

(1974) 09 DEL CK 0014

In the Delhi High Court

Case No : Civil Appeal No. 296 of 1974 and Civil Petition No. 35 of 1971

Globe Motors (W) Ltd.

APPELLANT

Vs

Sanghi Motors

RESPONDENT

Date of Decision : 20-09-1974

Acts Referred:

Citation : (1975) RLR 241

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : K.K. Bhatia and B.N. Nayar, for the Appellant;

Judgement

D.K. Kapur, J.

(1) The is an application under order 9 Rule 13 read with Section 151 of the Code of Procedure and also these provisions have to be read with Rules 6 and 9 of the Company Court - Rules, 1959. The facts of the case are that a. winding up petition was moved by M/s Sanghi Motors and two others in respect of M/s Globe Motors Workshop Limited. This winding up petition was C. P. 35/71. During the course of the hearing of this winding up petition the counsel for the respondent - company withdrew at one stage and then subsequently a seconds counsel who appeared, also withdrew. A notice was thereon sent to the Company sought to be wound up, which did not put in any further appearance. At that stage an ex parte winding up order was passed by myself, after considering the evidence led by the petitioner It was noted in the order that an attempt had been made to serve the respondent-company after counsel had withdrawn, but it was not possible to serve the Company, that is how the ex parte order was passed. A notice of the present application to set aside the ex parte order of winding up was given to the original petitioners in the case, respondents, 1,2 and 3 Lamed in the application and also to the official Liquidator and the National & Grindlays Bank. Limited. At the hearing of this application a compromise had been arrived at between the applicant and respondents 1,2,3 and the original petitioners in winding up petition, C.P. 35 of 1971. The statements of the counsel of both. sides and of

Shri Lakhbir Singh, Chief Accountant of M/s Sanghi Motors have been recorded. The terms of the settlement between the parties are set out in an application u/s 151 Cpc which has been marked Exhibit "A" for the purpose of this judgment. According to those terms, certain sums have to be paid by the applicant-company to the petitioners in the winding up petition. A sum of Rs. 2,000.00 has been paid today in the presence of the Court towards these Installments and a sum of Rs. 500.00 has been paid by way of costs. In terms of the compromise the winding up petition has to be restored but it is to remain stayed; till the Installments are paid. It is also stated that if there is a default in respect of the Installments, then the winding up petition will; automatically stand revived. There is nothing in the application for compromise about what is to happen after all these Installments are paid.

(2) The acceptance of the compromise has been opposed principally by respondent No. 5 which is a secured creditor of the applicant company. It is submitted that the winding up petition has ended in the passing of a winding up order which enures to the benefit of all the creditors. In the circumstances, it is claimed that the setting aside of winding up order is detrimental to the interests of all the creditors. In this background it is submitted that the present application cannot be heard without impleading all the creditors of the company. The counsel for the official Liquidator, who is respondent No. 4, submits that the winding up order should not be set aside, on the ground that it will be detrimental to some creditors whom the official Liquidator otherwise represents. Alternatively, the counsel for respondent No. 5 submits that the winding up order has become final and cannot be set aside at-all. Further, it is claimed that if a compromise as is contained in the application u/s 151 of the CPC is brought to court it requires a meeting of the creditors u/s 391 of the Companies Act, 1956.

(3) I have had occasion to deal with a situation somewhat similar to the one in the present case when dealing with another case in which an ex parte winding up order had been passed. "In the case K. C. Sethi etc vs. M/s Bir Bahadur Singh & Co. Private Ltd., C.P. 10 of 1973, a winding up order was passed on the non-appearance of the Company. Later an application was moved showing that the Company had changed its registered office and, Therefore, the winding up order has been passed without properly serving the Company. In C.A.No. 18/74 decided on March 28, 1974, I set aside the winding up order passed earlier ex parte. I had to examine in that case, the same arguments which have been advanced by the 4th and 5th respondents in the present case. Although, nobody had objected in that case to the setting aside of the ex parte winding up order, I had myself thought that it was a matter which required very serious consideration, because the consequences of the winding up order were that the company was to be wound up for the benefit of all the creditors, and all its assets and liabilities were to vest in the official liquidator. I came to the conclusion that whatever the consequences of the winding up order might be, the provisions of the Code of Civil Procedure, governed the trial of such a matter before the Court this is set out in the Company Court: Rules, which applies the provisions of the

Code to the trial of cases arising under the Companies Act; and even otherwise, the power to dismiss a matter in default for the non-appearance of the applicant or petitioner, and the power to pass an ex parte order is to be found in the provisions of the Code. It, Therefore, follows that if there is a power to pass an ex parte order there must be a corresponding power to set aside that order. I, Therefore, came to the conclusion that if a winding up order can be passed on the non- appearance of a Company it also follows, that the provisions allowing the setting aside of such an ex parte order must also apply.

(4) The two powers to my mind, are interconnected and, thus once an ex parte order winding up the applicant-company was passed, it would lead to a corresponding right in the Company to move for the setting aside of that order on the ground that there was no proper service or for other good reasons. There are peculiarities in the present case, because the applicant-company was represented by a counsel and had been served during the winding up proceedings. Later, that counsel withdrew and the subsequent counsel also withdrew; then, a notice was issued to the Company to put in appearance. There was no appearance by any counsel and even that notice could not be served. But as the service was initially complete, the court had to proceed to the stage of passing the winding up order. Now, if the Company satisfies the Court that it has good cause for non-appearance it can get that order set aside, and the provisions of Order 9 Rule 13 of the Code would apply. Therefore, there is jurisdiction in the Court to set aside the ex parte winding up order, even if it enures to the benefit of all the creditors.

(5) Once the jurisdiction of the Court to set aside the ex parte order is accepted to exist, it follows that the parties to the original winding up petition can also compromise the application for setting aside the ex parte order. Now, the parties before me have agreed to the ex parte order being set aside, I cannot see why this is illegal or beyond the power of the Court. I, Therefore, come to the conclusion that an ex parte order winding up a Company can be set aside and such an ex parte order can be set aside on a compromise by the parties who were before the Court or on the record of the case in the original petition. It is for this reason that I reject the submissions of respondents 4 and .5, and come to the conclusion that the ex parte winding up order can be set aside and the case can be restored to proceed on merits.

(6) As far as the objection to the present compromise on the ground that a meeting of the creditors u/s 391 of the Companies Act, 1956 is necessary is concerned, I think this submission does not require any serious consideration. It is only if some body moves the Court u/s 391 that a meeting can be called. The provisions of order 9 rule 13 are private to the parties who are already before the Court, and, Therefore, no meeting u/s 391 is necessary and there is no necessity to bind any other creditor by such compromise. I am, Therefore, of the view that the agreement arrived at between the parties today is legal as far as the claim before the Court today is concerned. It is a lawful compromise and has,

Therefore, been recorded and can result in the setting aside of the order winding up the applicant-company. I, Therefore, proceed to set aside the order directing the winding up of the Company. The terms recorded in the application u/s 151 of the CPC which has been presented by the petitioner and respondents 1, 2 and 3 are made part of this order. However, it is directed that the winding up petition will remain stayed after restoration till the Installments mentioned in the application are paid. If there is a default as mentioned in the application then also the winding up petition will be placed before the Court. If, all the Installments payable under the compromise are paid, then also the winding up petition will be placed before the Court for final disposal. If there is an application under Rule 101 for substitution, it will be dealt with by the Court; and at that time, if the winding up petition is sought to be disposed of in the manner set out in Rule 101, any other creditor maybe substituted as a petitioner.

(7) The result of this order will be that the winding up petition C.P.No 35 of 1971 will stand restored to the file but will remain stayed as provided in the compromise Exhibit" A. The petition will be placed before the Company Judge for directions on 9th December 1974.

(8) I also pass an order u/s 466 of the Companies Act, 1956 in respect of the winding up order previously passed. Such an order is necessary because the winding up order passed by the Court had already been. advertised. As held by me in C.A.I 8 of 1974 in Bir Bahahur Singh etc. vs. K.C. Sethi, in such a situation a stay order has also to be passed. I accordingly pass such an order and stay the winding up order previously passed.. The parties will bear their own costs C A No. 296/74 is disposed of.