

(2011) 07 RAJ CK 0018

In the Rajasthan High Court

Case No : Special Appeal (Company) No. 3 of 2011

In Re: Umang Boards Pvt. Ltd. (M/s.)

Date of Decision : 07-07-2011

Acts Referred:

Companies Act, 1956 — Section 439, 439(1), 439(2), 439(8), 557

Citation : (2012) 2 RLW 1239

Hon'ble Judges : Arun Kumar Mishra, C.J.;Sandeep Mehta, J

Bench : Division Bench

Advocate : Amol Vyas, for the Appellant; Sudhir Gupta, with Digvijay Anand, for the Respondent

Final Decision : Dismissed

Judgement

Saneep Mehta, J.—The Special Appeal has been preferred as against the order dated 13.12.2010 passed by the Single Bench in the S.B. Company Petition No. 19/2009. Appellant-applicant M/s. Umang Boards Private Limited had filed an application in the Company Petition to oppose the admission of the Company Petition filed for the purpose of winding up. The Company Petition has not yet been admitted. The application was filed on the strength of agreement to purchase shares dt. 24.12.2007 entered into by the appellant-applicant with the JME Employees Credit & Thrift Society Limited. It is not in dispute that an application was filed by the appellant with the State Govt. for transfer of certain shares, which has been declined. It is also not in dispute that the said workers' Union had also issued a cheque for refund of the amount paid under the agreement of Rs. 21 lacs to the appellant, which has not been accepted and it is not in dispute that the arbitration proceedings pertaining to the said agreement are pending before the ADJ No. 9, Jaipur. The Single Bench has held that as the appellant is not a creditor or contributory, it cannot be said that the applicant Umang Boards Private Limited is entitled to be heard at the stage of admission of the company petition for the purpose of winding up. Aggrieved by the order, this Special Appeal has been preferred.

2. Mr. Amol Vyas, learned counsel appearing on behalf of appellant-applicant has

submitted that there is no bar to grant opportunity of hearing at the stage of admission to a person interested on the basis of the agreement to purchase shares, though the appellant is not a creditor or contributory as on today but opportunity of hearing could have been granted, as there is possibility of arbitration award being passed in favour of the appellant. In that exigency, the right of the appellant would be adversely affected. Consequently, the opportunity of hearing ought to have been granted to the appellant. Learned counsel appearing on behalf of the appellant-applicant has placed reliance on a decision of the Apex Court in National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others, , to contend that even the workers have the right to participate in the proceedings at the stage of admission of a petition for winding up. The appellant being holder of agreement to purchase share from workers Society is also entitled to be heard on the same parity of reasoning. He has also relied upon the decision of the High Court of Bombay in In Re: C and M Farming Ltd., and the decision of the M.P. High Court in Gwalior Sugar Co. Ltd., Dabra Vs. Shyam Saran Gupta and Co., Kanpur, .

3. Mr. Sudhir Gupta, Sr. Advocate, assisted by Mr. Digvijay Anand, appearing on behalf of the respondents, has submitted that in view of the scheme of the Companies Act, 1956, hereinafter referred to as "the Act", particularly the provisions of Sections 439 & 557 and rr. 96, 98 & 99 of the Companies (Court) Rules, 1959, hereinafter referred-to as "the Rules", and Form No. 48, it could not be said that at the stage of admission, the appellant could claim the right to be heard. The appellant can participate at a later stage after the advertisement is issued under Rule 34 of the Rules, Learned counsel has relied upon the decision of the Apex Court in National Textile Workers' Union's case (supra); decision of the High Court of Bombay in Bharat Petroleum Corporation Ltd. Vs. National Organic Chemical Industries Ltd. and State Bank of India, ; and decision of the M.P. High Court in Gwalior Sugar Company Ltd.'s case (supra).

4. The main question for consideration is whether the appellant-applicant can claim the right to be heard at the stage of admission of the company petition filed for the purpose of winding up?

5. u/s 439 of the Act, a petition can be presented for the winding up of a company by the company; or by any creditor or creditors including any contingent or prospective creditor or creditors; or by any contributory or contributories; or by all or any of the parties specified in clauses (a), (b) and (c) of Section 439 of the Act; or by the Registrar. There are other exigencies when the Central Govt. and State Govt. can present such petition as per Clauses (f) and (g) of Sec. 439(1) of the Act respectively. As per provisions of Section 439(2) of the Act, a secured creditor, the holder of any debentures, whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures, shall be deemed to be creditors within the meaning of clause (b) of sub-sec. (1) of Sec. 439 of the Act. A contributory can also present a petition in the exigency as provided in sub-sec.

(3) of Section 439 of the Act. There are certain riders as against contributory as laid down in clauses (a) and (b) of sub-sec. (4) of Sec. 439 of the Act. The procedure has also been provided for admission of the petition for winding up under Part III of the Rules. As per Rule 95, a petition for winding up shall be in Form No. 45, 46 or 47, as the case may be, Rule 96 of the Rules deals with the admission of a petition and directions as to advertisement, which provides that a petition can be admitted in chambers and upon fixing a date for 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. A petition for the winding up of a company by a contingent or prospective creditor can also be presented with the leave of the court as contemplated under Rule 97 of the Rules and an application under Sec. 439(8) of the Act for grant of leave has to be filed and no advertisement of the petition shall be made unless the leave has been granted or where the leave has been granted subject to any conditions precedent to the admission of the petition, unless such conditions have been satisfied. Rule 98 of the Rules deals with the copy of the petition to be furnished. It provides that every contributory or creditor of the company shall be furnished with a copy of the petition within 24 hours of his requiring the same on payment of the prescribed charges. Rule 99 of the Rules deals with the advertisement of the petition. Subject to the directions of the Court, the advertisement has to be issued in Form No. 48.

Rr. 95, 96, 97, 98 and 99 are as follows:

95. Petition for winding up.-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, and shall be presented in duplicate. The Registrar shall note on the petition the date of its presentation.

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.

97. Petition by a contingent or prospective creditor.-A petition for the winding-up of a company presented by a contingent or prospective creditor shall be accompanied by an application u/s 439(8) for the leave of the court for the admission of the petition. No advertisement of the petition shall be made unless the leave has been granted, or, where the leave has been granted subject to any conditions precedent to the admission of the petition, unless such conditions have been satisfied.

98. Copy of petition to be furnished.-Every contributory or creditor of the

company shall be entitled to be furnished by the petitioner or by his advocate with a copy of the petition within 24 hours of his requiring the same on payment of the prescribed charges.

99. Advertisement of petition.- Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of these rules. The advertisement, shall be in Form No. 48.

6. It is apparent from the scheme of Section 439 of the Act and the aforesaid rules that the Company is required to be heard and the creditor and contributory can also apply for winding up & they can be heard. Similarly, the Apex Court in National Textile Workers Union's case (supra) has laid down that the workers are also entitled to be heard. There is no statutory requirement to widen the scope of the enquiry at the stage of admission, contemplated under the scheme of the Act.

7. Rule 34 of the Rules deals with the stage after the advertisement is issued according to which notice should be given by person intending to appear at the hearing of a petition. Rule 34 of the Rules uses the words "Every person", who intends to appear at the hearing of a petition, whether to support or oppose the petition shall serve on the petitioner or his advocate, notice of his intention at the address given in the advertisement. The person like the appellant can apply under the aforesaid provision for grant of opportunity of hearing at a later stage of the admission.

8. Rule 35 deals with the list of persons intending to appear, which is required to be filed before the court.

Rr. 34 & 35 of the Rules are quoted below:

34. Notice to be given by persons intending to appear at the hearing of petition.- Every person who intends to appear at the hearing of a petition, whether to support or oppose the petition, shall serve on the petitioner or his advocate, notice of his intention at the address given in the advertisement. The notice shall contain the address of such person, and be signed by him or his advocate, and save as otherwise provided by these Rules shall be served (or if sent by post, shall be posted in such time as to reach the addressee) not later than two days previous to the day of hearing, and in the case of a petition for winding up, not later than five days previous to the day of hearing. Such notice shall be in Form No. 9, with such variations as the circumstances may require, and where such person intends to oppose the petition, the grounds of his opposition, or a copy of his affidavit, if any, shall be furnished alongwith the notice. Any person who has failed to company with this Rule shall not, except with the leave of the Judge, be allowed to appear at the hearing of the petition.

35. List of persons, intending to appear, to be filed.-The petitioner or his advocate shall prepare a list of the names and address of the persons who have given notice of their intention to appear at the hearing of the petition. Such list shall be in Form No. 10, and shall be filed in Court before the hearing of the

petition.

9. Rule 36 deals with the procedure at the hearing of petition, once a list is submitted of the persons intending to appear under Rule 35. Thereafter, the order under Rule 37 is required to be drawn up.

10. In National Textile Workers' Union's case (supra), the Apex Court has laid down that the workers have no right to present a winding up petition against the Company, but if a winding up petition is properly filed by any of the persons entitled to do so u/s 439, they may still be entitled to appear and be heard in support or opposition to the winding up petition. That would depend upon whether their interest is likely to be affected by any order which may be made on the winding up petition. It has laid down that in the course of the winding up proceedings, it is the creditors and the contributories, who have been given a voice. That has nothing to do with the question whether the company should be wound up or not, which is a question in which the workers are vitally concerned and on which they must obviously be heard before any decision is taken by the Court. Following is the relevant portion of para 7 of National Textile Workers' Union's case (supra):-

The making of a winding up order on a petition for winding up would therefore almost certainly have an adverse consequence on the workers inasmuch as the continuance of their service would be seriously jeopardised and their right to work and earn their livelihood would be disastrously imperiled. Now it is an elementary principle of law, well settled as a result of several decisions of this Court and particularly the decisions in State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, ; A.K. Kraipak and Others Vs. Union of India (UOI) and Others, and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, that no order involving adverse civil consequences can be passed against any person without giving him an opportunity to be heard against the passing of such order and this rule applies irrespective whether the proceeding in which it is passed is a quasi-judicial or an administrative proceeding. The audi alteram partem rule which mandates that no one shall be condemned unheard is one of the basic principles of natural justice and if this rule has been held to be applicable in a quasi-judicial or even in an administrative proceeding involving adverse civil consequences, it would a fortiori apply in a judicial proceeding such as a petition for winding up of a company. It is difficult to imagine how any system of law which is designed to promote justice through fair play in action can permit the Court to make a winding up order which has the effect of bringing about termination of the services of the workers without giving them an opportunity of being heard against the making of such order. It would be violative of the basic principle of fair procedure and unless there is express provision in the Companies Act, 1956 which forbids the workers from appearing at the hearing of the winding up petition and participating in it, the workers must be held entitled to appear and be heard in the winding up petition.

11. The Apex Court has laid down that Rule 34 is applicable only after a winding

up petition is admitted and an order is made for advertisement of the winding up petition and it has no application at the stage when the winding up petition is before the court only for the purpose of deciding whether or not it should be admitted and advertised. The object and purpose of Rule 34 is not to confer a right on any one to appear at the hearing of the winding up petition but merely to provide the procedure to be followed before a person who is otherwise entitled to appear in a winding up petition can be heard in support or opposition of the winding up petition. The Apex Court has also laid down that the Rule 34 does postulate that apart from the creditors and contributories, there may be "other persons" who are entitled to appear at the hearing of the winding up petition because it is not confined in its application to the creditors and contributories but uses the generic impression "every person" and to this limited extent, it does undoubtedly lends some support to the contention of the appellants.

12. The Apex Court has ultimately concluded in para 11 of the National Textile Workers' Union's case (supra) that the workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made as also after the admission and advertisement of the winding up petition.

The Apex Court has laid down thus:

10. We may also mention that on behalf of the appellants some reliance was placed on Rule 34 of the Companies (Court) Rules, 1959 in support of their contention that not only the creditors and the contributories but also "other persons" are entitled to appear at the hearing of a winding up petition and the workers cannot therefore be excluded. This Rule provides that every person who intends to appear at the hearing of a winding up petition, whether to support or to oppose it, shall serve on the petitioner or his advocate notice of his intention at the address given in the advertisement and such notice shall be in form No. 9 and where such person intends to oppose the winding up petition, the grounds of his opposition or a copy of his affidavit if any shall be furnished alongwith the notice. The appellants contended that under this Rule anyone who wants to appear in a winding up petition can do so, provided he serves on the petitioner or his advocate, notice of his intention at the address given in the advertisement and complies with the other requirements of this Rule and therefore if the workers desire to appear at the hearing of the winding up petition, they are entitled to do so. The answer given in behalf of respondents Nos. 6 to 9 to this contention was that Rule 34 is applicable only after a winding up petition is admitted and an order is made for advertisement of the winding up petition and it has no application at the stage when the winding up petition is before the court only for the purpose of deciding whether or not, it should be admitted and advertised. It was also urged on behalf of respondents Nos. 6 to 9 that in any event Rule 34 does not confer a right on any and every person to appear at the hearing of the winding up petition, (sic) intends so to appear he must take various steps set out in that Rule beginning with service of notice on the

petitioner or his advocate before he can be heard on the winding up petition. We are inclined to agree with this contention of respondents Nos. 6 to 9. It is obvious that the object and purpose of Rule 34 is not to confer a right on any one to appear at the hearing of the winding up petition but merely to provide the procedure to be followed before a person who is otherwise entitled to appear in a winding up petition can be heard in support or opposition of the winding up petition. This rule cannot therefore be relied upon by the appellants as conferring a right on the workers to appear at the hearing of a winding up petition. But one thing is clear that this Rule does postulate that apart from the creditors and contributories there may be "other persons" who are entitled to appear at the hearing of the winding up petition because it is not confined in its application to the creditors and contributories but uses the generic impression "every person" and to this limited extent it does undoubtedly lends some support to the contention of the appellants.

11. We are therefore of the view that the workers are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as no winding order is made by the Court. The workers have a locus to appear and be heard in the winding up petition both before the winding up petition is admitted and an order for advertisement is made as also after the admission and advertisement of the winding up petition until an order is made for winding up the company. If a winding up order is made and the workers are aggrieved by it, they would also be entitled to prefer an appeal and contend in the appeal that no winding up order should have been made by the Company Judge. But when a winding up order is made and it has become final, the workers ordinarily would not have any right to participate in any proceeding in the course of winding up the company though there may be rare cases where in a proceeding in the course of winding up, the interest of the workers may be involved and in such a case it may be possible to contend that the workers must be heard before an order is made by the Court. We think that even when an application for appointment of a provisional liquidator is made by the petitioner in a winding up petition, the workers would have a right to be heard if they so wish because the appointment of a provisional liquidator may adversely affect the interest of the workers. But we may make it clear that neither the petitioner nor the Court would be under any obligation to give notice of such application to the workers. It would be for the workers to apply for being heard and if they do so, they would be entitled to appear and be heard on the application for appointment of provisional liquidator. The workers therefore in the present case had a right to be heard before the provisional liquidator was appointed by the Company Judge but the circumstance that the workers were not so heard would not have the effect of vitiating the order appointing provisional liquidator, because on the view taken by us, it would be open to the workers to apply to the Court for vacating that order and it would be for the Court after considering the material produced before it and hearing the parties to decide whether that order should be vacated or not.

13. It is apparent from the aforesaid dictum of the Apex Court that the scope of enquiry at the stage of admission is not widened, as under Rule 34 of the Rules, only right is given to other interested persons to apply and to have their say.

14. A conjoint reading of Section 439 of the Act and that of the rr. 96 & 98 makes it crystal clear that a petition can be placed in chambers for admission and the Court may issue notice to the Company before giving directions as to the advertisement of the petition. The appellant-applicant is not contingent neither prospective creditor nor creditor or contributory. Under Rule 98 of the Rules, a copy can be furnished of a petition at the stage of admission to contributory or creditor of the Company and that too, on the application being filed by the contributory or creditor. Thus, we find that it is not imperative for the Court to grant opportunity of hearing as of right to such an incumbent. Once an application was filed before the court, it was discretionary for the Court to pass appropriate orders and the Court has not granted opportunity of hearing at the stage of admission to the appellant-applicant. The appellant-applicant has claimed a right to be heard on the basis of the agreement, which has been repudiated as per the stand of the workers' Union and they have issued a cheque for refund of amount of Rs. 21 lacs and, admittedly, the arbitration proceedings are pending. It was incumbent upon the appellant-applicant to disclose all these facts in the application, which was filed for impleadment before the Company Judge but these material aspects that the Govt. has refused to transfer shares as well as repudiation of agreement, issuing of cheque by the workers' Union for a sum of Rs. 21 lacs which was paid and the pendency of the arbitration proceedings, were not disclosed. In the, circumstances, we find that the appellant-applicant cannot claim opportunity of hearing as of right under the provisions of the Act or the Rules all the stage of admission of Company Petition. Thus, we find that the discretionary order has been passed by the Company Judge, which calls for no interference.

15. Reliance has been placed on decision of the High Court of M.P. in Gwalior Sugar Co. Ltd.'s case (supra) in which it has been observed thus:

11. Where a winding up petition is advertised, any person, whose interests are likely to be affected adversely by winding up order, would naturally desire to oppose the petition. And, likewise, any person whose interests are likely to be affected favourably would desire to support it. The framers of the Rule specified creditors and contributories as those who would usually be interested in supporting or opposing the petition, but there may be others whose interests are likely to be affected by a winding up order. Therefore, they employed the general words "other persons" to enable all those who can satisfy the Court that their interests are likely to be affected one way or the other by a winding up order, to support or oppose the petition.

16. Aforesaid observations have been made in the context when once an advertisement is issued in a winding up petition, then "other persons" can apply as provided in Form No. 48.

17. The learned counsel for the parties have relied upon the decision in the Gwalior Sugar Co. Ltd.'s case (supra). The case pertains to the stage of Rule 34 of the Rules, where scope is widened of hearing as observed by the Apex Court in National Textile Worker's Union's case (supra). Thus, the ratio of the said decision, based upon interpretation of Rule 34 and Form No. 48, which provides opportunity of hearing to "other persons" also cannot be said to be attracted at this stage it applies subsequent to the issuance of the advertisement.

18. The decision of the High Court of Bombay in Hy-Line International (supra) has been relied upon by the learned counsel for the appellant-applicant in which reference has been made to the National Textile Workers' Union (supra). In para 4, it has been observed that the court has discretion to allow interested persons to participate in the proceedings so as to oppose the admission of the petition.

19. In the instant case, once the discretion has been exercised by the Company Judge, we find that the exercise of such a discretion is based upon the facts & circumstances of the case and it cannot be said to be suffering with illegality or arbitrariness so as to warrant interference in the appeal.

20. Mr. Sudhir Gupta, Sr. Advocate, with Mr. Digvijay Anand, appearing on behalf of the respondents, has referred to the decision in Bharat Petroleum Corporation Ltd.'s case (supra) in which the Single Bench of the High Court of Bombay has observed that the provisions of Section 557(1) of the Act can also be applied at the stage of admission. It was a case pertaining to the creditors to be heard in a company petition and they were permitted to intervene at the stage of admission. In our opinion also, as the creditors have a right under Rule 96 to obtain a copy of the petition, obviously they are entitled to be heard at the stage of admission, in case they apply.

21. In View of the aforesaid discussion, we find that the order passed by the Company Judge calls for no interference. The Special Appeal being devoid of merit, deserves to be dismissed and is hereby dismissed. No costs.