

(1998) 07 GUJ CK 0042

In the Gujarat High Court

Case No : Company Application No. 238 of 1998 in Company Petition No. 117 of 1994

Ashok Ganpule

APPELLANT

Vs

Gujarat Lease Financing Ltd. and Another

RESPONDENT

Date of Decision : 29-07-1998

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24, 24(1), 24(2), 31, 53
Gujarat Agricultural Produce Markets Act, 1963 — Section 6(5)

Citation : (1999) 1 GLR 591

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Judgement

R. Balia, J.—Heard learned counsel for the parties. Judge's summons have been taken by the applicant for reviewing the order made by this court in Company Petition No. 117 of 1994 on 24.6.98 ordering winding up of respondent Parshuram Potteries Works Co., Morbi, against official liquidator, respondent No. 2, and respondent No. 1, the original petitioner in the petition for winding up. The short grounds urged for reviewing the order, dated 24.6.98 is that before the order was made notice of petition was not published in the official gazette of the State as required by rule 24(1) of the Companies (Court) Rules which had the effect that the petition was not ripe for hearing. Reliance has been placed on decision of the Supreme Court in National Conduits (P) Ltd. Vs. S.S. Arora, with particular emphasis on the observation "a petition for winding up cannot be placed for hearing before the court unless the petition is advertised, that is clear from terms of rule 24(2)".

2. Mr. Thakore, learned counsel appearing for the original petitioner urges that requirement as to publication under rule 24(1) is referable only to the mode and manner of publication and that is subject to the directions of the court. Since the court while admitting petition had not directed for publishing in official gazette, but had directed the same to be published in two newspapers only, it was not necessary for the petitioner to have advertised the notice by publishing the same

in official gazette. The non-publication in official gazette does not vitiate the order under review. At any rate the issue as to effect of non-publication in gazette being highly debatable, no review would lie.

3. The fact of non-publication in official gazette is not in dispute. and the mode of advertisement of petition wherever it is so required to be advertised under the relevant rule. It directs that an advertisement of a petition unless otherwise ordered by the court or otherwise provided by the rules, is to be so published not less than 14 days before the date fixed for hearing, that is, the time by which advertisement should take place. The other direction made in the rule is that such publication be in two daily newspapers and in the official gazette of the State or the Union Territory concerned. Out of two daily newspapers, one must be of English and another of regional language. Such newspapers must be published from the State of Union Territory concerned. This relates to the mode of publication. However, these directions in sub-rule (1) are specifically subjected to direction of court otherwise. The words "unless the Judge otherwise orders" qualifies the entire requirement of sub-rule (1). The direction as to the manner as well as the time mentioned in sub-rule (1) have been made subordinate to the directions of the Judge or provisions made elsewhere in the rules. Sub-rule (1) in itself makes it abundantly clear that the mode and the time of advertisement, both are within the discretion of the court to devise, subject to limitations imposed in rules elsewhere. If the court does not order about time by which the advertisement is to be made, the time and type of medium through which advertisement is to take place shall be as envisaged in the sub-rule (1). Still court shall have to specify the date of hearing and name of newspapers in which the petition is to be advertised.

5. In this connection, some of the rules may be noticed which require for advertisement of petitions of different nature.

6. A petition to confirm reduction of share capital of a company which is filed along with the list of creditors is required to be advertised under rule 53. This "requirement of advertisement" is under rule 53. Such requirement can be dispensed with under rule 24(2). However, rule 53 does not specify any special mode or the time for publishing advertisement but leaves it to the discretion of the court by envisaging that the petition may be advertised in such manner as the Judge directs. As the rule does not prescribe the period or medium in which advertisement is to take place, but has been left subject to direction of court, such advertisement if not dispensed with must take place at least 14 days before the date of hearing and be published in an English daily, a Gujarati daily and official gazette as per sub-rule (1) of rule 24.

7. Rule 69 governs the procedure for dealing with the petitions for a compromise or arrangement under sections 391 and 394 and envisages directions that may be made by the court in an application u/s 391(1) for convening the meeting of the members or creditors, or class of them. The directions which are envisaged under rule 69 also envisage as to the notice to be given of the meeting or

meetings and the advertisement of such a notice.

8. Rule 74 envisages that the notices of the meeting shall be advertised in such newspapers in such manner as the Judge may direct not less than 21 days before the date fixed for the meeting. It may be noticed that the time fixed for publication under rule 74 is different from what has been envisaged in rule 24(1). That is to say, a larger time gap has been provided between the date of meeting and publication of notice, than what has been envisaged for advertisement generally under rule 24. However, no specific provision has been made as to mode of advertisement of notice of meeting. Requirement of advertisement stems from rule 69. Minimum period before which such notice must be advertised is prescribed under rule 74; which is otherwise than one provided under sub-rule (1) of rule 24. Reading these rules, requirement of advertisement under rule 69 can be dispensed with. However, if advertisement has to take place it must be at least 21 days before date of meeting as per rule 74 and not as per rule 24(1). Mode of advertisement shall remain as prescribed in rule 24(1), viz., one each in daily [newspaper] in English and regional language of the State and Official Gazette subject to different directions by the court.

9-10. Rule 80 which provides for fixing date and hearing for sanctioning a scheme or comprise or arrangement approved by the members or the creditors whose meeting has been called u/s 391(1) and 392(2), envisages that the notice of hearing shall be advertised in the same paper in which the notice of meeting was advertised or in such other papers as the court may direct not less than 10 days before the date fixed for hearing. It may be noticed that this rule specifically provides for lesser period of notice before the date of hearing. It also envisages ordinarily publication of notice in the same newspapers in which notice has been advertised under rule 74, though still discretion has been left with the court that it may be directed to be advertised in some other papers. Thus, this rule itself provides for requirement of advertisement as well as period and mode and medium of such advertisement. While dispensation with requirement of advertisement can be ordered under rule 24(2), for other matters, sub-rule (1) of rule 24 will give way to provisions made in rule 80 subject to directions of court.

11. Rule 96 which deals with the procedure concerning conduct and hearing of petition for winding up, envisages fixing up a date for hearing the petition and also direction as to the advertisement to be published and persons upon whom copies of petition are to be served. While rule 96 envisages direction as to the fixing of date of hearing and "requirement of advertisement", rule 99 envisages making such advertisement within the time and the manner provided by rule 24. However, this, requirement is also made subject to the directions of the court.

12. All the rules referred to above leave it in the discretion of the court how the advertisement of meeting or petition required under rules has to take place. None of these rules provides for discretion in the court to issue directions for

advertisement or not. That provision is to be found in sub-rule (2) of rule 24, which as noticed above, envisages dispensation of "advertisement required by these rules" except in the case of a petition to wind up. Thus it is reasonable to infer that while advertisement required under rules 53, 74 and 80 can be dispensed with, advertisement of petition for winding up required under rule 96 cannot be dispensed with.

13. The next question which arises for consideration is whether sub-rule (2) of rule 24 controls the provisions of sub-rule (1) of rule 24 as well ? I am of the opinion that requirement to advertise a petition is a substantive requirement of the rules and the manner and method of fulfilling that obligation of advertisement is a part of procedure governed by sub-rule (1) of rule 24 or as envisaged in other rules as noticed above. Rule 24(1) only provides generally in the absence of directions to contrary or provision to the contrary in rules that an advertisement should take place not less than 14 days before the date of hearing and it should be published in the Official Gazette, a daily newspaper in English and a daily newspaper in the regional language. However, it is open to the court to fix the time other than envisaged under rule 24(1) or the manner of publication as envisaged under rule 24(1). It has no relation to the substantive provision of requirement as to advertisement as is under sub-rule (2). Viewed from this angle, in my opinion, it is not really a case whether the court has necessary power to dispense with advertisement. It is a case where one has to consider whether the court has necessary discretion in the matter of providing manner in which the advertisement is to take place. As noticed above, apart from the language of rule 24 itself, the various rules themselves envisage that the manner of advertisement is ultimately in the discretion of the court and the fact that the notice has not been published in the three mediums, namely, official gazette, newspaper of English daily and in newspaper of regional language by itself cannot affect the validity or merit of the order made, if the advertisement as otherwise ordered has taken place in accordance with the directions issued by the court in that regard.

14. The contention of the learned counsel that Supreme Court decision in *National Conduits* (1967) 2 CLJ 232 supra, lays down the ratio that requirement of publication as under rule 24(1) is a necessary condition precedent before petition can be heard is not discernible from the said precedent. The only issue before the court was whether directions as to advertisement must be made simultaneously as soon as petition for winding up is admitted or it can be deferred. The court said that a petition for winding up cannot be placed for hearing before the court unless the petition is advertised. That is clear from terms of rule 24(2). But, it is not required that direction as to advertisement must also be made with order of admission. The court did not say anywhere nor was there an issue before it whether the requirement of rule 24(1) as to the manner of advertisement is a condition precedent before hearing of the petition. There cannot be any doubt about the conclusion emanating from rule 24(2) that advertisement of petition of winding up is a part of substantive provision without

which the petition could not have been heard. The decision in my opinion does not support the contention that it is further required that it should be invariably and inflexibly advertised in the manner prescribed under rule 24(1) and the court had no discretion to order advertisement in a different or other manner.

15. The issue at hand corresponds more proximately with principle enunciated in with Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, . It was a case arising under U.P. Municipalities Act, section 131 of which requires publication of proposals and draft rules along with notice. The publication of proposals and draft rules, etc., was further required to be published in a local newspaper published in Hindi and when there is no such local publication in Hindi, in such manner as the State Government may generally or by special order direct. The proposals were published in a local paper which was not in Hindi but in Urdu language. The contention, as has been raised in this petition, was raised that as the publication of draft rules, proposals, etc., had not been made in accordance with the scheme of the statute in local newspaper of Hindi, it cannot be said to be a publication at all. The court drew the distinction between substantive requirement as to publication and the procedural requirement as to the manner of publication. Holding former to be mandatory and latter to be directory, the court said :

"The provision with which we are concerned, namely, section 131(3), can be divided into two parts. The first part lays down that the Board shall publish proposals and draft rules along with a notice inviting objections to the proposals or the draft rules so published within a fortnight from the publication of the notice (see Sch. III). The second part provides for the manner of publication and that manner is according to section 94(3)."

Dealing with the first part, the court came to the conclusion :

"The object of providing for publication of proposals and draft rules is to invite objections from the inhabitants of the municipality, who have to pay the tax. The purpose of such publication obviously is to further the democratic process and to provide a reasonable opportunity of being heard to those who are likely to be affected by the tax before imposing it on them."

With this objective determined, the court further held :

"We are, therefore, of the opinion that his part of section 131(3) is mandatory and it is necessary to comply with it strictly before any tax can be imposed. We shall consider the interpretation of section 135(3) later; but we have no doubt that in the present case, in spite of section 135(3), the legislature intended that there must be publication as provided in what we have called the first part of section 131(3). We, therefore, hold that this part of section 131(3) is mandatory considering its language, the purpose for which it has been enacted, the setting in which it appears and the intention of the legislature which obviously is that no tax should be imposed without hearing taxpayers."

Turning to the second part as to the manner of publication, the court said :

"It seems to us that when the legislature provided for the manner of publication it did not intend that that manner should be mandatory. So long as publication is made in substantial compliance with the manner provided in section 94(3), that would serve the purpose of the mandatory part of the section which provides for publication. It would, therefore, not be improper to hold that the manner of publication provided in section 94(3) is directory and so long as there is substantial compliance with that the purpose of the mandatory part of section 131(3) would be served."

In my conclusions reached above, I am fortified by the ratio referred to above. Rule 24(2) relates to jurisdiction of the court to dispense with the substantive requirement of advertisement of any petition except in the case of petition for winding up. The object of advertising petition for winding up is discernible from format provided for the notice, in Form No. 48. It is to provide an opportunity to every creditor, contributory or other person desirous of supporting or opposing the making of an order on the petition of winding up. Keeping the petition for winding up outside the pale of discretion under rule 24(2) serves the object. Rule 24(1) provides generally the manner of informing the creditor, contributory or other person desirous of supporting or opposing the making of an order on the winding up petition. It may be noticed that while in case under U.P. Municipalities Act, the publication was not subject to direction of the Government in the case of availability of a local daily in Hindi, still the principle of substantive compliance was brought into play. This, in my opinion, need not be invoked in the present case, inasmuch as, a close reading of the relevant provisions goes to show that the manner of publication has been left to the discretion of the court concerned. It is in case that court has not provided any specific direction as to manner of publication made would arise if the publication has not been made in accordance with the directions issued by the court in that regard or in absence thereof in accordance with rule 24(1). As the publication of the notice in this case has taken per the directions of the court. I leave that question at that.

16. In this connection Mr. Soparkar, learned counsel for the applicant has referred to decision of Gujarat [Gauhati ?] High Court in MVI. Ahmadur Rahman and Others v. Registrar of Companies reported in (1973) 43 Comp Cas 522 and of the Rajasthan High Court in Falcon Gulf Ceramics Ltd. v. Industrial Designs Bureau reported in (1994) 3 Comp LJ 182 (Raj) : (1996) 86 Comp Cas 207 (Raj) to support the contention that the requirement as to publication in accordance with rule 24(1) is mandatory. Both the decisions are rendered in circumstances where no advertisement at all had taken place. Thus the two cases relied on by learned counsel are such in which there has been failure to comply with the substantive requirement of advertisement itself and has no bearing on the question raised before me as to where publication has been made in accordance with the direction of the court which was not strictly in accordance with rule 24(1), still the petition could not be heard.

17. Learned counsel also placed reliance on three decisions of the Supreme Court to contend that where statute prescribes certain mode of publication of notification or advertisement, failure to comply in part would render the while process invalid inasmuch as the requirement as to publication in the manner provided is mandatory requirement. Firstly, he placed reliance on *Raja Bahadur Giriwar Prasad Narain Singh Vs. Dukhu Lal Das and Others*, . The question had arisen under the Bihar Land Reforms Act. Relevant provision of the statute provides that the notification referred in sub-section (1) shall be published in official gazette and at least two issues of newspapers having circulation in State of Bihar and a copy of such notification shall be sent by RPAD. The notification has relevance to the vesting of lease governed under the notification in the State. The vesting of the property in State did not actually take place as a result of mere issue of declaration by the State Government but vesting takes effect, as a result of the provisions contained in section 4A, on publication of the notification. Thus keeping in view of the scheme of the Act the vesting was to take place on effective notification as per the manner and mode of notification. The statute itself provided emphasis by using the expression "at least two issues of two newspapers". Taking note of this, the court observed :

"The court has also to appreciate the significance of the expression "at least" used in sub-section (2) of section 3 and the further fact that this sub-section did not merely in general terms direct publication in newspapers, but went on to specify that the notification must be published as a minimum in two issues of two newspapers. Such a requirement indicates the emphasis laid down by the legislature on this manner of publication."

18. Thus considering the object and emphatic expression used by legislature, the publication specified was held to be mandatory. The statutory scheme was quite distinct from the scheme of rules under the Companies (Court) Rules with which we are concerned. It has been noticed above that the rules leave the time as well as manner of publication subject to directions of the court or provisions made elsewhere in the rules. The decision is of little assistance to the applicant.

19. Learned counsel referred to *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, . This case arose under the Gujarat Agricultural Produce Marketing Act, u/s 6(5) of which notification was required to be published in Gujarati, the regional language. The purpose of publication was to afford an opportunity to offer objections and suggestions an opportunity which the statute clearly deems so desirable. With reference to the object, the court said :

"This requirement is mandatory and must be fulfilled, a violation of which is likely to affect valuable rights of traders and agriculturists because in the absence of proper and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deems so desirable."

20. Thus, in *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, , the court with reference to the object of the notification found publication in the regional language as a mandatory direction as any other mode would have not fulfilled the purpose of offering an opportunity to offer objections and suggestions. This offers no parallel to the question, at hand.

21. Learned counsel, also placed reliance on *State of Orissa Vs. Sridhar Kumar Mallik and Others*, . The facts of this case are similar to facts in *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, . The notification required before constituting an area as "notified area" for inviting objections from inhabitants was required to be published in the regional language as well as the proclamation in the locality was also required. Notification was published in English but not in the language of the region of the area concerned. In the circumstances, it was found that notification did not satisfy the requirement of law as it failed to fulfil its objective, that is to say, the manner of actual publication failed the yardstick of substantive compliance.

21.1 This case also does not support the contention raised by learned counsel.

22. Learned counsel placed reliance on an unreported judgment of this court in *Sonal Cosmetics (Exports) Ltd. and another v. Harish J. Parikh* O.J. Appeal No. 8 of 1996 decided on 24.4.96.

22.1 Learned counsel for the applicant drew my attention to the contention raised by him with reference to invalidity of the order of winding up made for want of publication in official gazette and finding of the court that even if it is taken for granted as stated by the learned advocate for the respondent that in *Sandesh* newspaper, it was published on 31.1.1996 and in *Indian Express* on 10.2.96, it cannot be said that the notice is published in accordance with the rules.

22.2 In my opinion, this decision does not render much assistance to learned counsel inasmuch as the issue whether the court has power to issue direction to publish the advertisement in a manner different from provided under rule 24(1) was neither raised nor decided but the conclusion was reached on the assumption that publication in the three modes provided under rule 24(1) is required. A decision is precedent of conclusion raised and decided and not for the premise assumed to exist for reaching conclusions.

23. The question directly arose in another case *Plastisac P. Ltd. v. Gujarat Lease Finance Ltd. and another* O.J. Appeal No. 20 of 1998 decided on 24.3.1998. The issue raised before the court was that in view of rule 24 of the Companies (Court) Rules, with specific emphasis on sub-rule (2) thereof the Company Judge has no power to dispense with the publication of the notice of hearing of petition, for winding up in the Official Gazette.

23.1 In the said case, the learned Company Judge has dispensed with publication

in the Official Gazette and publication had been made in one Gujarati newspaper and in one English newspaper circulating in the area. The court concluded that the interpretation urged by the learned counsel for the appellant shall run counter to the combined rule of [regarding of rules ?] 24, 6 and 9 of the Companies (Court) Rules. Thus the Division Bench reached to the same conclusion, albeit for different reasons.

24. In this connection, support was also sought from rule 31 about the mandatory character of rule 24. Rule 31 envisages that in default of compliance with the requirements of the rules or directions of the Judge or Registrar, as regards the advertisement and service of petition, the petition shall, on the date fixed for hearing, be posted for orders of the Judge and the Judge may either dismiss the petition or give such further directions as he thinks fit.

24.1 On the premises of this rule, learned counsel contends that in default of compliance of the rules, the petition entails dismissal unless the court gives further directions in that regard and as rule 24 envisages publication in the manner envisaged above, non-compliance thereof may either result in dismissal or postponing of hearing. He contends that passing of an order of winding up without publication in the official gazette as required under rule 24(1) makes the order erroneous on the face of record, as the petition was premature for hearing on merit. It could only entail dismissal, or postponement of hearing with direction to complete the publication in the manner provided under rule 24(1).

25. As discussed above, the non-compliance of the rules entails dismissal is undoubted. But if the rules themselves provide that the requirement as to the manner of publication is subject to directions of the court and the court directs otherwise there would not be justifiable cause to hold that notwithstanding that, publication has taken place in accordance with directions of the court, the petition ought to have been dismissed or postponed for hearing with further directions. In fact, so far as the manner of advertisement is concerned, the rule 31 itself envisages the "directions of the Judge or Registrar as regards advertisement". Thus rule 31 envisages non-compliance with the requirement of rules generally or non-compliance with the directions of the court as regards manner of advertisement and service of the petition that would entail dismissal - not otherwise. As a matter of fact, close reading of rule 31 also suggests that directions as to advertisement and service of the petition specifically are made subject to the directions of the Judge or the Registrar before whom the petition or application is pending, and are not to be dismissed if the same accords with those directions. It is not the case of the petitioner that advertisement of the petition has not taken place in accordance with the direction of the court. This contention also in my opinion must fail.

26. Lastly, it was contended by learned counsel that in any circumstances, rule 24 envisages unless the court otherwise orders and rule 99 envisages compliance with rule 99 subject to any directions of the court, therefore; unless an express order for dispensing with publication in official gazette is made, the requirement

of publication of the petition in official gazette under rule 24(1) survives and as the same has not been complied with, the order under review becomes erroneous on the face of it, the petition having been heard and decided without publication of it in official gazette, dispensing with which was not ordered by the court.

26.1 Closely considering the argument stems from use of expression "dispensed with" in sub-rule (2), while sub-rule (2) as noticed above, relates to dispensing with the substantive requirement of advertisement under the rules, the same expression has not been used with reference to any of the requirements as to the manner and method of advertisement or the time of publication required under sub-rule (1). The question of dispensation is alien to the scheme of rule 24(1). The requirement of advertisement is in the official gazette, a daily newspaper in English language and a daily newspaper in the regional language circulating in the State or as per the directions of the court. Once the court has directed as to the manner in which the advertisement has to take place by publishing the same in named newspapers the omission to refer to official gazette cannot be carried to infer that requirement to publication in the third mode under the rule will survive. When court directs the publication of notice of hearing of petition specifying the medium in which it is to be published, this becomes direction of the court otherwise than contained in the rule and becomes operative as far as advertisement of that particular petition is concerned, and it must be deemed that publication in any other manner is not directed by the court. The basic premise on which this contention is made is fallacious. A conjoint reading of rule 24(1) and rule 99 makes it clear that expression "unless otherwise ordered" in rule 24(1) has been used in the same sense as subject to any directions by the court in rule 99.

26.2 Moreover, while sub-rule (1) deals with (the) manner and mode of advertisement of petition, sub-rule (2) speaks of "requirement of any advertisement required under the rules" makes its scope different from sub-rule (1). While sub-rule (2) takes within its sweep, for the purpose of exercising power to dispensing with, "requirement of advertisement" of any sort which may be of petition, or of a meeting of members or of creditors of the company or for any other object, that may be required under various rules. This distinction also supports the conclusion that exercise of discretion under sub-rule (2) is independent of exercise of power to direct required advertisement in manner otherwise than provided under sub-rule (1).

27. No other contention has been raised. The application, therefore, fails, and is hereby rejected.

27.1 There shall be no orders as to costs.

27.2 Learned counsel for the applicant states that the operation of the order of main petition had been stayed during the pendency of these proceedings and as the petitioner could not have filed review petition after filing the appeal,

petitioner has thus not preferred an appeal against the order of appeal which has remained stayed upto now, the interim order operating in this application should be allowed to continue until 5 August, 1998, to enable him to pursue his remedy of appeal. Learned counsel for the respondent No. 1 objects. However, in the facts and circumstances, the prayer is granted. The operation of the interim order passed in this petition shall continue to be operative until 5 August, 1998.