

(2016) 12 BOM CK 0063

In the Bombay High Court

Case No : C.P. No. 331 of 2016 with C.A.(L) No. 766 of 2016

West Hills Realty Private Ltd.

APPELLANT

Vs

Neelkamal Realtors Tower Pvt. Ltd.

RESPONDENT

Date of Decision : 23-12-2016

Acts Referred:

Companies (Court) Rules, 1959 — Rule 26
Companies Act, 1956 — Section 433(e)

Citation : (2017) 1 AIRBomR 542 : (2017) 2 ALLMR 36 : (2017) 2 BCR 693 :
(2017) 200 CompCas 179 : (2017) 3 MhLJ 384

Hon'ble Judges : S.C. Gupte, J.

Bench : Single Bench

Advocate : Mr. Simil Purohit with Mr. Gauraj Shah, Mr. Manish Doshi, Mr. Sandip Vimadalal instructed by M/s. Vimadalal & Co, for the Petitioner; Mr. Zal Andhyarujina with Ms. Rujuta Patil, Ms. Niyathi Kalra and Mr. Rahul Sabne instructed by Negandhi Shah and Himayat

Final Decision : Disposed Off

Judgement

S.C. Gupte, J. - These two company petitions, filed under Section 433(e) read with Section 434 of the Companies Act, 1956, seek winding up of the Respondent company on account of inability to pay its debts. The company petitions, filed in April 2016, are pending admission. Under Notification dated 7 December 2016, issued by the Central Government, all petitions relating to winding up under clause (e) of Section 433 pending before high Courts, and which have not been served on the Respondent as required by Rule 26 of the Companies (Court) Rules, 1959, stand transferred to the appropriate Bench of the National Company Law Tribunal ("NCLT") exercising territorial jurisdiction over the mater. It is the case of the Respondent that these petitions are covered in the mandate of the notification and stand transferred thereunder, whilst the Petitioners submit that the petitions having been served on the Respondent as required by Rule 26, the transfer notification does not apply to them and accordingly, this court retains its jurisdiction over them.

2. Since the controversy involves a question which would commonly arise in a number of petitions pending before this court, this court thought it fit to notify the petitions on the daily cause list, calling upon other interested parties wanting to make submissions on the issue to appear at the hearing. Accordingly, submissions are made at the Bar not only by the parties to these petitions, but also other interested parties whose petitions are pending before this court.

3. The crucial question, which arises for the consideration of the court, is : what amounts to a notice under Rule 26 of the Companies (Court) Rules, 1959 for the purposes of transfer of pending winding up petitions under Clause (e) of Section 433 of the Companies Act, 1956 to NCLT within the meaning of the relevant transfer provisions.

4. To understand the context, we need to consider the historical perspective in which the transfer notification is issued, which is set out below :

(i) The Companies Act, 1956 ("1956 Act"), which has been holding the field since 1 April 1956, enacts the law relating to companies and certain other associations. It provides for different subjects including the subject of winding up of companies and such other associations. Circumstances in which companies may be wound up are contained in Section 433. Clause (e) thereof provides for winding up of a company "if the company is unable to pay its debts".

(ii) In 2013, the Parliament passed the Companies Act, 2013 ("2013 Act"), which seeks to repeal the 1956 Act. The new Act, which received the assent of the President on 29 August 2013, consolidates and amends the law relating to companies over the last 100 years in this country (the first Indian Companies Act being the Act of 1913). Before the enactment of 2013 Act, the company law administration, which consists broadly of five important subjects, namely, (i) rectification of register of members, (ii) scheme of compromise and arrangements, (iii) reconstruction of sick industrial companies, (iv) oppression and mismanagement and (v) winding up, was provided for under different statutes and executed through different forum. Whereas rectification, schemes, oppression and mismanagement, and winding up came under the 1956 Act, the subject of reconstruction of sick companies was provided for in the Sick Industrial Companies Act, 1985. Even under the 1956 Act, the provisions of rectification, and oppression and mismanagement were administered by the CLB, whilst schemes and winding up were handled by the High Courts. On the other hand, reconstruction of sick companies came before BIFR. One of the objectives sought to be achieved by 2013 Act is to consolidate the entire company law administration and entrust it to a single adjudicatory body as well as appellate forum, namely, the National Company Law Tribunal ("NCLT") and National Company Law Appellate Tribunal ("NCLAT"). Section 1(3) of 2013 Act provides that its provisions (other than Section 1) shall come into force on such date as the Central Government may, by notification in the Government Gazette, appoint and different dates may be appointed for different provisions of the Act. The whole of 2013 Act is not yet brought into force. The Central Government has

been, by separate notifications, bringing into force different provisions of 2013 Act piecemeal.

(iii) Sections 408 and 410 of 2013, respectively, confer powers on the Central Government to constitute NCLT and NCLAT to exercise and discharge the powers and functions as are, or may be, conferred on them by the Act. In exercise of these powers, the Central Government through separate notifications issued by the Ministry of Corporate Affairs on 1 June 2016 constituted NCLT and NCLAT on 1 June 2016.

(iv) On the same day, i.e. 1 June 2016, the Central Government, in exercise of the powers conferred by clause (a) of sub-section (1) of Section 434 of 2013 Act, by Notification, appointed 1 June 2016 as the date on which all matters or proceedings or cases pending before the Board of Company Law Administration ("CLB") shall stand transferred to NCLT, to be disposed of in accordance with the provisions of 2013 Act or 1956 Act, as the case may be.

(v) By another Notification issued on the same day, the Central Government appointed 1 June 2016 as the date on which various provisions of 2013 Act listed out in the Notification shall come into force. These provisions included the relevant provisions of 2013 Act concerning oppression and mismanagement, which was the subject till then dealt with by the CLB under the 1956 Act.

(vi) In the meantime, in 2016, the Parliament enacted the Insolvency and Bankruptcy Code, 2016 ("Code"). It received the assent of the President on 28 May 2016. The Code seeks to consolidate and amend the laws relating to reorganisation and insolvency resolution inter alia of corporate persons. The Code designates the NCLT as the adjudicating authority for corporate persons for resolution of insolvency, liquidation and bankruptcy. Sections 7, 8 and 9 of the Code inter alia provide for initiation of corporate Insolvency resolution process by financial and operational creditors.

(vii) By Notification dated 7 December 2016, the Central Government brought into force various other provisions of 2013 Act including provisions relating to winding up contained in that Act, with effect from 15 December 2016.

(viii) Simultaneously, by another Notification of the same date, i.e. 7 December 2016, the Central Government, in exercise of the powers conferred under sub-sections (1) and (2) of Section 434 made rules, called "the Companies (Transfer of Pending Proceedings) Rules, 2016," which provide for transfer of various proceedings pending before the High Courts to NCLT. Insofar as we are concerned, the relevant rule, which provides for transfer of pending winding up petitions under clause (e) of Section 433 of 1956 Act, namely, Rule 5, is in the following terms :

"5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts - (1) All petitions relating to winding up under clause (e) of section 433 of the Act on the ground of inability to pay its debts pending before a High

Court, and where the petition has not been served on the respondent as required under rule 26 of the Companies (Court) Rules, 1959 shall be transferred to the Bench of the Tribunal established under sub-section (4) of section 419 of the Act, exercising territorial jurisdiction and such petitions shall be treated as applications under sections 7, 8 or 9 of the Code, as the case may be, and dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with Rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal within sixty days from date of this notification, failing which the petition shall abate.

(2)All cases where opinion has been forwarded by Board for Industrial and Financial Reconstruction, for winding up of a company to a High Court and where no appeal is pending, the proceedings for winding up initiated under the Act, pursuant to section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall continue to be dealt with by such High Court in accordance with the provisions of the Act."

5. As we have noticed above, for operation of Rule 5, the crucial question is, whether or not the petition has been served on the Respondent "as required under Rule 26 of the Companies (Court) Rules, 1959". That brings us to the requirement of Rule 26 and service of petitions thereunder. It is contended on behalf of the Respondent herein and others who argue for transfer of the petitions, led by Mr.Andhyarujina, that the service of the petition contemplated by Rule 26 is a post-admission service. It is submitted that the service of a petition under Rule 26 contemplates a simultaneous service of the notice of the petition, which, as Rule 27 provides, must be in Form No.6 given under the Rules. That form, in turn, is clearly to be served after the petition is admitted by the court. In fact, submit learned Counsel, there is no rule under the Companies (Court) Rules, 1959, which requires a preadmission notice of the petition to the Respondent. On the other hand, it is contended by the Petitioners and others who oppose transfer, led by Mr. Purohit, that service of the petition under Rule 26 and notice of the petition under Rule 27 are two entirely different matters. Every petition is required to be served on the Respondent, if any, named in the petition and such other person/s as the Act or the Rules may provide or as the Court or Registrar may direct. It is submitted that this requirement of Rule 26 is without reference to the admission of the petition. In any event, it submitted that in these petitions, there are specific directions issued by the Registrar to serve the petition on the Respondent. The service of the petitions, in the premises, effected by the Petitioners" advocates on the Respondent in the present case is service under Rule 26.

6. To appreciate these submissions and decide the controversy, we need to consider Rules 26 to 29, Form No.6, and Rules 96 and 98 of the Companies

(Court) Rules, 1959, which are quoted below :

"26. Service of petition-Every petition shall be served on the respondent, if any, named in the petition and on such other persons as the Act or these rules may require or as the Judge or the Registrar may direct. Unless otherwise ordered, a copy of the petition shall be served along with the notice of the petition.

27. Notice of petition and time of service-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.

"Provided always that such notice when by the Act or under these Rules is required to be served on the Central Government, the same shall, unless otherwise ordered by the court, be served not less than 28 clear days before the date of hearing."

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 acknowledgement. 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 prepaid 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.

29. Petitioner to effect service-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, summons and other processes and for the advertisement and publication of notices, required to be effected by these Rules or by order of Court."

Form No.6

(In Winding-up matters)

In the High Court of Judicature At Bombay Ordinary Original Civil Jurisdiction
Company Petition No..... of...

In the matter of Companies Act, 1956;

And

In the matter.....

(Full title as per proceeding)

To,

Name and address of the Respondent Company.

Take notice that petition under section of the Companies Act, 1956 for winding-up of the above named Company presented by..... the Petitioner on...../...../200 is admitted pursuant to order dated...../...../200 and the same is now fixed for hearing before the Company Judge on...../...../200 at 11:00 O'Clock in the forenoon or soon thereafter.

If you desire to support or to oppose the said Petition at the hearing, you should give notice thereof in writing to the Advocates for the Petitioners mentioned below so as to reach the Advocate for the Petitioner/s not later than five days before the date fixed for hearing of the said Petition and appear at the hearing in person or by an Advocate/s, who is entitled to practise in this Hon'ble Court. If you wish to oppose the said Petition, the grounds of opposition or a copy of your Affidavit, should be furnished with your notice to the Advocate/s for the Petitioner/s mentioned below.

Copies of the Petition and the Affidavit-in Support thereof are enclosed.

Dated this day of.... 200....

For Registrar (O.S.)/ Prothonotary and Senior Master

SEALER

This.....day of....., 200.....

Encl : Copies of the Petition and

Affidavit-in support thereof.

(Name and Address of the

Advocate/s for the Petitioner/s)

**Docket is required.

96. Admission of petition and directions as to advertisement-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.

98. Copy of petition to be furnished-Every contributory or creditor of the company shall be entitled to be furnished by the petitioner or by his advocate with a copy of the petition within 24 hours of his requiring the same on payment of the prescribed charges."

7. It may be noted at the outset that Rules 26 to 29, quoted above, come within Part-I entitled "GENERAL", whereas Rules 96 and 98 are under Part III entitled "WINDING-UP". It is also important to note that the rules concerning winding up contained in Part III do not provide for compulsory service of the petition or its notice on the Respondent company, though they provide for the discretion in the Judge in chambers hearing the petition for admission to direct a notice to be given to the company before issuing directions as to the advertisement of the petition. So also, there is no provision for either the time or manner of such service in Part III. For these matters, therefore, we need to go to the general provisions contained in Rule 26 to 29. Indeed, a Division Bench of our court in the case of Modern Dekor Painting Contracts Pvt.Ltd. v. Jenson & Nicholson (India) Ltd. 1983 Mah. LJ 485 has held that the rules contained in part III in relation to winding up being silent in regard to the form in which notice is to be given, it is 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 other persons and the form in which such notice is to be given and those provisions are contained in Rules 27, 28, 29 and 31 read with Form No.6. The Division Bench categorically rejected the submission of Counsel in that case that Rules 27, 28, 29 and 31 do not apply to a winding up petition.

8. Coming now to Rules 26 to 29, even a cursory reading of these rules makes it clear that the rules treat the two subjects, namely, service of petition and notice of petition, differently. Service of petition implies service on the respondent or other person, as the case may be, of a copy of the petition, whereas notice of the petition connotes notice of the hearing of the petition before the court. Rule 26 provides for service of petition, whilst Rule 27 provides for notice of petition. Rule 28 provides for the manner in which service is to be effected on the company, whereas Rule 29 casts the responsibility for all services required to be effected by the Rules or by orders of court or registrar on the petitioner.

9. Mr. Andhyarujina submitted that the mandate of Rule 26 is that a petition has to be served on the respondent and other persons only if the Act or Rules may require or if the Judge or Registrar may direct and that in default, every service of the petition must be accompanied by service of the notice of the petition. He then follows it up with his next submission that such notice of the petition is required to be in Form No.6, which clearly provides for a notice post-admission. He finally sums it up by submitting that every service of the petition under Rule 26 is, therefore, necessarily a post-admission service. There is a distinct fallacy

in this argument. First of all, if a petition had to be served on the respondent as well as other persons only as and if the Act or the Rules may require or the Judge or the Registrar may direct, there was no need to make any separate provision for such service in Rule 26. The Act or the Rules or the order of the Judge or the Registrar, as the case may be, anyway would have provided for the same. A separate provision for such service would make little sense. Secondly, even lexicologically the structure of the sentence in Rule 26 providing for such service does not support the interpretation suggested by Mr. Andhyarujina. A correct reading of Rule 26 implies that the requirement of service of petition is provided for in Rule 26 itself. It contains two commands, namely, (i) every petition shall be served on the respondent, if such respondent be named in the petition, and (ii) every petition shall be served on such other person as the Act or the Rules may require or as the Judge or the Registrar may direct. In other words, if a respondent is named in the petition, the requirement of service of the petition on such respondent is the requirement of Rule 26 itself. One does not have to go to the other provisions of the Act or the Rules or the orders of the Judge or the Registrar for such requirement. There is one more circumstance provided in Rule 26 where service of the petition needs to be made, i.e. when a notice of the petition is to be served. The last sentence of Rule 26 provides that when a notice of the petition is to be served on the respondent or any other person then, unless otherwise ordered, a copy of the petition shall also be served. Rule 26 has no reference to the order of admission of the petition. Rules 27 and 28, on the other hand, make it clear that they together form the requirement of service of the notice of the petition on the respondent company after the petition is admitted and provide for the time and manner of such service. Rule 29, on the other hand, fixes the responsibility of any service under the Rules or directions of the court or the Registrar on the petitioner. The scheme of these four rules, thus, suggests that whereas service of the petition is mandatory on the respondent and, if the Act or the Rules provide or the Judge or the Registrar directs, on such other person/s, whereas notice of the petition on the respondent is obligatory only in the event of admission of the petition. So also, other persons are entitled to notice of the petition only if the Act or the Rules require or the Judge or the Registrar directs. In case of any service, whether service of the petition or of the notice of the petition, it is the petitioner who must execute it.

10. As a matter of fact, as held by our court in the case of Modern Dekor Painting Contracts (supra) as well as the earlier case of Extrusion Processes Pvt.Ltd. v. Jivabhai Marghabhai Patel 1966 Company Cases (Vol.XXXVI) 60, there is no right in a company to be issued a notice before a petition is admitted or the court fixes the date of hearing. The Companies (Court) Rules do not provide for any such notice, though it is permissible for the Judge or the Registrar to require such notice to be given to the company. In fact, as the Supreme Court in the case of National Conduits (P.) Ltd. v. S.S. Arora 1967 Company Cases (Vol.XXXVII) 786 has observed, when a petition is filed before a High Court for winding up of a

company under the orders of the court, the High Court has three options. It may (i) issue notice to the company to show cause why the petition should not be admitted; or (ii) admit the petition, fix a date for hearing and issue a notice to the company before giving directions about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, order that the petition be advertised, and direct that the petition be served upon persons specified in the order. Whereas the requirements of Rules 27 and 28 of a post-admission notice of the petition to the company are absolute, the requirement of a notice at the stage of admission or before advertisement of the petition as provided in Rule 96, is a matter of discretion of the court. As held by the Allahabad High Court in the case of *U.P. Twiga Fiberglass Ltd. v. Parekh Marketing P. Ltd.* 1986 Company Cases (Vol.59) 886, Rule 26 is general in nature and does not control the requirement of Rule 96 to serve the "company". The notice to the company in Rule 96 is not required to be issued in any prescribed form. The company has only to be apprised of the fact that a petition for winding up has been filed. Such notice may be accompanied with a copy of the petition.

11. Mr. Andhyarujina and Mr. Madon submitted that the proviso to Rule 5 makes it clear that petitions to be transferred to NCLT must be at a preadmission stage, since the proviso in terms requires the petitioner to submit all information required for admission of the petition under Section 7, 8 or 9 of the Code, as the case may be, within 60 days from the date of the transfer notification. Whilst it is true that the petitions that are to be transferred to NCLT must be at a preadmission stage, the proviso does not imply that every petition at the preadmission stage ought to be transferred to NCLT. All winding up petitions admitted by High Courts would have necessarily complied with the requirement of service under Rule 26, whereas petitions pending admission might or might not have complied with the requirement of such service. Those petitions, which are pending admission and which have been served on the respondent as required under Rule 26, shall continue to remain in the High Court pending their admission, whilst the petitions pending admission, which have not been served on the Respondent as required under Rule 26, shall be transferred to, and considered for admission under Section 7, 8 or 9 of the Code by, NCLT. That clearly appears to be the mandate of the transfer notification, particularly, Rule 5 thereof.

12. In fact, if anything, the argument that Rule 26 contemplates a post-admission notice and only in the event such notice is actually served on the respondent that the petition shall stand transferred to NCLT, will lead to a peculiar situation. It will mean that those petitions, which are admitted and where notice of the petition is not served on the respondent pursuant to the order of admission, will stand transferred to NCLT and will be taken up for admission once again by requiring the petitioners in those petitions to furnish information for admission of the petitions under Section 7, 8 or 9 of the Code, as the case may be. That would be clearly anomalous.

13. In the premises, it follows that every winding up petition under clause (e) of Section 433 which is pending before the High Court and which is not served by the petitioner on the respondent company shall stand transferred to NCLT under Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016. If such pending petition is served by the petitioner on the respondent, the petition will continue to be dealt with by this court and the applicable provisions will be the provisions of 1956 Act.

14. As I have noticed above, these petitions, which have been served by the Petitioners on the Respondent in pursuance of the acceptance order, are to be treated as served as required under Rule 26 of the Companies (Court) Rules 1959. Accordingly, these petitions shall not be transferred to NCLT and shall continue to be dealt with by this court in accordance with the provisions of 1956 Act.