(1998) 10 MAD CK 0048

In the Madras High Court

Case No : O.S.A.Nos. 88 and 89 of 1998 and C.M.P.Nos. 7454 and 7455 of 1988

Nepc Micon Limited, 36, Wallajah Road, Chennai-2 and another — APPELLANT

Vs

Hindustan Thompson Associates Ltd., Chennai-105 — RESPONDENT

Date of Decision : 21-10-1998

Acts Referred:
Companies Act, 1956 — Section 433, 434, 439

Citation : (1999) 95 CompCas 532 : (1998) 2 CTC 709 : (1998) 3 LW 457

Hon'ble Judges : Natarajan, J;C. Shivappa, J

Bench : Division Bench

Advocate : Mr. T.R. Rajagopal, for the Appellant; Mr. Aravind Datar, for the Respondent

Judgement

1. The appellants in these two appeals are private limited companies, incorporated under the provisions of the Companies Act, 1956, having

registered office at No.36, Walajah Road, Anna Salai, Chennai. The appellants have challenged the order of this Court passed under company

jurisdiction, in C.A.Nos.408 and 409 of 1998 in C.P.Nos. 17 and 18 of 1997, in these appeals.

2. The aspect to be considered in these appeals is, whether the impugned order is devoid of various statutory safeguards against admission,

advertisement and publication of winding up petitions? In order to appreciate the legality of the impugned order, it is appropriate to refer the

objects of the company, the position of the parties and how the demand made, which led to the filing of the company petitions. The main objects of

the company are: (i) to carry on business of manufacturers, sellers, importers, exporters, suppliers, lessors or lessees and dealers of all kinds of power generation equipments including wind mills and turbines, hydro-turbines, thermal turbines, solar modules, panels;(ii) to generate, accumulate,

distribute, supply electricity and other power, subject to and in accordance with law for the purpose of light, heat, motive power and for all other

purposes for which electric and other energy can be employed; (iii) to carry on business of generating energy by any other non- conventional

methods and deal in the said equipments, accessories and tools; (iv) to provide all types of engineering facilities including construction, technical

consultancy and architectural services related to the use, application, installation, erection, operation and maintenance of all kinds of power

generation and its related products; (v) to enter into foreign collaboration, contract, sole selling agency agreement for installation erection, operation

and maintenance of all kinds of power generation equipments, products, either manufactured, sold, supplied and dealt with by the said company or

by otherwise.

3. The respondent was appointed as the advertising agent of the appellants'' companies, vide letter dated 12.8.1993, after having accepted the

standard terms set out by the respondent. It is the grievance of the respondent herein that though bills were presented with supporting vouchers as

required, even after acknowledgement, payments to the tune of Rs. 1,52,43,258.98 with interest at 24% p.a., which comes to Rs. 36,31,954.59

in C.P.No. 17 of 1997 and Rs. 1,11,67,630.80 with interest at 24% p.a. amounting to Rs. 20,13,314.00 in C.P.No. 18 of 1997, have not been

forthcoming from the appellants herein, in respect of several bills. Hence the respondent herein filed two Company Petitions viz, C.P.Nos.17 and

18 of 1997 on 17.1.1997, under Sections 433 and 439 of the Companies Act 1956, for winding up the appellants'' companies and also filed two

Company Applications in C.A.Nos. 408 and 409 of 1998 on 6.3.1997, for advertising the winding up petitions, under Rule 24 of the Company

(Court) Rules, (hereinafter referred to as ''the Act'' and ''the Rules, for short), before this court under company jurisdiction. On 19.3.98, the

appellants herein filed four applications (two applications in each of the Company petitions) viz., C.A.Nos. 470 to 473 of 1998, seeking

revocation of the admission and stay of all further proceedings, inter alia contending that the amount claimed is disputed and if the petitions are admitted it would make the court an instrument, in possible cases, of harassment and even blackmail, consequently, the business of the company is

bound to suffer serious loss and injury. Without passing any order on the said applications usual advertisement was directed to be published in the

Government Gazette and local dailies by order dated 9.6.1998.

4. The learned Senior Counsel Mr. T.R. Rajagopal contended that on presentation of winding up petition seeking advertisement thereof has certain

serious consequences on the status, standard, financial viability and stability and the operational efficiency of the company. He further urged that

where the debt is bona fide disputed, a petition for winding up is not an alternative to the suit to recover the same, but may be a strategy to take an

unfair advantage. He also invited our attention to the impugned order, wherein there are no findings as to whether presentation of the petition was

bona fide, reasonable or otherwise, in the sense, with an ulterior motive resulting in abuse of the process of the court.

5. Section 433 of the Act sets out the circumstances in which a company may be wound up by the Court, one such being where the company is

unable to pay its debts. Section 434 sets out the circumstances and situations in which a company may be deemed to be unable to pay its debts.

Rule 95 of the Rules provides that the petition for winding up of a company shall be presented in the Registry. Then comes Rule 96, which is very

material. It provides that (i) the Court may issue notice to the company to show cause as to why the petition should not be admitted; (ii) may admit

the petition and fix the date for hearing issue notice to the company before giving directions about the advertisement of the petition; and (iii) may

admit the petition, fix up the date for hearing of the petition and order that the petition be advertised and direct that the petition be served upon the

persons, who are connected with the order.

6. Rule 24, which relates to the advertisement of the 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 dale 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 daily newspaper in the regional language circulating in the State or the Union

Territory concerned, as may be fixed by the judge; and 92) 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"". Rule 9 of the Rules reads thus: ""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 to prevent

abuse of the process of the Court."" Rule 96 of the Rules, which is very material provides: ""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"".

7. It would appear at a glance that the rule confers a discretionary power on the judge not to give any direction at that stage, but, if after receipt of

the notice the company appears and satisfies that the debt is bona fide disputed 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 the

winding up petition to prove its claim by a suit or in any other manner. Thus, undoubtedly, a winding up petition is not a recognised mode for

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 conferred on the judge before whom the petition comes up for admission, to issue pre-admission notice to the company so that the

company is not taken unawares 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 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.

8. In National Conduits (P) Ltd. Vs. S.S. Arora, the Apex Court has taken the view that a petition for winding up cannot be placed for hearing

before the Court, unless the petition is advertised. That is clear from Rule 24 (2) of the Rules. But, that is not to say, as soon as the petition is

admitted it must be advertised. If the petition is admitted, it is still open to the company to move the Court for staying the proceeding for the ends

of justice or to prevent abuse of the process of the Court, and therefore the petition be not advertised. Such application comes within the ambit of

the last clause of Rule 96, even where there is unconditional admission for winding up.

9. Infact, the Kerala Court in George Vs. The Athimattam Rubber Co. Ltd., Thodupuzha, , went to the extent of saying that when a pre-admission

notice is issued to the company under Rule 96, it would be open to the company to appear and ask for stay of proceedings or even seek to revoke

the admission on the ground that the petitioner was not acting bona fide in filing the petition.

10. The observation in Lord Krishna Sugar Mills Ltd. and Another Vs. Smt. Abnash Kaur and Others, , that the Court, in appropriate cases, has

the power to suspend advertisement of the petition for winding up, pending disposal of the application for revoking the order of admission of the

petition, was approved by the Apex Court. On principle, whenever the petition is admitted, the court need not take recourse to advertise the

petition. It is contrary to the plain terms of Rule 96 of the Rules and such a view viz. ordering advertisement immediately after admission, if

accepted, would make the court an instrument of harassment and even blackmail, resulting in serious loss and injury to the company.

11. The learned single Judge has held that the contentions of the respondent need not be considered there in and advertisement can be ordered as

contemplated under Rule 24 of the Rules, which view had already been depricated by the Apex court in the decisions cited supra and held

contrary to the plain terms of Rule 96 of the Rules.

12. In the result, the appeals are allowed and the impugned order passed on C.A.Nos.408 and 409 of 1998 in C.P.Mos. 17 and 18 of 1997,

ordering advertisement and and publication of the winding up petition in the official gazette of Tamil Nadu and in the local dailies is set aside. We

request the learned single Judge, in addition to the of inherent power, for the ends of justice and for prevention of abuse of the process of the curt,

the petition should or should not be advertised according to taw, uninfluenced by the order impugned. The determination on these aspects also

requires consideration of C.A.Nos. 470 to 473 of 1998 according to law. The appeals are ordered accordingly , but without costs.

