

(1938) 08 AHC CK 0014
In the Allahabad High Court

Shri Gopal Chandra and Another

APPELLANT

Vs

Narain Das and Others

RESPONDENT

Date of Decision : 19-08-1938

Acts Referred:

Companies Act, 1956 — Section 218

Citation : AIR 1938 All 623

Hon'ble Judges : Harries, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Harries, J.—This is an application by B. Shri Gopal Chandra and L. Panna Lal praying that a Company known as the New Vaish and Paliwal Ginning and Cotton Press Co. Ltd., now in voluntary liquidation, should be compulsorily wound up. There is a further prayer that certain mortgagees should be ordered to deliver possession of the property of the Company to B. Shri Gopal Chandra who is the liquidator appointed in the voluntary liquidation. There is a third prayer that certain sale proceedings in the Court of the Munsif of Shikohabad in Suit No. 364 of 1936 be stayed pending the disposal of this application. When the matter came up before me on 4th August 1938, I gave Mr. Sanyal who appears for the applicants leave to amend his application and this has been done. The application as originally framed mentioned that it was one under various Sections including Section 221, Companies Act. This latter Section deals with powers of the Court to make an order that a voluntary winding up shall continue subject to the supervision of the Court. It may be pointed out that in the application as originally drafted no mention whatsoever was made of Section 218, Companies Act. When Mr. Sanyal opened the case Mr. Malik said that he had been under the impression that as this was an application u/s 221 he had to meet the case of a possible order for winding up under the supervision of the Court. The prayer was actually in these words : "It is respectfully prayed that the said Company be winded up under a com. pulsory scheme by the Hon"ble Court," The actual wording of the prayer did suggest that what the applicants wanted was an order

for compulsory winding up, but having regard to the fact that they had mentioned a number of Sections but not Section 218, I thought it proper to give the opposite parties an opportunity to consider the matter. The matter coming before me again to-day, Mr. Sanyal has argued that his clients are entitled as of right to an order compulsorily winding up this Company. He contends that all he has to show is that he is a creditor of the Company and that the Company is at present being wound up voluntarily, Section 218, Companies Act, upon which he relies is in these terms:

The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.

2. According to the argument for the applicants any creditor has an absolute right where a company is in the process of being wound up voluntarily to demand that it should be wound up compulsorily. Section 218, Companies Act, as it now stands, is materially different from the corresponding Section in the old Act which was Section 219. By that Section both creditors and contributories had to show that they were likely to be prejudiced but since the Amending Act of 1936 the creditors need no longer show that they are prejudiced. Great stress is laid upon this Amending Act but in my view the present Section 218, Companies Act, means that any creditor who would otherwise be entitled to a compulsory order for winding up may apply to the Court for such an order though the company is at the date of such application in the process of being wound up voluntarily. It will be observed that what the Section says is that the voluntary winding up of the company shall not bar the right of any creditor to have it wound up by the Court. If the creditor has no right to have it wound up by the Court, then quite clearly the fact that there is a voluntary winding up in progress cannot assist him. What the Section means is that creditors who have a right u/s 162 to have the company wound up can exercise that right in spite of the fact that the company has gone into voluntary liquidation. Previous to the Amending Act the creditor had to show not only that he had a right to have the company wound up but further he had to show that if the voluntary winding up continued he would be prejudiced. If he failed to prove prejudice the Court permitted the voluntary winding up to continue because in such winding up the creditor would have as good a chance of obtaining payment of his money as he would if the company was wound up compulsorily. Even today a contributory has to show not only that he has a right to ask for a compulsory winding up order but also that he would be prejudiced if the voluntary winding up was allowed to continue. In my judgment a creditor is not entitled as of right to ask a Court to convert a voluntary winding up into a compulsory winding up. A creditor on the other hand who could have asked in the first instance for a compulsory winding up order can always come to Court and ask that the voluntary winding up should be converted into a compulsory one.

3. The applicants in this case are B. Shri Gopal Chandra, a vakil practising at Agra, and L. Panna Lal. The former is the liquidator appointed in the voluntary liquidation, but he appears in his personal capacity. The other applicant is a creditor for a considerable sum and he at present holds a decree for Rs. 2800 which has not been satisfied.

4. No Section of the Companies Act has been cited to me which enables the liquidator in a voluntary winding up to ask the Court to pass an order compulsorily winding up the company. The liquidator represents the company although in these proceedings he is not stated to be acting as such. The other applicant, Panna Lal, is, as I have stated, a creditor and he is entitled to ask to have the voluntary winding up converted into a compulsory one provided he satisfies the provisions of Section 218, Companies Act.

5. I have already stated that the applicant, Panna Lal, is not entitled to an order as of right and that before he can obtain an order he must show that he, as a creditor could obtain, had there been no voluntary winding up, an order compulsorily winding up the company. The allegations in the petition are supported by affidavits but it is impossible for me to go into the merits of this case for the simple reason that the company as such is not a party though the application is for an order compulsorily to wind it up. It appears to me that all the parties who have been joined as opposite parties are wholly unnecessary and that there is no application before me upon which I can adjudicate upon the merits. The opposite parties Nos. 1 to 6 are mortgagees and auction-purchasers of property which belonged to the company. Opposite party No. 7 is an ex-director and share-holder of the company. Opposite parties Nos. 8 to 11 are four directors out of the six directors composing the Board.

6. In my judgment the presence of these opposite parties is wholly unnecessary and the one essential party, namely the company, is not before the Court. Mr. Malik appears on behalf of the opposite parties Nos. 1 to 6 and quite clearly they are entitled to have this application dismissed against them with costs. The other opposite parties have not instructed counsel but clearly they also are entitled to have this application dismissed. As they do not appear to have incurred any costs, I will make no order as to costs with regard to them.

7. Mr. Sanyal has argued that I should allow this application to be amended so that the company should be made a party. I have already allowed one amendment of this petition and the amendment which is now asked is that I should substitute the company for all the present opposite parties. In other words that I should change the whole complexion of the application. I feel that I cannot possibly accede to this prayer. If the applicant Panna Lal wishes to pursue an application for conversion of the voluntary winding up into a compulsory one, he should commence fresh proceedings against the company. The result therefore is that this application fails and is dismissed. Opposite parties Nos. 1 to 6 must have their costs from the applicants. There appears to be a stay order in this case staying certain proceedings in the Court of the Munsif of Shikohabad.

The stay order is hereby discharged. The documents received from the Registrar of Joint Stock Companies should be returned.