas 688 (Kar); 1 COMP LJ 232, to raise presumption of inability to pay, it is not enough merely to show that the company has omitted to pay the debt despite service of statutory notice, it must be further shown that the company omitted to pay without reasonable excuse and condition of insolvency in the commercial sense exists. Reading the petition of the respondent, it is clear that the petition is based on the ground that the company is unable to pay its debt in the sense that it is actually unable to pay debts presently due and demanded. However, as observed by Sir William James in *European Life Assurance Society, In re* [1869] 9 LR Eq 122 at page 128, it is plainly and commercially insolvent, that is to say, that its assets are such and its existing liabilities are such as to make it reasonably certain as to make the court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities, language which seems to be the origin of the phrase commercially insolvent. Machinery for winding up should not be permitted to be utilised merely as a means for realising debts due from a company. A winding up petition is not a legitimate means of seeking to enforce payment of debts. It is required to be noted that in a given case, if the notice is given and the amount is not paid, and the petition which is presented before the court discloses the assets of the company which are insufficient to meet liabilities including contingent and prospective liabilities and further it discloses the position of fixed assets as well as valuation of plant and machinery of the company, then it can be said that material is placed before the court to arrive at a tentative decision whether the company is able to pay or not able to pay the dues. In some cases it is held that mere production of balance-sheet of the company would not be, by itself, decisive, even though ordinarily, the court does not go behind the company's balance-sheet to ascertain its financial position. Apart from that, in the instant case, no facts and figures are given so far as the appellant-company is concerned. No capital is shown. There is nothing to indicate what are the liabilities. The court exercising powers for winding up is exercising its equitable jurisdiction. Therefore, material must be placed before the court and prima facie the material must go to indicate that the

company is unable to pay its debts. Even in insolvency proceedings supporting documents are required to be produced to indicate that prima facie there is a case of insolvency. Pleadings and supporting documents on record must indicate that it is a case for winding up. If there is nothing on the record to show that the company is defunct or has discharged its labour force and commercial cum manufacturing activities have come to a grinding halt since long and it is not a temporary suspension thereof, then in a case like this where the respondent has secured the order of admission by not disclosing the true facts about its registered office, which is a decisive factor for determining the jurisdiction of the court and with a view to indicate that this court has jurisdiction by mentioning that the records are available with the Registrar of Companies, Gujarat State, Ahmedabad, and further the process being not served on the appellant company by the respondent in accordance with rule, and in the absence of material which is required to be placed before the court to come to a conclusion that prima facie the company is unable to discharge its debts, we think that the public notice would cause injury to the company. In the case of Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, , the court has observed :

"In an application of this type allegations in the petition are of primary importance. A prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the application has to be dismissed. The interest of the applicant alone is not of predominant consideration. The interest of the shareholders of the company as a whole apart from those of other interests have to be kept in mind at the time of consideration as to whether the application should be admitted on the allegations mentioned in the petition."

24. Hence, we are of the view that in a case like this, such a course could have been adopted only after assessing the materials produced before the court by the petitioning creditor and on satisfying that the company is commercially insolvent. At this stage, we would like to reiterate the views expressed by this court in the case of Atul Drug House Ltd., In re [1971] 41 Comp Cas 352 wherein the court held that at the time of admission of a petition for winding up u/s 433(f) the petitioner must convince the court not only of a just and equitable ground for so doing but also that there is no alternative remedy open to the petitioner. This is because if such a petition is admitted and there is a public advertisement, it would cause irreparable harm to a solvent company even if the company succeeds ultimately.

25. The learned advocate for the petitioner has drawn our attention to paragraph 17 of the judgment in the case of Kanchanaganga Chemical Industries v. Mysore Chipboards Ltd. [1995] 3 Comp LJ 201; [1998] 91 Comp Cas 646 (Kar) (at page 654) :

"17. In Pradeshia Industrial and Investment Corporation of U.P. Vs. North India Petrochemical Ltd. and Another, , the Supreme Court has in detail laid down the

requirements to be established even prima facie before getting petition u/s 433(e) admitted and advertised in paragraphs 26 to 33 of the judgment. If from the materials available on the record it could not be made out that the company is commercially insolvent, then that petition could be dismissed even before issuing notice regarding admission. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. There lies responsibility and duty on the courts to find whether the concerned company has become commercially insolvent for purposes of winding up. At the initial stage, courts would be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before even issuing process regarding admission lest it would be an instrument in the hands of creditors as vendetta to harass the debtor-company needlessly. Vindication of majesty of justice and enforcement of law are prime objects of justice and should not be abused since the company petition for winding up is an interest litigation."

26. In the result, as the company does not have its registered office within the jurisdiction of this court, this court cannot entertain the company petition. There is abuse of process of this court at the hands of the petitioner. The main company petition being No. 25 of 1996 stands rejected and rule therein is discharged.

27. The appeal is allowed accordingly. In the circumstances of this case, costs should be awarded which we quantify at Rs. 10,000.

28. In view of the aforesaid orders, no further order is required in the civil application and it stands disposed of accordingly.