

(2001) 05 DEL CK 0045
In the Delhi High Court
Case No : Co. Appeal No. 2 of 2001

Lt. Col. R.K. Saxena

APPELLANT

Vs

Imperial Forestry Corporation Ltd., Official Liquidator

RESPONDENT

Date of Decision : 31-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 3, 151
Companies (Court) Rules, 1959 — Rule 24, 24(2), 9, 96, 99
Companies Act, 1956 — Section 439(1)

Citation : (2001) 107 CompCas 401 : (2001) 1 DLT 777 : (2001) 60 DRJ 54

Hon'ble Judges : Sanjay Kishan Kaul, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Sarat Chandra, for the Appellant; Mr. S.K. Luthra, for the Respondent

Final Decision : Dismissed

Judgement

Devinder Gupta, J.—The question involved in this appeal is that whether the requirement of petition to be advertised in one of the issues of Official Gazette of, the State or Union territory concerned, as provided in Rule 24 of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules") can be dispensed with.

2. The facts in brief are that the appellant filed a petition under sub-section (1) of Section 439 of the Companies Act, 1956 for winding up of the respondent Company. The said company petition was admitted for hearing and a provisional liquidator was appointed on 10.6.1998. No direction was given to advertise the petition, as required under rule 24 of the Rules. Application (CA.631/2000) was filed by the appellant for directions to advertise the petition praying further that while directing the petition to be advertised in a daily newspaper in English language and daily newspaper in regional language circulating in Delhi, requirement of advertising the petition in the Official Gazette be dispensed with. Learned Company Judge by the impugned order directed the advertisement of

the winding up petition in one of the issues of Statesman (English publication from Delhi) and in one issue of Amar Ujala (Hindi publication from Bareilly, U.P.). The prayer for dispensing with publication in the Official Gazette was rejected. The petition was also directed to be advertised in the Delhi Gazette. The appellant has challenged that part of the order by which prayer to dispense with advertisement in the Gazette has been rejected.

3. Learned counsel for the appellant contended that Rule 24 has to be read with Rule 99 of the Rules. There is ample power in Rule 99 vested with the Company Court to dispense with even the mandatory requirement of Rule 24 because of the wording of Rule 99, which says:-

"Subject to any directions of the Court".

4. It was urged that learned Company Judge failed to correctly appreciate the ratio of the decisions cited before him, namely, *U.P. Twiga Fiberglass Limited v. Parekh Marketing P. Limited* (1986) 59 CompCas 886 and *Plastisac P. Limited v. Gujarat Lease Finance Limited* (2000) 101 CompCas 334.

5. Shri S.K. Luthra, Advocate, appearing for the Official Liquidator has tried to support the impugned order urging that power is not vested in the Company Judge to dispense with the mandatory requirement of advertising the petition in the Official Gazette in addition to its being advertised in the two dailies.

6. We have duly considered the respective submissions. On a petition being filed, Rule 96 of the Rules provide for the manner of its admission and advertisement, if any, Rule 96 of the Rules reads:-

"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."

7. Rule 96 thus provides that the said petition will be laid before the Judge in Chambers for admission and for fixing a date for hearing and for directions as to the advertisements, if any, 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. Thus the company petition on being filed, when is posted before the Company Judge for admission, he may either : (a) issue notice to the company to show cause why petition be not admitted; or (b) admit the petition and fix a date for hearing and issue a notice to the company before giving direction about advertisement of the petition or (c) admit the petition, fix a 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.

8. Rule 24 of the Rules deals with the mode and manner of advertising such of the petition, which is required to be advertised. It reads:-

"24 Advertisement of petition- (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 of 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."

9. A petition for winding up cannot be placed for hearing before the Court unless the petition is advertised, which would be clear from the terms of sub-rule (2) of Rule 24. Though there is a discretion vested in the Judge while issuing direction to advertise a petition but sub-rule (2) of Rule 24 has taken away the said discretion, which mandates that a petition to wind up a company must be advertised. Requirement of the Rules is that a petition for winding up of a company is mandatory and the requirement of the Rule is that it shall be advertised in one of the issues of the Official Gazette of the State, one issue of a daily newspaper in English and daily newspaper in regional language. Submission of learned counsel for the appellant was that this mandate stands diluted because of the wording of Rule 99, which says that subject to any directions of the Court. He contended that it is not impermissible for the Company Judge to exercise discretion in either way. The Court may direct that the petition be or be not advertised or be advertised in a particular manner or be advertised only in one newspaper instead of two.

10. We are not convinced by what has been urged by learned counsel for the appellant. The requirement of advertising the petition in the Official Gazette is mandatory. No doubt on reading Rule 99 it may be said that there is a discretion vested in the Court, but the said discretion is limited only to the extent that at what stage the petition be advertised. It may not be advertised forthwith or advertising the petition may be deferred for some time.

11. Rule 99 reads as under:-

"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. 18."

12. In *U.P. Twiga Fiberglass Ltd. v. Parekh Marketing P.Ltd.* (1986) 59 CompCas 886, the decision relied upon by the appellant a counsel, the question was whether advertisement could not have been issued without affording opportunity to the Company to oppose the same. In that context learned counsel for the Company had urged before the Bench that the petition had not been advertised

in the Gazette on the day on which advertisement in the newspaper was made, Therefore, there was violation of the requirement of Rule 24, which submission was turned down observing that Rule 99 lays down expressly that the manner provided for advertisement in Rule 24 is subject to any direction of the Court and this leaves no room for doubt that the Company Judge could give specific direction with respect to advertisement as he did under the impugned order and dispensed with publication in the Gazette.

13. With due respect to Hon'ble Judges, such a view is not possible because of mandate of sub-rule (2) of Rule 24, which as per the decision of the Supreme Court in *National Conduits (P) Ltd. v. S.S.Arora* (1967) 37 CompCas 786 is mandatory in nature in so far as petition for winding up of a company is concerned. The question, which had come up before the Supreme Court was that once a petition is admitted, whether the Court is bound forthwith to advertise the petition. The High Court had held that once a petition is admitted the Court is bound forthwith to advertise the petition. Judgment of the High Court was set aside holding that the view taken by the High Court is contrary to the plain terms of Rule 96. 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. The Court in such a case has ample power to entertain such an application of the Company under its inherent powers contained in Rule 9 of the Rules. Contrary view if accepted that once petition is admitted to file it must be advertised, would make the Court an instrument, in possible cases of harassment and even of black mailing in as much as once a petition is advertised the business of the Company is bound to suffer serious loss and injury. In other words, the inherent powers of the Court to postpone the act of advertising the petition was reiterated in *National Conduits (P) Ltd.'s* case (supra) but it was simultaneously observed that the petition for winding up cannot be placed for hearing before the Court unless the petition is advertised.

14. The method and manner of publication is provided in sub-rule (1) of Rule 24 saying that it shall be advertised not less than 14 days before the date fixed for hearing: (a) in one issue of the Official Gazette of the State of Union Territory concerned; and in one issue each of daily newspaper in English language and a daily newspaper in the regional language circulating in the State.

15. In *Plastisac P.Limited v. Gujarat Lease Finance Limited* (2000) 101 CompCas 334 also learned Single Judge of Gujarat High Court has read the inherent power of the Company Court contained in Rule 9 to be a power sufficient to dispense with the mandatory requirement of advertising the petition in Official Gazette, which view taken, with due respect, in our view, is not the correct view, more particularly in what has been said in *National Conduits (P) Ltd.'s* case (supra). The extent of applicability of the provisions of the CPC is provided in Rule 6 of the Rules, which reads:-

"6. Practice and Procedure of Court and provisions of the Code to apply- Save as provided by the Act or by these rules and practice and procedure of the Court

and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these rules or the practice and procedure of the Court.

16. Inherent powers of the Company Court are contained in Rule 9, which reads:-

"9. Inherent powers of Court:- Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers 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."

17. A combined reading of aforesaid rules 6 and 9 indicates that the inherent powers of the Court could be exercised in the same manner as provided in Section 151 of the CPC by the Court except in cases where the Companies Act and the Rules framed there under provide otherwise. There is a specific rule 24, which requires that the petition shall must be advertised unless the Judge otherwise orders. Exercise of discretion is implicit in this Rule but is confined only to the time limit for advertisement. The discretion, which can be exercised is relatable only to that part of the Rule, which says:

"be advertised not less than fourteen days before the date for hearing".

18. Rule 4(1) also provides a particular manner in which advertisement is to be made. There is no scope for exercise of inherent jurisdiction of dispensing with such a requirement. Rule 24(1) requiring publication to be done in Gazette and two newspapers attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. The principle was approved and accepted in the well-known cases of *Taylor v. Taylor* [(1875) 1 Ch D 426,; 45 LJ Ch 373 and AIR 1936 253 (Privy Council)] Supreme Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, and as regards compliance of requirement contained in Rule 3 of Order 39 of the Code in *Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others*, .

19. There appears to be a purpose for the manner in which advertisement is to take place that it must have a wider publicity and by its publication in the Official Gazette an authenticity is but to the advertisement. We find no infirmity in the order passed by learned Company Judge holding that in view of the clear mandate of the sub-rule (2) of Rule 24 of the Rules, Company Court cannot invoke powers under Rules 6, 9 or 99 to dispense with advertisement of the winding up petition of a Company of Official Gazette.

20. Dismissed.