
(1956) 03 BOM CK 0007

In the Bombay High Court

Case No : Appeal No. 58 of 1956 in I.C. No. 370 of 1955

Western India Theatres Ltd.

APPELLANT

Vs

Associated Bombay Cinemas Ltd.

RESPONDENT

Date of Decision : 20-03-1956

Acts Referred:

Companies Act, 1956 — Section 202

Citation : (1959) 29 CompCas 127

Hon'ble Judges : Chagla, C.J.;P.V. Dixit, J

Bench : Division Bench

Judgement

Chagla, C.J.—This appeal raises a rather important question as to procedure to be followed in the winding up of companies. The respondents presented a petition for winding up of the appellant company before Mr. Justice COYAJEE who was the Company Judge. The petition was presented on November 11, 1955, and the learned Judge made the following endorsement :

"Accepted. Petitioners waive service. Hearing 2nd of December."

2. It may be pointed out that before this petition was filed the respondent company had given notice of the presentation of the petition to the appellant company and in answer to that notice the appellant company appeared before Mr. Justice COYAJEE and all that Mr. Justice COYAJEE'S endorsement indicates is that the appellant company had waived service of the petition. On December 1, 1955, Mr. K. M. Modi, managing director of the appellant company, made an affidavit setting out his defence to the case sought to be made out by the petitioners for the winding up of the appellant company, and in this affidavit he raised various contentions with a view to satisfy the court that the petition should not be proceeded with. Pursuant to the direction given by Mr. Justice COYAJEE, the case came up before him on December 2, 1955. Mr. Justice COYAJEE did not take up the petition as he knew the managing director of the appellant company and he felt that he would feel embarrassed if he tried the matter, and, therefore, he directed that the matter should be heard by some other Judge. The

petition was placed before Mr. Justice DESAI and after several adjournments Mr. Justice DESAI made the order which is under appeal. The order was made on July 3, 1956, and it directed that the petition be advertised in the daily newspapers, The Times of India and The Bombay Samachar of Bombay, The Statesman of Calcutta, The Hindustan Times of Delhi, The Hindu of Madras, and in The Bombay Government Gazette on July 30, 1956, and the learned Judge further ordered that the petition be placed on his daily board on August 20, 1956, for hearing and final disposal.

3. It is this order against which the appellants have come in appeal, and the preliminary point raised by Mr. K. T. Desai for the respondents is that no appeal lies u/s 202 of the Companies Act and that the order made by the learned Judge is a purely procedural order and does not affect the rights of the parties. We have pointed out in *Bachharaj Factories Ltd. v. Hirjee Mills Ltd.*, that section 202 conferred upon a party aggrieved a substantial and valuable right of appeal and that the court must be anxious not in any way to cut down or impair that right. At same time we expressed the opinion that if an order made u/s 202 was merely a procedural order which in no way affected the rights or liabilities of parties such an order would not be appealable. As we shall presently point out, it is unnecessary for us at this stage to decide whether the order made by Mr. Justice DESAI is procedural or affects the rights of parties, because the view we take is that Mr. Justice DESAI made this order without exercising his jurisdiction to hear the appellants and deciding their contentions as he was bound to do at this stage. Clearly, therefore, apart from any other question, failure on the part of the learned Judge to exercise his jurisdiction would be appealable u/s 202 of the Companies Act.

4. What is urged by Mr. DESAI is that as soon as Mr. Justice COYAJEE accepted the petition, Mr. Justice DESAI had no discretion left in him and it was obligatory upon him to make an order of advertisement which he has made. Says Mr. Desai, if it was obligatory upon him to do so then his order cannot be challenged. Turning to rule 733 of the High Court Rules :

"every petition for the winding up of any company by the court, or subject to the supervision of the court, after admission, shall be advertised fourteen clear days before the hearing."

5. What is made obligatory by this rule is the advertising of the petition fourteen clear days before the hearing. In other words, the petition cannot be finally heard unless fourteen clear days have expired between the date of the advertisement and the hearing. It is equally clear that the final hearing contemplated by rule 733 can only take place after the petition has been advertised. But there is nothing in the rule which precludes the learned Judge from dismissing the petition after admission without proceeding to direct that the petition should be finally heard. A petition may fail on various grounds and the learned Judge may be satisfied that the petition is clearly not maintainable, or that the petition constitutes an abuse of the process of the court, or that the

petitioner has failed to make out that he is a creditor, if it is a creditor's petition, in which case it would be futile to have the petition advertised and proceed to the final hearing of that petition. The principle underlying rule 733 is that a petition should not be heard on merits without giving an opportunity to all persons who are interested in the company from coming up before the court and putting before the court their point of view. In the winding up of a company the creditors are interested, the shareholders are interested, and therefore it is but right that before the court makes final order on the petition these parties should be heard. But that does not mean that the discretion of the court is taken away to dismiss a petition at an early stage if no answer is called for on the merits petition. If this is clearly borne in mind, then the practice followed by this court is a perfectly proper practice and we shall proceed to point out how that practice is in conformity with rule 733.

6. Now, a petitioner may give notice to the company before he presents the petition for acceptance. That is what the respondents did in this case. When the respondent appears before the learned Company Judge, the learned Judge would hear him and if the learned Judge is satisfied that the petition should be proceeded with, then he would give the necessary directions under rule 733 as to in which papers the petition should be advertised and which should be the date of the hearing. But it is open to a petitioner to present a petition ex parte, in which case the learned Judge may accept or may not accept it. He may on perusing the petition come to the conclusion that it is frivolous or that it fails to make out a proper case for the winding up of the company, in which case he may reject it. But if he chooses to accept it, the practice followed by this court - and that is the correct practice - is for the learned Judge to direct that a notice should be given to the company. This notice is for the purpose of enabling the company to show cause why the petition should not be proceeded with. In answer to the notice all that the respondent is entitled to urge is that for any justifiable reason the petition should not be proceeded with and further steps should not be taken. If the learned Judge is satisfied at that stage that the respondent has made out a proper case and has shown cause, he can dismiss the petition. If, on the other hand, the learned Judge feels that the respondent has not shown proper cause and that the petition must proceed to a final hearing on merits, he then makes the order under rule 733, directs the advertisement of the petition, and fixes the final hearing of the petition. This notice is essential because, as Mr. Purshottam has rightly pointed out, it is a very serious matter for any company to have the petition advertised without the company being heard in its defence. Mr. Desai was inclined cavalierly to suggest that after all what did it matter, the petition would be advertised and the appellant would be entitled to show cause on merits when the petition came on for hearing on the day fixed by Mr. Justice DESAI. But that is completely ignoring the effect and the serious effect that might be created by advertising the fact that a creditor has presented a petition for winding up against the company. It is precisely because of this that our practice insists upon a notice being issued to the company to enable the company to put before the

court its contention why the petition should not be proceeded with, if that is the contention the respondent wishes to put forward.

7. In this case, unfortunately, the whole trouble has arisen because of the form in which Mr. Justice COYAJEE, with respect to him, made the order. He accepted the petition on November 11, 1955. Strictly, as the appellants were before him, he should have proceeded to hear the appellants as to whether the petition should be proceeded with or not. Instead of doing that, on that very day he postponed the hearing of that to December 2, 1955. The proper expression he should have used in his endorsement should have been : "Petition put on board December 2, for further directions." Instead of that, the learned Judge used the expression "hearing", and this expression is seized upon by Mr. Desai for the contention that the petition was accepted and that the hearing was fixed on December 2, which was ultimately taken up by Mr. Justice DESAI. It is clear that in view of rule 733 the learned Judge could not have fixed the final hearing of this petition on December 2. If he wanted to hear the petition on merits on that day, the petition had to be advertised and the procedure laid down in that rule had to be carried out.

8. Mr. Desai says that the learned Judge must have overlooked the provisions of rule 733. We refuse to believe that Mr. Justice COYAJEE with his wide experience of company matters could possibly overlook the provisions of rule 733. It is clear that what the learned Judge intended was to hear the appellants on December 2, with regard to their contention that the petition should not be proceeded with, and this is borne out by the fact that Mr. Modi, the managing director of the appellants, has made an affidavit on December 1, 1955, setting out the grounds on which the petition was being resisted and to show why it should not be proceeded with. Therefore, when the matter ultimately came up before Mr. Justice DESAI, it was still at the stage of giving directions, and although we are told the matter was heard at great length by Mr. Justice DESAI, judging by the fact that the learned Judge has delivered no judgment and has merely given a direction as to the advertisement, the learned Judge seems to have taken the view that once the petition was accepted it was obligatory upon him to order advertisement of the petition. Now, as we have already pointed out, rule 733 does not take away the discretion of the Judge to consider whether the petition should be proceeded with or not. Therefore, what Mr. Justice DESAI should be have done when the matter came up before him was to have decided whether the petition should be proceeded with or not. Various alternatives were open to the learned Judge. He might have decided that the petition should not be proceeded with and that it should be dismissed at that stage; he might have decided that the petition should be stayed and that no further action should be taken on the petition; or he might have decided that this was a case where the contributories and the creditors should be heard, that the petition should be advertised, and that the final hearing should be fixed for a particular date. If the learned Judge had made the order after considering these various alternatives and if he had done so after hearing the contention of the appellants and had

come to the conclusion that there was no substance in their contention, then undoubtedly it could not be said that the learned Judge has not exercised his discretion. But as we have just pointed out, it is clear from the order of Mr. Justice DESAI and the absence of any indication in the judgment to the contrary that Mr. Justice DESAI felt that he was bound by the mandatory provisions of rule 733 and that he had to give effect to those provisions.

9. The result, therefore, is that we must set aside the order of Mr. Justice DESAI, and send the matter back to him with a direction that he will pass the necessary order after considering the contentions of the petitioners as set out in their petition and the contentions of the appellants as set out in the affidavits on record. After considering these contentions it will be open to the learned Judge to make any of the orders which we have already suggested he can make on this petition. He will treat this matter as at the stage of notice for directions and treating it as a notice he will either give directions in terms of rule 733 or he will dismiss the petition or stay the petition as he thinks proper.

10. Costs of the appeal, costs in the petition.

11. Order accordingly.