

(1982) 03 BOM CK 0004
In the Bombay High Court
Case No : Appeal No. 56 of 1982

Modern Dekor Painting Contracts Pvt. Ltd.	APPELLANT
Vs	
Jenson and Nicholson (India) Ltd. and another	RESPONDENT

Date of Decision : 16-03-1982

Acts Referred:

Companies Act, 1956 — Section 397, 398

Citation : (1983) MhLj 485

Hon'ble Judges : S.K. Desai, J;B.J. Rele, J

Bench : Division Bench

Advocate : J.I. Mehta with H.V. Chande, for the Appellant; Vihang V. Tulzapurkar, instructed by Crawford Bayley and Co., for the Respondent

Judgement

B.J. Rele, J.—This is an appeal against the order dated 27th January, 1982 dismissing Company Application No. 204 of 1981 in Company Petition No. 221 of 1977, taken out by the Company--Modern Dekor Painting Contracts Pvt. Ltd. for setting aside the ex parte order passed on 24th June, 1981 ordering the Company to be wound up and for restoring to file the said Company Petition No. 221 of 1977 for winding-up for being heard on merits.

2. A few facts necessary for determination of the question in this appeal are that the said Company Petition No. 221 of 1977 was preferred by the Petitioning Creditors Jenson & Nicholson (India) Ltd. for winding-up of the Company on the ground that Modern Dekor Painting Contracts Pvt. Ltd. (Hereinafter referred to as "the company"), was unable to pay its debts as and when they became due. It appears that the said petition was accepted and on 5th December, 1977, the petition was placed on board for admission. The Company appeared on an intimation having been received from the Petitioning Creditors* Advocate that the petition would be placed on board for admission. The Company also opposed the admission of the petition by filing an affidavit. However, on 5th December, 1982 an order was passed as follows: --

"In the event of the Respondent Company depositing in Court a sum of Rs.

50,000 (Rupees fifty thousand) within twelve weeks from to-day, the petition to stand dismissed.

If such deposit is made, then:

(a) the Company's Advocates to forthwith intimate to the Prothonotary and Senior Master and the Petitioners' Advocates the fact of such deposit,

(b) the petitioner to be at liberty to file a suit or counter claim in the appropriate Court for recovery of the amount in petition due to the petitioner, such suit or counter-claim to be filed within 8 weeks of the date of intimation that such deposit has been made.

(c) the amount of such deposit to stand credited to the said suit or counter-claim as the case may be.

(d) the Prothonotary & Senior Master to invest the amount so deposited under the directions of the Court. If no such suit or counterclaim is filed by the petitioner within the said period, the Company to be at liberty to withdraw the amount deposited.

In the event of the Company failing to deposit the said amount within the said period the petition do stand admitted, and be advertised in the Maharashtra Government Gazette, Indian Express and Mumbai Samachar. The petition to come up for hearing four weeks after the date of the advertisement.

Twelve weeks time for making the deposit expired on 5th March, 1978 and the Company failed to make the requisite deposit. Nothing happened for the period of nearly two years and one month and it was for the first time on 24th April, 1980 that an application was made on a precipe to the Prothonotary and Senior Master of this Court for issuance of a certificate of non-deposit. Pursuant to the said application, the Prothonotary and Senior Master issued a certificate of non-deposit on 26th March, 1981, i. e. nearly eleven months after the application. After obtaining the said certificate, the Petitioning Creditors, through their Advocates submitted a draft of advertisement to the Prothonotary and Senior Master for fixing a date of hearing. On 22nd May, 1981 the advertisement was published in the Bombay Samachar, on 4th June, 1981 in Indian Express and on 4th June, 1981 in the Official Gazette. On 18th June, 1981 the Petitioning Creditors' Advocate submitted a precipe to the Prothonotary and Senior Master for placing the Winding-up Petition on board on 24th June, 1981. Accordingly, on 24th June, 1981 the petition for winding-up was placed on board. On that day the Company was absent and an ex parte order for winding-up of the Company was passed. On 15th July, 1981 a representative of the Official Liquidator went to the residential premises of Jehangir Homi Gora, a Director of the Company and it was only then that the Company became aware of the Winding-up Order. Thereafter on 24th July, 1981 the Company took out a Judge's Summons being Company Application No. 204 of 1981 for setting aside the said ex parte order of winding-up.

3. The Judge's Summons was heard on 27th January, 1982 and the same was dismissed for the reasons stated in the order. Against the said order, the Company has preferred this appeal.

4. Shri Chande, the learned Advocate appearing on behalf of the Company has submitted that it was obligatory upon the Petitioning Creditors to have served an individual notice upon the Company as required by Rule 28 of the Companies (Court) Rules, 1959 and the service should have been effected in accordance with the provisions contained in Rules 27, 28 and 29 of the Companies (Court) Rules, 1959. It is the submission of Shri Chande that the provisions of Rules 27, 28 and 29 are mandatory and the effect of the non-compliance with the provisions of these Rules is as stated in Rule 31 and that is the petition for Winding-up should have been dismissed. The impugned order, therefore, should be set aside. Shri Chande, anticipating an argument that may be advanced on behalf of the respondents has referred to Rules 95 and 96 of the Companies (Court) Rules, 1959 and he has submitted that these two Rules do not contemplate that notice of the hearing of the Winding-up petition is not to be served upon the Company.

5. Shri Tulzapurkar, the learned counsel appearing on behalf of the Petitioning Creditors has, on the other hand, submitted that Rules 27, 28, 29 and 31 are contained in Part I of the Companies (Court) Rules, 1959 and that these four Rules are general Rules while Rules 95 and 96 are contained in Part III of the Companies (Court) Rules, 1959 which are the Rules specifically made applicable in the case of Winding-up Petition and that since Rules 95 and 97 do not contemplate service of an individual notice upon the Company, the advertisement issued in the Bombay Samachar, Indian Express and the publication of the notice in the Official Gazette must be deemed to be sufficient service of the hearing of the Winding-up Petition upon the Company and for this reason, the Winding-up Order should be sustained as also the order of dismissal of the Judge's Summons for setting aside the ex parte order.

6. It is difficult to accept the submissions of Shri Tulzapurkar. It must at first be stated that there is no provision in the Companies (Court) Rules, 1959 or in any other Rules for acceptance of a Winding-up Petition, but a practice has developed in this Court of placing a Winding-up Petition before the Court for acceptance and this practice and procedure which is a long standing practice and procedure has been saved by Rule 6 of the Companies (Court) Rules, 1959. Rule 6 provides:

Save as provided by the Act or by these Rules, the 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.

7. The main question that arises for determination in this appeal is whether it was obligatory upon the Petitioning Creditors to serve a notice individually upon

the Company and in the absence of such individual notice, what is to happen to the Company Petition for Winding-up and an incidental question that would arise for determination also in this appeal would be, whether there is any such thing as deemed service in the Companies (Court) Rules, 1959. Unless it is shown that the Rules in Part III which has a caption heading "Winding-up by Court" exclude either by a specific provision in the Rules or by necessary implication the Rules contained in Part I of the Companies (Court) Rules, 1959, it cannot be said that the Rules contained in Part I are not applicable to the Companies (Court) Rules.

8. Rule 95 Provides:

A petition for winding-up of 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.

9. Rule 96 provides for admission of petition and directions as to advertisement. It States:

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.

10. Rule 96 contemplates notice to be given to persons by publication in newspapers by advertisement in accordance with the directions given by the Company Judge. It also contemplates notice if the Company Judge, before giving directions as to the advertisements of the petition, so directs. The persons mentioned in rule 96 are mainly the creditors and share holders of the Company. This rule merely empowers the Court to direct notice to be given to the Company before giving directions as to the advertisement of the petition. It does not say that no notice to the Company of the hearing of the winding-up petition is necessary. Further, the notice to persons by advertisement is not notice to the Company and it cannot be deemed to be notice to the Company, as the rule itself makes distinction between notice to persons and notice to company.

11. Rule 96 is also silent in regard to the form in which notice is to be given. It is, therefore, necessary to look to the other provisions in the Company (Court) Rules, 1959 in order to ascertain whether there is any provision for giving notice to the Company and the form in which notice is to be given to the persons and to the company. Those other provisions are rules 27, 28, 29 and 31. Rule 27 provides for notice of petition and time of service. It states :

Notice of every petition required to be served upon any person shall be in Form No. 6, and shall, unless otherwise ordered by Court or provided by these rules, be served not less than 14 days before the date of hearing.

The wording "Form No. 6" of the petition shows that notice in Form No. 6 is to be given only after the petition is admitted. Form No. 6 is in following terms:

Form No. 6 (See Rule 27) (Heading as in Form No. 1). Company Petition No.of..... Notice of petition.

To:

Take notice that a petition u/s of the Companies Act, 1955, for.....presented by.....on the..... day of.....19.....was admitted on the day of..... 19.....and that the said petition is fixed for hearing before the Company Judge on the.....day of.....19.....If you desire to support or oppose the petition at the hearing, you should give me notice thereof in writing so as to reach me not later than.....days before the date fixed for the hearing of the petition, and appear at the hearing in person or by your advocate. If you wish to oppose the petition, the grounds of opposition or a copy of your affidavit should be furnished with your notice. A copy of the petition will be furnished to you if you require it, on payment of the prescribed charges for the same, is enclosed herewith.

Date.....

(Name) Sd..... (Advocate for petitioner) Address: (This notice should be served on or before the.....day of.....19.....) Note: Where the notice is to a respondent named in the petition, a copy of the petition should be served on him along with the notice.

This notice in Form No. 6 is to be signed by the advocate of the petitioner. Therefore, it has to be prepared by petitioning Creditors" Advocate. It is not for the office of the Court to prepare the notice in Form No. 6. The notice to persons to be published by advertisement contemplated by rule 96 is the notice in Form No. 6 prescribed by rule 27. It is, therefore, difficult to accept the submission of Shri Tulzapurkar that in a winding-up petition, what the Court has to look to is only the Rules in part HI of the Companies (Court) Rules, 1959 and to shut its eyes to the Rules contained in Part I of the Companies (Court) Rules, 1959.

11-A. It is also difficult to accept the submission of Shri Tulzapurkar that Rules 27, 28, 29 and 31 do not apply to a winding-up petition.

12. Rule 28 of the Companies (Court) Rules, 1959 is as under:

"28. Service on company:

(1) Where a petition is presented against a Company, it shall be accompanied by a notice of the petition in the prescribed Form together with a copy of the petition for service on the company and an envelope addressed to the company at its registered office or its principal place of business and sufficiently stamped for being sent by registered post for acknowledgment. The Registrar shall immediately on the admission of the petition send the notice together with the

copy of the petition to the company by registered post.

(2) Every petition and, save as otherwise provided by these Rules or by an order of Court, every application, shall, unless presented by the Company, be served on the company at its registered office, or, if there is no registered office, at its principal or last known principal place of business, by leaving a copy thereof with an officer or employee of the company, and in case no such person is available, in such manner, as the Judge or Registrar may direct, or, by sending a copy thereof by pre-paid registered post addressed to the company at its registered office, or, if there is no registered office, at its principal or last known principal place of business, or to such person and at such address as the Judge or Registrar may direct.

Where the company is being wound up, the petition or application shall also be served on the liquidator, if any, appointed for the purpose of winding-up the affairs of the company.

13. Shri Tulzapurkar has submitted that rule 28 has no application to a winding-up petition, but it is meant to be applied to other petitions like petition under sections 397 and 398 of the Companies Act and it has no application to a petition for winding up. This submission has been made by Shri Tulzapurkar in the same strain in which he made his submission that the only Rules which are applicable to a Winding-up petition, are the Rules contained in Part III of the Companies (Court) Rules, 1959. It is also difficult to accept this submission of Shri Tulzapurkar. The opening words of rule 28 (1) are "where a petition is presented against a company" and the opening words of sub-rule 2 of rule 28 are "Every petition". Therefore, neither in sub-rule (1) nor in sub-rule (2) is a winding-up petition excepted. A plain reading of rule 28 shows that it is applicable to every petition filed against a Company and it admits of no exception. Furthermore, the language of rule 28 shows that the service of notice upon the company is mandatory. The words "every petition.....every application shall, unless presented by the company be served on the company" are not merely directory but they are mandatory. Reading rules 27 and 28 together, the prescribed form referred to in rule 28 is form No. 6 which is prescribed by rule 27.

14. Rule 28(1) requires that when a petition is presented against a company, it shall be accompanied by a notice of the petition in the form prescribed together with a copy of the petition for service on the company. The notice of the petition referred to in Rule 28 is not a letter addressed by the Petitioning Creditor's Advocate to the company intimating the date fixed by the Court the admission of the petition. This is made clear by the fact that after the admission of the petition, a notice has to be served upon the company and this is made amply clear by the said sub-rule 1 of Rule 28 which states that the Registrar shall immediately on the admission of the petition send the notice together with the copy of the petition to the company by registered post. Therefore, the notice contemplated by sub-rule 1 of Rule 28 is a notice which is to be served by the Registrar after the winding-up petition is admitted. The Registrar is defined--

Rule 2(11) "Registrar" means, in the High Court the Registrar of the High Court, and includes the Prothonotary, Master and Assistant Master, and such other officer as may be authorised by the Chief Justice to perform all or any of the duties assigned to the Registrar under these Rules, and in the District Court, such officer of that Court as may be authorised by the High Court to perform all or any of the duties assigned to the Registrar, under these Rules.

Therefore, the Prothonotary, Master and Assistant Master or such other officer as may be authorised by the Chief Justice to perform all or any of the duties of the Registrar under these Rules, is the person who is made responsible for the service of the notice. Therefore, a letter intimating the date fixed for the admission of the petition given to the company is an altogether a different aspect of the matter. This letter which has been termed as a notice in the arguments advanced before us is not under the Companies (Court) Rules. Such a notice has not been provided for by the Companies (Court) Rules and such notice cannot be made a foothold for the submission that such a notice will be a deemed notice of the winding-up petition. Rule 28 is quite clear. Sub-rule 2 of Rule 28 also provides the mode and the manner in which service upon the company is to be effected. In the first part of sub-rule 2 of Rule 28, a personal service upon the company is contemplated while in the latter part of sub-rule 2 of Rule 28, if personal service cannot be effected upon the company, then service is to be effected by registered post. Again that Rule 28 applies with all its force to a winding-up petition is made clear by part two of sub-rule 2 of Rule 28. Part two of sub-rule 28 provides:

where the company is being wound-up, the petition or application shall also be served on the Liquidator, if any, appointed for the purpose of winding-up the affairs of the company.

The word "also" in this part makes it amply clear that the petition for winding-up has to be served upon the company. For this reason also, it is difficult to accept the submission of Shri Tulzapurkar that to a winding-up petition, the only Rules that are applicable are the Rules to be found in Part III of the Companies (Court) Rules. It is also difficult to accept the submission of Shri Tulzapurkar that the advertisements published in the newspapers and in Government Gazette should be taken as service upon the company.

15. This conclusion is further fortified by the subsequent Rules, viz. Rules 29 and 31. Rule 29 provides:

save as otherwise provided by these Rules and subject to any directions of the Judge or Registrar, the petitioner, applicant or any other person having the conduct of proceedings in Court, shall be responsible for the service of all notices, summonses and other processes and for the advertisement and publication of notices, required to be effected by these Rules or by order of Court.

While Rule 28 provides that the Registrar shall send the notice, Rule 29 makes the Petitioning Creditor responsible for the service of notice. Here also, it will be

noticed, that the Rules makes distinction between service of notice and issue of advertisement. Therefore, even if an advertisement is required to be published as provided in Rule 96, it does not exclude service of notice upon the company. Rule 31 makes this position further clear. It states:--

In default of compliance with the requirements of the Rules or the directions of the Judge or Registrar, as regards the advertisement and service of the petition, the petition shall, on the date fixed for hearing be posted for orders of the Judge and the Judge may either dismiss the petition or give such further directions as he thinks fit.

Rule 31 also distinguishes between issuance of an advertisement and service of notice upon the company. The provisions of Rules 27, 28, 29 and 31 make a complete provision in regard to the service of notice upon the company and in regard to the issuance of advertisements in newspapers and they apply "ex proprio vigore" to a winding-up petition. They exclude by necessary implication "deeming service" as submitted before us. There is no such "deeming service" contemplated by the Companies (Court) Rules 1959.

16. The next question is what is the effect of non-compliance of the notice as contemplated by Rules 27, 28 and 29 of the Companies (Court) Rules upon the company? The effect is as directed in Rule 31 of the Companies (Court) Rules and viz. that the petition will have to be posted for orders for dismissal of the petition or to pass such order as the Court may deem fit.

17. Since the notice of the winding-up petition was not served upon the company, the appeal will have to be allowed and the order dated 27th January, 1982 dismissing the Judge's Summons, viz. Company Application No. 204 of 1981 with have to be set aside.

We, therefore, pass the following order:

Appeal allowed. Order dated 27th January, 1982 passed in Company Application No. 204 of 1981 dismissing the Judge's Summons set aside. Judge's Summons made absolute in terms of prayer (a).

Shri Chande waives service on behalf of the company.

Company Petition No. 221 of 1977 to be placed on Board of the learned Company Judge on 14th April, 1982 for hearing and final disposal. The company to file its affidavit to the Company Petition for winding-up on or before 31st March, 1982 and to furnish a copy thereof to the Petitioning Creditors before that date. The Petitioning Creditors to file affidavit in rejoinder, if they so desire, before 8th April, 1982. There will be no order as to costs of the Judge's Summons as well as of this appeal. Official Liquidator to act upon certified copy of the minutes of the order.