

(2011) 12 MAD CK 0292

In the Madras High Court

Case No : Company Application No. 932 of 2011 in C.P. No. 68 of 2009

Subhiksha Trading Services Ltd., "Habib Complex", 6th Floor,
No. 5, Durgbai, Deshmukh Road, R.A. Puram, Chennai
600028

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 20-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 3
Companies (Court) Rules, 1959 — Rule 21, 95
Companies Act, 1956 — Section 391, 394

Citation : (2011) 12 MAD CK 0292

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : Prakash Goklaney, for the Appellant; H. Karthik Seshadri, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—This application is filed by the respondent to dismiss C.P. No. 68 of 2009.

2. C.P. No. 68 of 2009 was filed by the respondent in this application to pass an order of winding up of the applicant company. Alongwith C.P. No. 68 of 2009, various applications were filed by various creditors and other persons for winding up of the applicant company. During the pendency of the said applications, an order of winding up was passed in C.P. No. 68 of 2009 on 31.3.2009 and a provisional liquidator was appointed. The appointment of provisional liquidator was challenged in O.S.A. Nos. 84 and 93 of 2009 and the Honourable Divisional Bench stayed the appointment of provisional liquidator subject to certain conditions. The order for effecting advertisement dated 31.3.2009 was also subsequently deferred. Meanwhile, Cash and Carry Wholesale Traders Private Limited filed Company Application Nos. 1066 and 1067 of 2009 under sections 391 and 394 of the Companies Act proposing a scheme of arrangement to make

the company financially viable and the winding up petition and the two applications were heard together and the winding up petition was admitted by order dated 28.8.2009 and the respondent herein was directed to effect advertisement in the Government Gazette as well as in the newspapers. As per the said order, advertisements were effected in the Government Gazette and in the newspapers.

3. Company Application No. 1066 and 1067 of 2009 were dismissed on 28.8.2009 and appeals preferred against such order in O.S.A. Nos. 301 and 302 of 2009 were also dismissed. Thereafter, the petitioner in Company Application Nos. 1066 and 1067 of 2009 filed SLP Nos. 29827 and 29828 of 2009 on the file of the Honourable Supreme Court and the Honourable Supreme Court, by order dated 24.11.2009, passed the following order:-

Having heard learned counsel on both sides, we see no reason to interfere in these Special Leave Petitions, except to the extent indicated herein-below:

We are requesting the Company Court to take up for hearing on 26th November, 2009 the afore-stated Scheme for Amalgamation first in point of time. On examination of the said Scheme, if the Company Court finds merit in the said Scheme in the context of financial viability of the said Scheme, then, dependent upon the view of the Company Court, it will look into the Scheme of Arrangement sponsored by Cash and Carry Wholesale Traders (P) Ltd. (C.A. Nos. 1066 and 1067 of 2009). However, if the Company Court finds that the Scheme of Amalgamation is not viable financially, then, consequent upon that finding, the Company Court will take up for hearing the winding up petitions (C.P. No. 26/2009, C.P. No. 68/2009 and other connected winding up petitions).

Before concluding, we may state that the Company Court will decide the financial viability of the Scheme of Amalgamation uninfluenced by the observations made in the impugned judgment.

4. As stated supra, before the Honourable Supreme Court passed the above order, the winding up petition was admitted by this court on 28.8.2009 and publication was ordered and publication was also effected. As per the direction of the Honourable Supreme Court, Company Application Nos. 239 and 240 of 2008 filed to approve the scheme of amalgamation were heard and disposed of by the learned Single Judge by order dated 25.10.2010 dismissing the said applications which prayed for scheme of amalgamation. Against the said order, O.S.A. Nos. 18 and 53 of 2011 were filed by the petitioner and the same is pending.

5. In the background of the above facts, C.P. No. 68 of 2009 and other connected winding up applications were posted for hearing. The learned counsel appearing for the petitioner in C.P. No. 68 of 2009 submitted his arguments and at the instance of the learned counsel for the respondent in C.P. No. 68 of 2009 viz., the petitioner in this application, adjournments were granted for submitting the arguments of the petitioner in this application as the petitioner had some personal inconvenience and the matter was listed on 13.12.2011 for arguments

of the petitioner in this application. On that date, the learned counsel Mr. Prakash Goklaney submitted that as per the order of the Honourable Supreme Court in SLP Nos. 29827 and 29828 of 2009 dated 24.11.2009, the winding up petition can be taken into consideration after the disposal of the applications filed for approving the scheme of amalgamation in C.P. Nos. 239 and 240 of 2008 and though those applications were dismissed by the learned Single Judge, appeals were filed in O.S.A. Nos. 18 and 53 of 2011 and the appeals are continuation of proceedings and therefore, as per the order of the Honourable Supreme Court, till the disposal of the applications by the Division Bench, the winding up petitions should not be taken and in the event of the appeals in O.S.A. Nos. 18 and 53 of 2011 are allowed, the order passed against the petitioners would become infructuous and therefore, the hearing in C.P. No. 68 of 2009 be deferred till the disposal of O.S.A. Nos. 18 and 53 of 2011.

6. Mr. Karthik Seshadri, learned counsel for the respondent in this application and the petitioner in C.P. No. 68 of 2009 submitted that the order to be passed in the applications filed to approve the scheme of amalgamation has nothing to do with the winding up petition and even as per the Honourable Supreme Court, after the disposal of the applications seeking for the approval of the amalgamation, the Company Court can take up the winding up application and those applications seeking for approval of scheme of amalgamation were already dismissed and therefore, there is need to defer the hearing of C.P. No. 68 of 2009. He further submitted that even after the winding up order is passed, the scheme of amalgamation can be considered by this court and section 391 of the Companies Act specifically provides for such contingency and therefore, there is no need to defer the further hearing of C.P. No. 68 of 2009.

7. Thereafter, Mr. Prakash Goklaney, learned counsel for the applicant in this application prayed for time to submit his arguments in the winding up petition and the matter was adjourned to 15.12.2011. On that date, Mr. Prakash Goklaney, learned counsel for the applicant submitted that the applicant has filed this application raising a preliminary objection regarding the maintainability of the winding up petition filed by the respondent and he was able to find out the defects in the winding up petition filed by the respondent herein after having inspection of the records and therefore, that application has to be heard. In such circumstances, this application was heard on 16.12.2011.

8. It is submitted by the learned counsel for the applicant that the winding up petition was not properly sworn to as per the provisions of Rule 95 and it was not in accordance with Form No. 46 of Companies Court Rules. He further submitted that the affidavit, as per Rule 21 and Form 3 was not in accordance with Rules and Forms and therefore, the court ought not to have taken cognizance of the Company Petition as it was not properly sworn to as per the Rules and as per the Forms prescribed under the Company Courts Rules. He further submitted that the petition for winding up was verified by the Senior Vice President Mr. Baksaran and he is not a Director or Secretary or Principal Officer of the Company and

therefore, Company Petition No. 68 of 2009 was not properly verified by the competent person as per Rule 95 and Form 46. He further submitted that the affidavit filed under Rule 21 of the company Court Rules was also not in accordance with Form 3 and therefore, the same is also not in accordance with law and no leave was obtained as per proviso to Rule 21 when an affidavit was filed by a person other than the Director, Principal Officer, Secretary of the Company. He also relied upon the following judgments in support of his contention:

- 1) In In Re: Gaya Textiles Private Ltd. etc. and Star Textile Engineering Works Ltd.,
- 2) Mool Chand Wahi v. National Pains (P) Ltd. (Company Cases Vol.60 page 402 (Punjab & Haryana)
- 3) Mool Chand Wahi v. National Pains (P) Ltd. (Company Cases Vol.60 page 198 (Punjab & Haryana)
- 4) Shantilal Khushaldas & Bros. v. C.S. Shah (Company Cases Vol. 77 page 253)
- 5) Tayal Potteries v. Macroplast PVT. LTD. (Company Cases Vol.103 page 404)

9. The learned counsel for the applicant further submitted that admittedly, in Company Petition No. 68 of 2009 an order was passed on 31.3.2009 by a learned Single Judge of this court admitting the said petition and appointing provisional liquidator and publication was also ordered and in the same petition, another order was passed on 28.8.2009 admitting the Company Petition and advertisement was ordered to be effected and the second admission in respect of the same application is also illegal and as per the first admission order dated 31.3.2009, no advertisement was given and therefore, in the absence of any advertisement, the Company Petition cannot be taken up for hearing and relied upon the judgment in The National Conduits (P) Ltd. Vs. S.S. Arora,

10. Mr. Karthik Seshadri, learned counsel for the respondent in this application and the petitioner in C.P. No. 68 of 2009 submitted that the present application is filed only to prolong the litigation and in the counter filed in the petition for winding up in C.P. No. 68 of 2009, no such pleas now raised were taken and the pleas now raised are also not legally tenable and there is no violation of any statutory rule and the winding up application was properly filed by a competent person and it was also properly sworn to by a competent person. He submitted that the person, who filed the application was authorized by the Board to initiate proceedings and the Board Resolution was also filed alongwith the typed set of papers and therefore, it cannot be stated that the Company Petition was not properly instituted. He further submitted that the Companies Act does not define the Principal Officer of a Company and it only says that the petition can be filed by a Director, Secretary or other Principal Officers of the Company and the Senior Vice President is a Principal Officer having been authorised by the Board through appropriate resolution and the affidavit was also filed by him and the same is in

accordance with Form 3 and Rule 21 of the Company Courts Rules and therefore, there is no substance in the arguments of the learned counsel for the applicant. He also relied upon the judgments reported in United Bank of India Vs. Naresh Kumar and others,) and United Bank of India Vs. Prabhas Ch. Deb and Others, in support of his contention. He further submitted that though the advertisement was not effected in pursuance of the order passed on 31.3.2009 as the same was deferred by this court and it was also reflected in the order dated 28.8.2009 and the order of admission of winding up petition was also challenged by filing O.S.A. Nos. 18 and 53 of 2011 and hence, the learned Single Judge passed the order admitting the winding up application and ordered publication and advertisement and the same were effected and therefore, it cannot be stated that there is no proper advertisement.

11. Heard both sides. As stated supra, this application was filed after the arguments were advanced by the petitioner in C.P. No. 68 of 2009. As rightly submitted by the learned counsel for the respondent, the points now raised were not taken in the counter filed in Company Petition No. 68 of 2009 and for the first time, these points are raised to reject the winding up petition. Admittedly, these points are all technical points and therefore, we will have to see whether the petitioner has made out a case for dismissal of the application. As per Rule 95 of the Company Courts Rules, the application shall be as per Form 46 and as per form 46, it must be verified by an Officer which includes the Director, Managing Director or Secretary or Principal Officer of the Company. Admittedly, the person who verified the petition is not a Director or Secretary and it is approved by the Board resolution that the Vice President is authorised by the Company to file necessary applications. Further, the petitioner is a Senior Vice President of the company. The Companies Act nowhere defines the Principal Officer and therefore, having regard to the post the person is holding and the resolution passed by the Company authorizing the said Officer to file the application, in my opinion, it cannot be contended that the person who verified the Company Petition for winding up is not proper officer. In the judgment reported in The State of Bombay Vs. Purushottam Jog Naik, the Honourable Supreme Court dealt with verification of the affidavit and held that the verification should be modelled on the lines of Order XIX Rule 3 of the CPC and when any matter deposed to is not based on personal knowledge, the sources of information should be clearly disclosed and the verification should not be a slipshod verification. In the judgment reported in AIR 1968 Calcutta 388 cited supra, it is held that the verification by an incompetent person will result in the dismissal of the application.

12. The decision reported in Company Cases Vol.77 page 253, dealt with verification by a Power of Attorney and it is held therein that when verification is done by a power of attorney, leave must be obtained from the court and in this case, verification was done by a duly authorised person.

13. The judgments reported in Company Cases Vol.60 page 198 (Punjab &

Haryana) and Company Cases Vol.60 page 402 (Punjab & Haryana) also dealt with proper persons to verify the affidavit. In the decision reported in Company Cases Vol. 103 page 404, it was held that Rule 21 is mandatory and verification not done by the persons stated in Rule 21 Form 3 is not a proper verification.

14. Therefore, having regard to the above cases, the verification must be done by a competent officer and it must be in accordance with Form 46 Form 3 Rules 95 and 21 of the Company Courts Rules. As stated supra, the verification is done by a Senior Vice President who is authorised by the Company by the Board resolution and being a Senior Vice President he is also a Principal Officer of the Company and therefore, in my opinion, the petition is verified by a proper person. Further, the affidavit filed to verify the petition is also in accordance with Form 3.

15. Even assuming that there is some defect in the verification, having regard to the fact that the same is raised at the fag end of the case and those pleas are not raised in the counter, in my opinion, those pleas cannot be allowed to be raised at the stage of arguments. Further, in a similar situation, the Honourable Supreme Court has dealt with such technical matters in the judgment in the Appeal (Civil) No. 183 of 2000 dated 11.7.2006 in the matter of M/s. Associated Journals Ltd. v. The Mysore Paper Mills Ltd. as follows:-

We are of the opinion that the Rules of procedure cannot be a tool to circumvent the justice. In fact, the Rules are laid to help for speedy disposal of justice. The learned Judges of the Division Bench has appreciated that the technical plea raised by the respondent regarding defective affidavit was raised after seven years of filing the petition. The learned counsel submitted that the appellant is raising the defence of technical plea to protect himself from the consequence of his default and this plea cannot be considered effective enough to review the order of advertisement. Assuming without admitting that the affidavit was not verified as per the Company Rules, the learned counsel has correctly submitted that if this objection was taken earlier the respondent would have cured the defect. For the aforesaid reasons, we are of the opinion that the appeal has no merit and the order passed by the learned Judges of the Division Bench confirming the order passed by the learned Company Judge does not call for any interference by this Court. The appeal stands dismissed accordingly. No costs.

16. Therefore, having regard to the judgments of the Honourable Supreme Court, such trivial issues cannot be allowed to stand in disposing of the Company Petition. Further, the Honourable Supreme Court in decision reported in United Bank of India Vs. Naresh Kumar and others, also held as follows:-

A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a corporation can ratify the said action of its officer in signing the

pleadings. Such ratification can be express or implied. The court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.

17. Further, in the judgment reported in *United Bank of India Vs. Prabhas Ch. Deb and Others*, it was held that an agent of the bank is a Principal Officer who is acquainted with the facts of the case and therefore, he is a competent person to sign and verify the plaint. In this case also, the Senior Vice President is well aware of the facts of the case and he is also authorised by the Board of Directors by board resolution. Hence, it cannot be contended that winding up petition is not properly verified by a competent person. As regards the advertisement, admittedly, advertisements were effected in pursuance of the order dated 18.8.2009. As rightly submitted by the learned counsel for the respondent, the earlier order of advertisement was deferred and therefore, it cannot be contended that another order of advertisement cannot be effected. As proper advertisement was effected, the judgment reported in *National Conduits (P) Ltd. Vs. S.S. Arora*, cannot be applied to the facts of this case.

18. The applicant has filed this application when the matter was posted for arguments. The objections raised regarding the maintainability of the Company Petition are trivial in nature and as stated *supra*, those were not raised in the counter and for the first time, these points are raised only to drag on the proceedings after the arguments of the learned counsel for the applicant were heard in part. Hence, in my opinion, such a practice should not be encouraged.

In the result, the application is dismissed with a cost of Rs. 5000/- to be payable by the applicant to the Mediation and Conciliation Centre attached to High Court within a period of two weeks.