

(2019) 02 DEL CK 0466

In the Delhi High Court

Case No : Company Petition No. 319 Of 2015

Ashok Kumar & Sons (HUF)

APPELLANT

Vs

Brahma City Private Ltd

RESPONDENT

Date of Decision : 08-02-2019

Acts Referred:

Companies (Court) Rules, 1959 — Rule 26, 27, 28, 29, 96
Companies (Transfer of Pending Proceedings) Rules, 2016 — Rule 5
Companies Act, 2013 — Section 419(4), 433(c), 433(e), 434

Citation : (2019) 02 DEL CK 0466

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Sandeep P.Agarwal, Rajesh Pathak, Devesh Bhati, Satyam Dwivedi

Judgement

Jayant Nath, J

1. By this judgment, I will decide the preliminary objection raised by the respondent who has contended that as notice has not been issued in this petition, this court would not have jurisdiction to try the matter and the same be transferred to NCLT.

2. On 22.02.2018, this court had noted the various contentions regarding the contention of the learned counsel for the parties as follows:

"Learned counsel for the respondent relies upon the Notification dated 7.12.2016 being GSR I 19(E) issued by the Ministry of Corporate Affairs to contend that in view of the fact that though notice of this petition has not been directed to be issued, this court does not have the jurisdiction to adjudicate this petition and the matter has to be referred to NCLT.

Learned senior counsel appearing for the petitioner has relied upon judgment of the Bombay High Court in [2017 (3) MilL] 384} West Hills Realty Private Ltd., vs. Neelkamal Realtors Tower Ltd. to contend that mere service of petition on the respondent as envisaged under Rule 26 of The Company (Court) Rules, 1959 is

sufficient for this court to continue to adjudicate the present petition."

3. I had been while dealing with the issue as to which matters are to be retained by this court in Co.Pet. No.123/2016, titled as 'Grundfos Pumps India Pvt. Ltd. v. IIC LIMITED', decided on 09.01.2018, held as follows:

"4. Rule 5 of 2016 Rules reads as follows:

"[5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.-

(1) 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:

.....

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent."]."

5. Rules 26 and 27 of the Companies (Court) Rules, 1959 read as follows:

"26. Service of petition - Every petition shall be 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.

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.

"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".

6. Form-6 reads as follows:

"Form No. 6

(In Winding-up matters)

IN THE HIGH COURT OF JUDICATURE AT ORDINARY ORIGINAL CIVIL JURISDICTION COMPANY PETITION NO. OF

In the matter of Companies Act, 1956;

And

In the matter _____

(Full title as per proceeding)

To,

Name and address of the

Respondent Company.

TAKE NOTICE THAT Petition under Section of the Companies Act, 1956 for winding-up of the abovenamed Company presented by the Petitioner on --/--/200 is admitted pursuant to Order dated --/--/200 and the same is now fixed for hearing before the Company Judge on --/--/200 at 11:00 O' Clock in the forenoon or soon thereafter.

If you desire to support or to oppose the said Petition at the hearing, you should give notice thereof in writing to the Advocates for the Petitioners mentioned below so as to reach the Advocate for the Petitioner/s not later than five days before the date fixed for hearing of the said Petition and appear at the hearing in person or by an Advocate/s, who is entitled to practice in this Hon'ble Court. If you wish to oppose the said Petition, the grounds of opposition or a copy of your Affidavit, should be furnished with your notice to the Advocate/s for the Petitioner/s mentioned below.

Copies of the Petition and the Affidavit-in Support thereof are enclosed.

Dated this day of 200.."

7. Bombay High Court in West Hills Realty Pvt. Ltd. v. Neelkamal Realtors Tower Pvt. Ltd.(supra), stated as follows:-

"8. Coming now to Rules 26 to 29, even a cursory reading of these rules makes it clear that the rules treat the two subjects, namely, service of petition and notice of petition, differently. Service of petition implies service on the respondent or other person, as the case may be, of a copy of the petition, whereas notice of the petition connotes notice of the hearing of the petition before the court. Rule 26 provides for service of petition, whilst Rule 27 provides for notice of petition. Rule 28 provides for the manner in which service is to be effected on the company, whereas Rule 29 casts the responsibility for all services required to be effected by the Rules or by orders of court or registrar on the petitioner.

9. Mr.Andhyarujina submitted that the mandate of Rule 26 is that a petition has to be served on the respondent and other persons only if the Act or Rules may

require or if the Judge or Registrar may direct and that in default, every service of the petition must be accompanied by service of the notice of the petition. He then follows it up with his next submission that such notice of the petition is required to be in Form No. 6, which clearly provides for a notice post-admission. He finally sums it up by submitting that every service of the petition under Rule 26 is, therefore, necessarily a post-admission service. There is a distinct fallacy in this argument. First of all, if a petition had to be served on the respondent as well as other persons only as and if the Act or the Rules may require or the Judge or the Registrar may direct, there was no need to make any separate provision for such service in Rule 26. The Act or the Rules or the order of the Judge or the Registrar, as the case may be, anyway would have provided for the same. A separate provision for such service would make little sense. Secondly, even lexicologically the structure of the sentence in Rule 26 providing for such service does not support the interpretation suggested by Mr. Andhyarujina. A correct reading of Rule 26 implies that the requirement of service of petition is provided for in Rule 26 itself. It contains two commands, namely, (i) every petition shall be served on the respondent, if such respondent be named in the petition, and (ii) every petition shall be served on such other person as the Act or the Rules may require or as the Judge or the Registrar may direct. In other words, if a respondent is named in the petition, the requirement of service of the petition on such respondent is the requirement of Rule 26 itself. One does not have to go to the other provisions of the Act or the Rules or the orders of the Judge or the Registrar for such requirement. There is one more circumstance provided in Rule 26 where service of the petition needs to be made, i.e. when a notice of the petition is to be served. The last sentence of Rule 26 provides that when a notice of the petition is to be served on the respondent or any other person then, unless otherwise ordered, a copy of the petition shall also be served. Rule 26 has no reference to the order of admission of the petition. Rules 27 and 28, on the other hand, make it clear that they together form the requirement of service of the notice of the petition on the respondent company after the petition is admitted and provide for the time and manner of such service. Rule 29, on the other hand, fixes the responsibility of any service under the Rules or directions of the court or the Registrar on the petitioner. The scheme of these four rules, thus, suggests that whereas service of the petition is mandatory on the respondent and, if the Act or the Rules provide or the Judge or the Registrar directs, on such other person/s, whereas notice of the petition on the respondent is obligatory only in the event of admission of the petition. So also, other persons are entitled to notice of the petition only if the Act or the Rules require or the Judge or the Registrar directs. In case of any service, whether service of the petition or of the notice of the petition, it is the petitioner who must execute it."

8. I may note that Madras High Court in *Mr. Sanjay Goel vs. EL Forge Ltd.* being CP Nos. 14/2015, 239/2015, 242/2015, 94/2016 and 364/2016 dated 11.1.2017, however, did not agree with the view of the Bombay High Court and held as

follows:

"24. As rightly pointed out by the learned Additional Solicitor General, in the case of West Hills Realty Pvt. Ltd. (supra), the Court had not laid down the definite principle that Rule 26 also encompasses cases where pre-admission notice has been issued.

25. With great respect to the observations contained therein, the court was more concerned about the anomaly which may occur in the event of such cases being transferred. In my respectful view, that aspect may not be a right consideration to examine as to what is the support and import of Rule 5 of the Transfer Rules. The Rule has to be interpreted to give true meaning and to give effect to Section 434(c). Thus, Rule 26 referable therein should definitely mean the notice on admission and not pre-admission notice as no such procedure is contemplated under the statute. Therefore, such procedure having not been statutorily recognized and not saved by the Transfer Rules, all company petitions which have not been admitted and notice has not been served on the respondent under Rule 26 have to be necessarily transferred."

9. In my opinion, the judgment of the Bombay High Court in West Hills Realty Private Ltd. and Ors. vs. Neelkamal Realtors Tower Pvt. Ltd., gives the correct position. As rightly noted by the Bombay High Court, Rule 26 of the Companies (Court) Rules, 1959 deals with Service of petition whereas Rule

27 deals with Notice of petition. There is nothing in Rule 26 to show that the service of the petition is to be effected only when the petition is admitted. In fact, admission of a winding up petition is dealt with the Rule 96 of the Companies (Court) Rules 1959. The said Rule 96 reads as follows:-

"96. Admission of petition and directions as to advertisement -Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition."

10. Hence, the above noted Rule 96 also provides for an eventuality of service of notice to be given to the company before directions as to the advertisement of the petition.

11. Clearly Rule 26 does not deal only with situations where copy is served on the respondent after admission of the winding up petition. Hence, the present petition is liable to be heard by this Court."

4. In a recent judgment, the Supreme Court in Forech India Ltd. v. Edelweiss Assets Reconstruction Co.Ltd., Civil Appeal 818/2018, by judgment dated 22.01.2019 has dealt with the above noted Rules 26 and 27 of the Companies(Court) Rules, 1959. The Supreme Court held as follows:

"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.

17. The resultant position in law is that, as a first step, when the Code was enacted, only winding up petitions, where no notice under Rule 26 of the Companies (Court) Rules was served, were to be transferred to the NCLT and treated as petitions under the Code....."

5. Hence, only winding up petitions where no notice under Rule 26 of the Companies(Court) Rules, 1959 was served, were to be transferred to NCLT.

6. In the present case, when the matter came up for hearing on the first date on 15.07.2015, the respondent on seeing the matter on the list entered appearance. In a detailed order this court noted the submissions of the learned senior counsel appearing for the respondent. This court also noted the submission of the learned senior counsel for the respondent that his clients are apprehensive of issuance of notice of winding up since that may have an adverse effect on the reputation and standing of the company, which is a going concern and is actively engaged in the business of property development including, inter-alia, the project, namely, Brahma City at Gurgaon, Haryana. The respondent was directed to file an affidavit setting down willingness of the respondent company to abide by all the terms and conditions of the agreement between the parties, making it clear that in case there is any variation in the plot being offered to the petitioner, the same will be strictly in accordance with the terms of the agreement and all consequences in terms thereof shall follow. Thereafter, several hearings have taken place. The matter was heard on 17.11.2015, 01.08.2016, 03.02.2017, 12.07.2017 and 24.10.2017.

7. On 03.02.2017, the respondent company was directed to file an additional affidavit to place on record the expected time period within which the respondent company would be in a position to hand over the possession of the plot in question. The affidavit was filed.

8. Hence, as per the orders of this court no formal notice was issued on the respondent to show cause as the respondent entered appearance on the first date itself and submitted that it was ready and willing to abide by all the terms of the agreement. In fact, on the first date when the matter was taken up for hearing, namely, 15.07.2015 this court after noting the contentions of the petitioner and the respondent noted as follows:

"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."

None of the subsequent orders have issued notice to the respondent. The respondent has also not been asked to file counter affidavit to the main petition to oppose its admission. Hence, no notice under Rule 26 of the Companies(Court) Rules, 1959 was served on the respondent. The Supreme Court in *Forech India Ltd. vs. Edelweiss Assets Reconstruction Co.Ltd.* (supra) has held that where no notice under Rule 26 of the Companies (Court) Rules is issued the petition has to be transferred to NCLT. Hence, this court would have no jurisdiction to retain the present matter in view section 434 read with Rule 5 of the Companies(Transfer of Pending Proceedings) Rules, 2016. It is directed accordingly. The Registry may transfer the present petition to NCLT.