

(2009) 07 MAD CK 0546

In the Madras High Court

Case No : Original Side Appeal No. 89 of 2009

Kothari Industrial Corporation Ltd.

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 10-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3
Companies (Court) Rules, 1959 — Rule 99
Companies Act, 1956 — Section 443(2)

Citation : (2009) 151 CompCas 44 : (2009) 4 LW 242 : (2009) 5 MLJ 881 :
(2010) 97 SCL 119

Hon'ble Judges : P.P.S. Janarthana Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : T.K. Seshadri for T.K. Bhaskar, for the Appellant; Arvind P. Datar for PL. Narayanan, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—This appeal is filed against the order of the Company Court dated 08.04.2009 made in CP No. 51 of 2007 ordering winding up of the appellant company under the provisions of the Companies Act, 1956 and directing to advertise within 14 days a notice in the prescribed form of making of the order of winding up in one issue of Tamil Daily "Dinamani" and another two issues in the English daily "Indian Express" and the "Times of India" (All India Edition) and other peripheral directions.

2. The above said winding up order is assailed by the appellant on several grounds. The primal and material ground on which the order of the Company Court is challenged, is that none of the statutory provisions, which are mandatory in nature for ordering winding up of the company, has been not only taken note of, but also followed in this case. Even without admitting the company petition, the winding up order has been passed, which is ex facie an illegal order as it is against the requirements of the statutory provisions i.e., Rules 96 and 99

of the Companies (Court) Rules, 1959 and the impugned order is quite contrary to Section 443(2) of the Companies Act.

3. Learned Counsel for the respondent-company petitioner has also not disputed the factum that the company petition was neither admitted nor the mandatory statutory provisions were followed in this case. But it was argued on behalf of the respondent-company petitioner that this Court, being the first appellate Court, can cure the defect of non admission of the company petition and failure of causing publication of the company petition as per the requirement of the Companies (Court) Rules, 1959. It is also submitted that if the Court is intended to remit the matter to the Company Court for redoing the exercise, the exercise being procedural in nature, this Court may request the Company Court to keep in tact the finding recorded for ordering winding up and remit the matter to the Company Court for purpose of completing the procedural lacuna explicit in the order of the Company Court.

4. Heard the learned Counsel on either side and perused the materials available on record.

5. There is no dispute about the way in which the order of winding up is passed by the company Court, i.e., the order of the company Court is passed without following the mandatory statutory provisions, which is evident from paragraph 5 of the order, wherein the Company court has categorically stated that on notice, the respondent has filed its counter disputing the averments contained in the company petition". Upon hearing the parties on pre-admission notice stage the impugned order of winding up is passed.

6. Rule 96 of the Companies (Court) Rules, 1959 read as under :

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 advertisement 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.

Rule 24 which refers to advertisement of petition provides:

(1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these Rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned, and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge.

(2) Except in the case of a petition to wind up a company, the Judge may, if he thinks fit, dispense with any advertisement required by these Rules.

It is explicit from the above Rules that when a petition is filed in the company Court for winding up of a company, the 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. A petition for winding up cannot be placed for hearing before the Court, unless the petition is advertised: that is clear from the terms of Rule 24(2). But that is not to say that as soon as the petition is admitted, it must be advertised. In answer to a notice to show cause why a petition for 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. If the petition is admitted, it is still open to the Company to move the Court that in the interest of justice or to prevent abuse of the process of Court, the petition be not advertised. vide *National Conduits (P) Ltd. v. S.S. Arora* (1968) 37 CC 786.

7. From the above decision of the apex Court, it is evident that the admission of the Company Petition and advertisement of the same as provided in the Rules are must and in the absence of advertisement and its admission, the company petition was bound to be rejected. In *Cotton Corporation of India Ltd. v. United Industrial Bank Ltd.* (1984) 55 CC 423, the inbuilt safeguard against the abuse of machinery of winding up has been succinctly explained by saying that Rule 96 confers a discretionary power on the Judge not to give any direction at the initial stage, but, if after receipt of the notice, the company appears and satisfies that the debt is bona fide dispute or the presentation of the petition is mala fide, actuated by ulterior motive or an abuse of the process of the Court, certainly the Judge may decline to admit the petition and may direct the party presenting winding up petition to prove its claim by a suit or in other manner. Thus, undoubtedly, a winding up petition is not a recognised mode of recovery of debt and if the company is shown to be solvent and the debt is bona fide disputed, the Court generally is reluctant to admit the petition. This power is conferred on the Judge before whom the petition comes for admission, to issue pre-admission notice to the company so that the company is not unaware and may appear and point out that the petitioner is actuated by an ulterior motive and presentation of the petition is a device to pressurise the company to submit to an unjust claim. This is a sufficient safeguard against the mala fide action and the company would not suffer any consequence as apprehended. This inbuilt safeguard under the Act and the Rules would save the company from adverse consequences if a petition is presented with ulterior motive. See *NEPC Micon Ltd., NEPC Agro Foods Ltd. v. Hindustan Thomson Associates Ltd.* (1999) 95 Com Cases 532.

8. Admittedly, in this case, none of the above mandatory statutory provisions are followed. On pre-admission notice and upon hearing the appellant company it was directed to be wound up.

9. Where a statute requires to do a certain thing in a certain way, the thing must be done in that way and all other methods of performance are necessarily forbidden. AIR 1984 SC 718 - A.R. Antulay v. R.S. Nayak.

10. Any order passed against the principles of natural justice or in violation of a statutory provisions is regarded to be illegal. "Legality" and "regularity" are well understood terms and well recognised grounds for interference, on appeal or revision. An order is illegal, if it is opposed to any enactment or any Rule having the force of law. It is irregular if the procedure followed is in violation of the principles of natural justice and fair play. See Kesava Rao v. Subbaraju AIR 1957 AP 55.

11. As we are of the view that the order of the Company Court ordering winding up is quite contrary to the statutory requirements and in violation of the requirements, the order would amount to illegal order not supported by the statute. When an order is illegal, it cannot be severed by keeping the finding alone in tact and setting aside that portion of the conclusion and remit back the matter to the Company Court to cure the defects. Likewise, it is also impossible for an appellate Court to do the exercise of the Company Court, when the Court has come to conclusion that the order impugned is held to be an order passed against the statutory provisions.

12. The decisions relied on by the Counsel for the respondent in Koksingh v. Smt. Deokabai reported in AIR 1976 SC 634 and P. Purushottam Reddy v. Pratap Steels Ltd. reported in AIR 2002 SC 771 are not applicable to the facts of the case on hand in as much those two decisions were rendered explaining the scope of Order 41 Rule 33 prior to amendment and Order 41 Rules 23, 23-A and 25 of CPC respectively. In Koksingh's case, the precise dispute was whether the appellate Court could grant a decree, which was not granted by the trial Court in the absence of an appeal. In that case the trial Court did not grant decree for charge over the property for which the respondent filed the suit, but granted personal money decree. On appeal by the appellant against that money decree, the High Court granted a decree for charge over the property. When this was disputed, the Apex Court ruled as follows:

6. In Giani Ram v. Ramii Lal (1969) 3SCR 944 : AIR 1969 SC 1144 the Court said that in Order 41 Rule 33, the expression "which ought to have been passed" means "what ought in law to have been passed" and if an appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the Court below, it may pass or make such further or other decree or order as the justice of the case may require.

7. Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial Court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge.

Likewise in Pursuhottam Reddy case, the decree was granted by the trial Court in a specific performance suit. On appeal, the High Court, having found that no plea

was taken that the suit for specific performance was not maintainable for non-compliance with Forms 47 and 48 of the Appendix A to the Civil Procedure Code, and having found that there was no specific issue framed by the trial Court that whether the plaintiff was ready and willing to perform his part of the contract, set aside the decree granted by the trial Court and remitted back for re-consideration. After referring to the Order 41 prior to and subsequent to 1976 Amendment, it was observed by the Supreme Court that in view of the express provision of Order 41 Rule 23-A, the High Court cannot have recourse to its inherent power to make a remand as the inherent power can be availed of *ex debito justitiae* only in the absence of express provision in the Code. It is only in exceptional cases, where the Court may now exercise the power of remand *de hors* the Rules 23 and 23-A. To wit, the Superior Court, if finds the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 of the CPC and hence it is no judgment in the eye of law and it may set aside the same and send the matter back for re-writing the judgment so as to protect the valuable right of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the Civil Procedure Code. An unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided.

13. As already stated, the Company Law is a Special Law and it provides certain inbuilt mandatory safeguards to be followed by the Company Court while passing orders and winding up as envisaged in the Company Court Rules. As already stated, the impugned order is an order against the statute and no judgment in the eye of law, the judgments referred to above cannot be made applicable to the facts of the present case. Hence, the respondent cannot improve the case under the cover of these judgments.

14. For the foregoing reasons, the order impugned in this appeal is set aside the the matter is remitted to the Company Court to pass orders on the petition in accordance with the statutory provisions.

15. The appeal stands disposed of in the above terms. However, there will be no order as to costs. The application in M.P.No.2 of 2009 is an taken out seeking for permission from the Court to permit the applicant Company to transfer the properties in favour of the purchasers in terms of the memorandum of understanding dated 16.3.2009. In as much as the order passed by the Company Court is set aside and the matter is remitted back to the Company Court, we are not entertaining this application and the application is dismissed. The connected M.P.No.1 OF 2009 is closed.