

(1975) 07 DEL CK 0011

In the Delhi High Court

Case No : Company Petition Appeal No. 26 of 1975

Bipla Chemicals Industries

APPELLANT

Vs

Shree Keshariya Investment Ltd.

RESPONDENT

Date of Decision : 30-07-1975

Acts Referred:

Citation : (1977) 47 CompCas 211 : (1975) ILR Delhi 901

Hon'ble Judges : T.P.S Chawla, J

Bench : Single Bench

Advocate : S.K. Dholakia and K.K. Jain, for the Appellant;

Judgement

T.P.S. Chawla, J.

(1) A company known as "Shree Keshariya Investment Limited" owns the Priyalaxmi Mills in Baroda. In March this year, and afterwards, 28 petitions were filed by various creditors for the winding up of this company. Notices were issued to it to show cause why each of the petitions should not be admitted. In due course appearance was entered on behalf of the company, and more "time was obtained to file answers. On 9th May, 1975, time was extended further because Mr. K. K. Jain, counsel for the company, intimated to me orally in court that the company was trying to make arrangements to pay all the petitioning creditors. He prayed for a date to be fixed after the long vacation so as to give the company enough time for the purpose- I acceded to that request. However, on 16th July, 1975, when the petitions were again listed for further orders, it was stated on behalf of the company that it had not succeeded in raising the necessary funds to pay the creditors. Mean while, the company had filed applications under rule 9 of the Companies (Court) Rules 1959 and section 151 of the CPC in each of the proceedings. Counsel for the company said that these may be treated as its answer to the notices to show cause against admission.

(2) During the discussion on 16th July, 1975, counsel for the company prayed that the petitions be ordered to stand over for a period of four months to enable

it to obtain loans from two Banks with which it was negotiating. He said that if the loans were obtained the company would then be in a position to pay its debts. The creditors opposed this request, but, after some persuasion, were minded to agree, provided that satisfactory guarantees were furnished for the amounts owing each of them so that their interests were safeguarded in the intervening period. Counsel for the company took time to obtain instructions. On 25th July, 1975, he informed me that the company was unable to find sureties. Consequently, the petitions have now again been posted for admission.

(3) I begin my emphasising that the only question presently before me is whether the creditors' petitions should be admitted; and, if so, what further directions ought to be given. The main relevant facts are not in dispute. It is admitted that in the aggregate a sum of about Rs. 10 lakhs is due from the company to the petitioning creditors. It is not disputed that each of the creditors served the company with a notice of demand in accordance with section 434(a) of the Companies Act 1956, and that the company did not reply to the same it was conceded on behalf of the company that in its present financial straits it was unable to pay the amounts admitted to be due to the creditors. Clearly, on these facts, the creditors would, *prima facie*, be entitled to an order for the winding up of the company, and, *a fortiori*, to have their petitions admitted.

(4) Nevertheless, admission was opposed on three grounds. Firstly, it was said, that the company had assets worth about Rs. 5 crores, and "that was more than ample to meet its liabilities. The book value of the fixed assets, according to the balance-sheet for the year ended 31st March, 1974, was alleged to be about Rs. 1.08 crores and the estimated market value Rs. 3 crores. In addition, it was said, that in the premises of the Mills owned by the company were lying finished and semi-finished goods worth over Rs. 1 crore, and there were "book debts" owing to the company of about Rs. 80 lakhs. This is how the approximate figure of Rs. 5 crores was arrived at

(5) Secondly, it was said, that the company had approached the Bank of Baroda and the Central Bank of India for obtaining loans amounting to Rs. 80 lakhs. Discussions were said to be continuing, and it was anticipated that the loans would be granted in the very near future after approval had been received from the Government of the State of Gujarat. And, if the loans were sanctioned, the company intended to restart the Mills, which were presently at a standstill, and then present a scheme for "part-payment to the creditors". It was explained that though the company had been thinking of putting forward a scheme for the consideration of the creditors "for payment of their dues in Installments", it had not done so because it would be "premature at this stage" as the loans it was seeking had not yet been sanctioned by the banks or approved by the Government. In these circumstances, it was feared, that if the petitions for winding up were admitted, the company's scheme to revive the Mills and "to repay the creditors in full in the course of time" would be jeopardised. A request was again made that the petitions be ordered to stand over for about four

months so as to enable "the company to obtain a final decision regarding the loans for which it had applied.

(6) Thirdly, it was asserted that the majority (in value) of the creditors were opposed to winding up the company. In each of the proceedings, applications have been filed by Shree Risbabh Investment Limited and others, jointly claiming to be creditors of the company to the extent of Rs. 96 lakhs, in which the winding up is indeed opposed. The grounds of the opposition are the same as those urged on behalf of the company and mentioned above- Also, the view is expressed that it is not in the interest of the general body of creditors of the company that it be wound up.

(7) As to these applications moved by the creditors opposed to winding up, an objection was raised that they had no locus standi to be heard at this stage. Counsel for these creditors sought to maintain the applications under rule 9 of the Companies (Court) Rules 1959. That rule only preserves the inherent power of the court "to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court". Inherent power cannot be used to upset or distort the scheme of things under the Companies Act and the rules framed there under. In particular, rule 96 provides that :

"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."

The only notice this rule contemplates is to the company, and to no one else. Form No. 48, appended to the rules, which is the form of advertisement to be published, shows that creditors, contributories or other persons desirous of supporting or opposing the petition may appear on the date of hearing fixed by the court. But, that is after the petition- has already been admitted. There is no rule which envisages that any one other than the company may be heard to oppose the admission of the petition. Nor was I shown any authority which might lead to such a conclusion.

(8) On principle I can see "no reason why creditors inclined to oppose the winding up should be heard at this stage. Their interests are not in any manner affected or prejudiced by the mere admission of the petition. .They will have a full opportunity to have their say after it is admitted. Besides, it seems only right that all the creditors should be heard at one and the same time. Then it would be possible to ascertain the wishes of the majority. To hear some, in the absence of others, is unfair and creates problems."" At present there is not even a list of creditors put before me, and I have no means of knowing their totality-and, hence, what would constitute a majority. Therefore, I hold, that the creditors

opposed to winding up have presently no right to intervene. The applications moved by them will stand over and will be considered at the appropriate time.

(9) In the present case this makes no difference, for, as I have already said, all the grounds of opposition set forth by these creditors have been urged on behalf of the company. Their validity must still be determined as put forward on its behalf.

(10) Of course, it is material to know, as the company has alleged in its third ground, that there are creditors opposed to the winding up and that they might even have the majority in value. However, that in itself would not be sufficient to refuse an order for winding up, and such creditors would have to adduce good reasons why the order should not be made. That they think the company is commercially solvent and have full faith and confidence in its management, and that the company expects to pay its creditors in the near future are not adequate reasons. Nor is it enough that they believe that in the long run the creditors are more likely to be paid if the company is allowed to continue trading instead of being wound up. These principles are well settled and the leading authorities are noticed in *Re Focus Advertising Pvt. Ltd.*, (1974) 44 Comp Cas 567(1). With them in mind, one has to consider and weigh the other two grounds urged by the company, treating them as propounded not only on its behalf but also an assumed majority of the creditors.

(11) Before doing so, I must notice a preliminary objection raised by Mr. Sultan Singh, counsel for one of the petitioning creditors. He contended on the authority of *Extrusion Processes Private Ltd. vs. Jivabhai Marghabhai Patel* (1966) 36 Comp Cas 60(2), that a company had no right to be heard before a petition for winding up had been admitted. That docs seem to be the ratio decidendi of that case. Apparently, the basis of that decision is the closing sentence of rule 96 of the Companies (Court) Rules, quoted above, which permits notice to be given to the company "before giving directions as to the advertisement of the petition", and not before "admission". Read literally and narrowly that sentence is capable of the construction that notice to the company can issue only after admission. But, I think, it is equally possible to take the view that the word "before" comprehends "any time before" directions as to the advertisement are given, and is not restricted to the interval between "admission" and the "giving" of such "directions". Normally, there is no such interval. According to the first part of the rule, when a petition is posted before a Judge for admission, it is also simultaneously posted for directions following on the admission- Therefore, in the normal case, notice "before giving directions as to the advertisement of the petition", would be given before the order of admission. In exceptional cases, of course, the court may admit the petition and postpone giving directions as to the advertisement.

(12) General considerations point to the same conclusion. Surely, the company is as much, if not more, affected by the admission of the petition as by its advertisement. So, there appears to be no sense in affording the company an

opportunity of being heard respecting the order of advertisement, but not that of admission. By giving to the word "before" the larger meaning which I have indicated, and which it is perfectly able to bear, this strange result is avoided. Interpreted in this way, the closing sentence of the rule defines the latest point of time at which notice may be given to the company when a petition is posted before a Judge in accordance with the earlier sentence. It does not limit the earliest point. In those cases in which for some reason the order of advertisement is not made immediately after that of admission, notice may be given to the company before or after the admission or both.

(13) This view is supported by the judgment of the Supreme Court in *National Conduits (P) Ltd. Vs. S.S. Arora*, . Elucidating various possibilities, the Supreme Court said:

"WHEN a petition is filed before the High Court for winding up of a company under the order of the court, the High Court (i) may issue notice to the company to show cause why the petition should not be admitted; (ii) may admit the petition and fix a date for hearing and issue a notice to the company before giving directions about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order."

Two sentences later, the court said : In answer to a notice to show cause why a petition turn winding up be not admitted, the company may show cause and contend that the filing of the petition amounts to an abuse of the process of the Court." To my mind this is clear authority for the proposition that a company may be allowed to show cause against the admission of a petition for winding up.

(14) In all the petitions before me, notices to show cause against admission were issued. In so far as the judgment of the Division Bench of the Bombay High Court in *Extrusion Process Private Ltd. Vs. Jivabhai Marghabhai Patel*, (1966) 36 Comp Cas 60(2), is inconsistent with what the Supreme Court said, it cannot be followed. Moreover, that judgment suffers from internal weakness in that it contains at least one observation directly contrary to what it purports to decide. At one place the Judges said : In response to the notice under rule 96 the company may show cause why the petition should not be proceeded with or rejected." I am wholly unable to reconcile this observation with the next preceding sentence, which contains the decision of the court, and reads:

"THERE can, however, be no question of hearing the company at the stage of admission."

Even Mr. Sultan Singh confessed that he could not reconcile those two sentences. Counsel for the other petitioning creditors did not support Mr. Sultan Singh's objection, and, indeed, conceded that the company could be heard in opposition to the admission of their petitions. In my opinion, that is the correct view.

(15) Returning to the grounds urged by the company, the acknowledged position is that about Rs. 10 lakhs are due to the petitioning creditors and about Rs. 96 lakhs to the creditors opposed to the winding up. Thus, Rs. 1.06 crores are due to the known creditors; and for aught I know there may be others who have not yet appeared on the scene. A list of its creditors has not yet been filed by the company. As against this, the company claims to have assets worth Rs. 5 crores. No material has been put before me on the basis of which I might be persuaded to accept this figure. Although it is alleged that the book value of the fixed assets is about Rs. 1.08 crores according to the balance sheet for the year ended 31st March, 1974, that balance sheet has not been placed on record. Nor have any particulars of the fixed assets been stated. No basis whatsoever has been indicated for estimating the market value of these assets at Rs. 3 crores. The position with regard to the finished and semi-finished goods alleged to be lying in the premises of the Mills, and the "book debts" alleged to be owing to the company, is the same. No document whatsoever has been placed on record to substantiate the allegations made on behalf of the company. At the very least, the latest balance sheet ought to have been produced. Obviously, that would have thrown a great deal of light on the real financial state of the company. In the circumstances, I can only think that this and other relevant documents have been advisedly withheld. An adverse inference must follow.

(16) Furthermore, even supposing that the company has sufficient assets to pay its debts, that is cold comfort to its creditors. It was said in *Re Focus Advertising Pvt. Ltd.*, (1974) 44 Comp Cas 567(1), that once it is established that a debt, regarding which there is no bona fide dispute, is owing to a creditor despite statutory notice of demand, he is entitled to a winding up order "and the court will not listen to a defense on the part of the company that it is not commercially insolvent or that its financial position is not such as to be unable to pay its debts". Here, counsel for the company conceded that the amounts claimed by the petitioning creditors and also by the creditors opposed to the winding up were in fact due- though there were disputes regarding some small items. It is also apparent from the allegations made by the petitioning creditors, that most of the amounts claimed by them have been due for over a year. No attempt was made to pay them either in whole or in part despite notices of demand. Hence, the petitioning creditors would seem to be entitled to a winding up order without having to show anything more.

(17) I appreciate that on hearing a winding up petition, the court may, instead of making an order for winding up the company, make any of the other orders contemplated by section 443 of the Companies Act. It may even "adjourn the hearing conditionally or unconditionally". I accept that many considerations which would be relevant at the hearing of a winding up petition may also have some part to play at the admission stage. But, I think, that the approach at the admission stage would be rather different than that at the hearing. At the admission stage, I would have thought, that as soon as a prima facie case for winding up was made out, the petition ought to be admitted. In contrast, at the

hearing, all the facts proved would have to be taken into account for deciding what was the best order to make having regard to all the circumstances of the case.

(18) I do not think that merely because the company has applied for loans of Rs. 80 lakhs, which it might possibly get, is a good reason for denying the petitioning creditors even entry to the court. Not even counsel for the company suggested that the petitions could or should be dismissed on this ground. All that he prayed for was an adjournment for a period of four months. Once again, I have not been shown any documents or correspondence pertaining to the loans said to have been applied for by the company. I do not know what, if any, stage the negotiations have reached. There is no way of judging whether the company's expectation that the loans will be sanctioned is well-founded. Some of the petitioning creditors have said that the company's requests have already been rejected, and there is no prospect of the company securing any loans. It seems to me that the whole position is very uncertain. At present the company is quite unable to formulate a scheme for paying its creditors. Counsel for the company admitted that unless the loans for which it had applied were forthcoming, there would be no option open to the company except to submit to an order for winding up.

(19) Having regard to all these aspects, in my view, the only appropriate order to make at this stage is to admit the petitions. No real prejudice can be caused to the company by such an order. It can still carry on its negotiations for loans and present a scheme if, and when, its position improves. At the hearing, no doubt the court will consider what is the appropriate order to make on all the facts established before it. On the other hand, to defer orders admitting the petitions would be to delay the claims of the petitioning creditors further; and, this, on rather nebulous grounds. Such a course would be contrary to the interest of justice especially when it is remembered that the amounts claimed by them are admitted to be due, and have already been outstanding for a considerable period. Accordingly, I admit all these petitions. Costs will abide the event.

(20) In order to avoid multiplicity of proceedings, all further proceedings will be taken only in C.P. 26 of 1975. The other petitions will be kept pending for the time being.

(21) The petition in C.P. 26 of 1975 will now be advertised in the Hindustan Times, the Vir Arjun, and the Delhi Gazette, and also the Gujarat Samachar published from Ahmedabad, for hearing on 1st October, 1975. Notices of the petition will also be served on the Commissioner of Income Tax, Ahmedabad, the Labour Commissioner, Ahmedabad, the Commissioner of Sales Tax, Ahmedabad, and the Regional Provident Fund Commissioner, Ahmedabad, because, I am told, that they may have claims or demands against the company.