

(1994) 10 AP CK 0036

In the Andhra Pradesh High Court

Case No : Original Side Appeal No. 31 of 1994

Soujanya Hotels Private Ltd.

APPELLANT

Vs

Nalla Satyanarayana Murthy and Others

RESPONDENT

Date of Decision : 04-10-1994

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24, 96
Companies Act, 1956 — Section 433, 439

Citation : (1994) 3 ALT 356 : (2001) 103 CompCas 1082

Hon'ble Judges : P.L.N. Sarma, J;B.S. Raikote, J

Bench : Division Bench

Advocate : V.S. Raju and P.V. Rama Raju, for the Appellant; A.K. Mylswamy, for the Respondent

Final Decision : Partly Allowed

Judgement

P.L.N. Sarma, J.—This original side appeal has been preferred by the respondent in Company Petition No. 44 of 1994, challenging the order of the learned single judge dated August 11, 1994, admitting the company petition and directing to cause publication of the filing of the company petition in two dailies, one in the vernacular and the other in English. The respondents in this appeal are petitioners in the company petition.

2. For convenience sake, we will refer to the parties in these proceedings as the "company" and "creditors". To appreciate the point in issue, it is necessary to refer to the facts which are relevant for the purpose of this appeal.

3. The creditors filed Company Petition No. 44 of 1994 u/s 433(e) read with Section 439(1)(b) of the Companies Act, 1956 (for short "the Act"), for compulsory winding up of the company and for the appointment of the official liquidator, as the provisional liquidator to take charge of the affairs of the company, on the ground that the company failed and neglected and was also unable to pay the debt due to the creditors.

4. When the company petition was posted for admission, the learned single judge passed the following order, which is impugned in this appeal :

"Admit.

The petitioners are directed to take out notices to the respondents and file proof of service into court. They are also directed to cause publication of the filing of this petition in Indian Express and Eenadu. Post on September 15, 1994."

5. The company filed Company Application No. 194 of 1994 in the company petition on August 16, 1994, seeking stay of the publication of filing of the company petition in two dailies. However, pursuant to the impugned order, publication was caused in Eenadu daily a vernacular in the Rajahmundry edition on August 17, 1994. On the same day, viz., August 17, 1994, the learned single judge passed an interim order granting stay of the publication. However, on August 18, 1994, the publication was also caused in the English daily Indian Express, Vijayawada edition.

6. Even though the publication of the admission of the company petition was caused in both the dailies, this appeal has been preferred by the company challenging the procedure adopted by the learned single judge in straightaway directing the publication of the admission of the company petition simultaneously with the order of admission of the company petition.

7. V. S. Raju, learned counsel appearing for the appellant-company in this appeal contended that the procedure adopted by the learned single judge in directing the publication of the admission of the company petition immediately after the admission of the company petition without giving notice to the appellant-company is not sustainable. According to him, the procedure adopted is contrary to the decisions rendered by the Supreme Court of India, and in particular, the one reported in National Conduits (P.) Ltd. v. S. S. Arora [1967] 37 CC 786 (SC). According to learned counsel for the appellant-company, the learned single judge ought to have issued "notice before admission" on the company petition so as to enable the company to contest the same on the ground that it is not a bona fide one and that it was resorted to with an ulterior motive of pressurising the company to pay the amount ; and to meet the ends of justice and to prevent the abuse of the process of the court, the company petition ought not to be admitted.

8. On the other hand, learned counsel A.K. Mylswamy appearing for the respondents/creditors contended that the company court has ample power and jurisdiction not only to admit but also simultaneously order advertisement of the admission of the company petition. He also sought to support the order of the learned single judge by referring to the material filed on behalf of the creditors. Both counsel relied upon the decision in National Conduits (P) Ltd. Vs. S.S. Arora, .

9. To appreciate the rival contentions, it would be necessary to refer to the relevant rule, which has a bearing on the issues, viz., rule 96 of the Companies

(Court) Rules, 1959 (for short "the rules") :

10. Rule 96 of the Companies (Court) Rules, 1959 reads 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."

11. The other rule which relates to the advertisement is Rule 24 of the Rules, which is as under :

"(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."

12. These two rules as well as rule 9, which provides for the inherent power in the company court to give such directions or pass such orders as may be necessary for the ends of justice and to prevent the abuse of the process of the court, were the subject-matter of consideration by the Supreme Court in the decision *National Conduits (P) Ltd. Vs. S.S. Arora*, . In the said decision, when an application was filed under Sections 433 and 439 of the Act in the High Court of Delhi, a learned single judge ordered notice to the company. In response to the notice issued to the company, an application was filed on its behalf seeking not only the dismissal of the company petition but also praying that it should not be advertised. The company court directed that the company petition should not be advertised and that it should also be dismissed. In coming to the said conclusion, the learned judge observed that the company petition was filed to unfairly prejudice the interests of the shareholders of the company and that it is not a bona fide petition. On appeal, a Division Bench of the Delhi High Court set aside the said order of the learned single judge on the ground that when once a company petition is admitted and taken on file, the court is bound forthwith to advertise the company petition. The said order of the Division Bench was the subject-matter of appeal before the Supreme Court. The learned judges of the Supreme Court after considering the relevant rules as mentioned above, referred to the scheme of the rules and were of the opinion that the order of the Division Bench was not sustainable and accordingly, the appeal was allowed. In the said decision *National Conduits (P) Ltd. Vs. S.S. Arora*, , on a consideration of rule 96, the learned judges stated that the said rule contemplates three courses, when a

petition is filed for compulsory winding up of the company under Sections 433 and 439 of the Act. They are as under (page 281) :

". . . the High 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 the 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."

13. From the above decision, it is clear that the company court, when a petition is filed before it for winding up of a company, has the above-mentioned three courses open to it. But that is not to say that as soon as the company petition is admitted, it has to be advertised. The learned judges of the Supreme Court also observed that even before admitting the petition, the company court has a discretion to issue notice before admission. Similarly, it has the discretion to issue notice to the company before directing the advertisement of the admission of the company petition. The object behind this principle is, that if a notice is issued before admission of the petition, the company may appear and also show cause as to why the company petition should not be admitted and also may be able to establish that the company petition filed is nothing but an abuse of the process of the court and it is not bona fide and it was filed with a mala fide intention to pressurise the company to pay the amounts, which are otherwise disputed bona fide. It is further to be noticed that this procedure and the discretion is vested in the company court, for the reason that the company petition is primarily for winding up of the company and it is not the recognised mode of recovery of a debt. The remedy for recovery of a debt is primarily by way of a suit. All these facts can be placed before the company court, if notice before admission is given on the company petition to the company. That is the reason why a discretion is conferred on the company court to issue notice before either admitting the company petition or before directing the advertisement of the admission of the company petition, if it is admitted. The most important thing to be kept in mind is that in a given case, if ultimately the company court comes to the conclusion that the petition itself is not bona fide and is actuated by an ulterior motive and dismisses the application, if the admission of the petition is already advertised the damage done to the company cannot be undone. That is the reason why the learned judges clearly held in the said decision *National Conduits (P) Ltd. Vs. S.S. Arora*, , and in the decision in *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, that there is "sufficient" built-in safeguard in the provisions of the Companies Act and the rules framed thereunder, which would save the company from any adverse consequences. The built-in safeguards are those referred to by us in the foregoing paragraphs.

14. It is to be noticed in this connection that even after the admission of the company petition after notice is served on the company, it is open to the

company to come forward and file an application for revoking the admission on the grounds stated supra, namely, that it is not a bona fide petition and it is actuated by ulterior motives.

15. Having regard to the reasons mentioned above, we are of the opinion that though the company court has power and jurisdiction to direct advertisement of the admission of the company petition simultaneously with the admission of the company petition, but the same should not be done as a matter of course. In the normal course, the company court would do well to give notice to the company before issuing directions for advertising the petition. In fact, in *Bipla Chemicals Industries Vs. Shree Keshariya Investment Ltd.*, a learned single judge of the Delhi High Court, on a consideration of these rules, stated as follows (page 216) :

"Therefore, in the normal case, notice before giving directions as to the advertisement of the petition" would be given before the order of admission. In exceptional cases, of course, the court may admit the petition and postpone giving directions as to the advertisement."

16. We are of the opinion that the observations extracted above equally apply to the third course mentioned above, namely that in the normal course, notice should be given to the respondent before advertising the admission of the company petition. In exceptional cases only, the advertisement of the admission of the company petition should be ordered. Therefore, if in any given case, the company court comes to the conclusion that the directions to advertise must be given simultaneously with the admission of the company petition, it should record reasons for the same and this can only be resorted to in exceptional cases as stated above. It is well to remember in this connection that when a company petition is filed u/s 433 of the Act for compulsory winding up of the company by a creditor on the ground that the company is unable to pay its debts, there will not be any urgency to direct advertisement of the admission of the company petition simultaneously with the admission of the petition, when the creditor was able to wait so long ; he can as well wait till the notice is served on the company. In such cases, normally the balance of convenience is on the side of the company, requiring notice to be given to it before directing advertisement.

17. In the decision *National Conduits (P) Ltd. Vs. S.S. Arora*, , the learned judges stated while setting aside the order of the Division Bench, that the Division Bench of the High Court of Delhi before passing the impugned order, viz., directing advertisement was bound to consider the views expressed by the learned single judge, namely H.R. Khanna J. This is on the premise that if those circumstances are available on record, advertisement should not be ordered. This is in the realm of exercising the discretion, which is vested in the court. In that connection, the learned judges stated as under (page 789) :

"For reasons already set out in our judgment, the High Court erred in holding" that a petition for winding up must be advertised even before the application filed by the company for staying the proceeding for the ends of justice, or to

prevent abuse of the process of the court. The view taken by the High Court that the court must, as soon as the petition is admitted, advertise the petition is contrary to the plain terms of rule 96. Such a view, if accepted, would make the court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury."

18. It is worthy of note that Rule 9 of the Rules enjoins the company 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. The inherent power preserved by this rule enables either party and in particular, the company against which this petition is filed, to file an application for revoking the admission and also in a given case to stay the order directing the advertisement. All these facts and circumstances are stated to be the built-in safeguards, which enable the prevention of abuse of the process of the court.

19. In the present case, the learned single judge while admitting the company petition straightaway directed advertisement of the admission of the company petition. This course is not correct in law, having regard to what is stated above. Accordingly, that portion of the order of the learned single judge, viz., they are also directed to cause publication of the filing of this petition in Indian Express and Eenadu, is hereby set aside. It is always open to the company to file an application, if it is so advised and if it is so aggrieved, seeking revocation of the admission of the company petition and for any other relief it may choose. If such an application is filed, the same will be disposed of, by the company court, on its own merits and in accordance with law. Accordingly, the appeal is partly allowed to the extent indicated above, but there shall be no order as to costs,

20. If the creditors again seek the advertisement of the admission of the company petition, it is open to them to file such an application and the same will be disposed of on the merits in accordance with law after hearing all the parties. It is made clear that we have not gone into the merits of the case and this judgment shall not be taken as pronouncing in any manner on the merits of the rival contentions in the case. Our judgment relates to the procedure adopted in directing the advertisement of the admission of the company petition simultaneously with the admission of the company petition only.