
(2003) 02 AHC CK 0064

Allahabad High Court

Case No: Order on Civil Misc. Recall Application No. 155372 of 2002 in C.P. No. 7 of 2002

Om Prakash Jaiswal
and Others

APPELLANT

Vs

Shekhraj Hotel (P) Ltd.

RESPONDENT

Date of Decision: Feb. 5, 2003

Acts Referred:

- Companies (Court) Rules, 1959 - Rule 24
- Companies Act, 1956 - Section 146, 147, 433, 434, 51

Citation: (2004) 122 CompCas 255 : (2004) 50 SCL 59

Hon'ble Judges: Sunil Ambwani, J

Bench: Single Bench

Advocate: R.P. Agarwal, for the Appellant; Shashi Nandan and Vishram Tiwari, for the Respondent

Final Decision: Dismissed

Judgement

Sunil Ambwani, J.

The above application has been filed to recall ex parte order dated 9.8.2002 by which the company was wound up by this court.

2. I have heard Sri Shashi Nandan, assisted by Sri Vishram Tiwari, Advocates, for applicant, and Sri R.P. Agarwal, for the petitioners.

3. A creditor's winding up petition was filed by petitioners to wind up Shekhraj Hotels (P) Ltd. with its registered office at New Colony, Aam Ghat, Ghazipur (U.P.) on the ground that it has failed to pay an amount of Rs. 23,81,400 which includes the principal amount of Rs. 13,01,000 and the agreement dated 28.3.2000 executed by the company with the petitioners and further a sum of Rs. 4,00,000 given on 6.4.2000 along with agreed interest @ 2% per annum in spite of statutory notice dated 18.12.2001 which was sent by post to the registered office of the company at New Colony, Aam Ghat, Ghazipur, as well

as to its old registered office located earlier at 14/44 Prag Narain Road, Lucknow. Notices were issued by this court to the respondent company to show cause as to why the company petition be not advertised under Rule 24 of the Companies (Court) Rules, 1959. Steps were taken and notices were issued to the respondent company at its registered office at Aam Ghat, Ghazipur, on 20.2.2002. Notices were returned back with endorsement that there is no hotel in the area and thus returned. On 16.4.2002, the court noticed the aforesaid report and on the request of counsel for petitioner permitted fresh steps, both by registered post as well as by publication. It was made clear in the order that the publication is only to avoid service and is not by way of advertisement under Rule 24. The publication was required to be made in "Pioneer" published in English from Lucknow within a month.

4. Fresh steps were taken and notices were sent again on 24.4.2002 by registered post fixing 21.5.2002. Once again, these notices of registered post were returned back unserved with the remarks that there is no hotel in the area. On 5.7.2002, the court again noticed that the summons have returned back. A copy of newspaper of "Pioneer" dated 28.4.2002 published summons in pursuance of the courts order dated 16.4.2002 was placed on record and under the circumstances, the service of notices on respondent company was deemed to be sufficient. The court, thereafter, considered the averments made in the petition and directed publication to be made in the same newspaper "Pioneer" under Rule 24 of the Companies (Court) Rules, 1959, published in English from Lucknow as well as the daily newspaper "Aaj" published from Varanasi within a month. Steps were taken and that advertisement was made in daily newspaper "Pioneer" published in English from Lucknow dated 18.7.2002 and daily newspaper "Aaj" published from Varanasi on 16.7.2002 as well as in Official Gazette dated 27.7.2002. The newspapers and gazettes were brought to record vide application dated 5.7.2002. No one put in appearance in spite of aforesaid notice and publications. The court thereafter considered the averments on merits on 9.8.2002, and finding that the respondent company has failed to pay a sum of Rs. 23,81,400 in spite of notice dated 18.12.2001 and also finding that it is unable to pay its dues and is liable to be wound up, appointed Official Liquidator in U.P. Allahabad as liquidator of the company to take over its assets, prepare inventory and report to the court and also to send notices to directors of the company to file statement of affairs within statutory period.

5. On 10.9.2002, the above application was filed to recall the order on the ground that registered office of respondent company is presently situated at S-21/116-K-5 Englishia Line, Varanasi, which is so recorded with the Registrar of Companies, Kanpur. No notice was ever sent by the petitioner at the aforesaid registered office and on account of the aforesaid fact the applicant did not have any knowledge about the pendency of the petition. In paragraph 7--it was stated that notice which have been published in the newspaper, namely, "Pioneer" and "Aaj" were also not within the knowledge of any of the directors of the company as both the newspapers have a very limited circulation in the city of Varanasi. All the directors of the company are residing at room No. 109, Babu Rao

Jagtap Road, Byculla, Mumbai, and that no notice whatsoever has been sent to directors residing at Bombay, nor any publication was made in any newspaper having circulation at Bombay. In paragraph 9, it has been stated that the addresses of all the directors have been mentioned in the agreement dated 28.3.2000 on which reliance has been placed by the petitioner, but they have deliberately avoided to serve notice upon directors on the addresses mentioned in the agreement, nor any registered notice was sent or served at the registered office of the company. In paragraph 10, it has been stated that the alleged loan agreement dated 28.3.2002 has been signed by Mr. Raj Narain Singh, one of the directors of the company, in his individual capacity, as the company has not passed any resolution empowering him to enter into agreement or to obtain loan from a private party. The agreement has not been ratified by the Board of directors, nor does it bear the common seal of the company and thus the company or its directors cannot be bound by the terms and conditions of any agreement entered into by Raj Narain Singh in his individual capacity.

6. In the counter affidavit, it has been stated that Sri P.K. Singh who has filed affidavit in support of recall application is not entered in the record of the Registrar of Companies as director of respondent company and is an imposter. He is not entitled to file the said affidavit. Upon inspection of record in the office of Registrar of Companies, it has been verified that the registered office of the company was not situated at S/21/116-K-5 Englishia Line, Varanasi, on the date when statutory notice of demand dated 18.12.2001 was sent by the petitioner. It was also not situate at the said place on 19.12.2001 when the demand notice was published in the "Pioneer", Lucknow, and also not situated at the said place when the company petition was filed on 13.2.2002, on 16.2.2002, and on 23.4.2002 when the steps for service of notice were taken by registered post and that even on 28.4.2002 when the substituted service was made by publication in "Pioneer" and notice of hearing of publication were published on 16.7.2002, 18.7.2002 and 27.7.2002 in "Aaj", "Pioneer" and Official Gazette respectively. Throughout the aforesaid period, the registered office of the company was situate at New Colony, Aam Ghat, Ghazipur. Form 18 issued by the Registrar of Companies on 10.9.2002 evidences the change of the registered office of the company from 14/44, Prag Narain Road, Lucknow, to New Colony, Aam Ghat, Ghazipur, with effect from 9.12.2000 and has continued at the same place up to 9.10.2002, the date on which certified copy was issued by the Registrar of Companies. The directors of the respondent company have full knowledge of the winding up proceedings but they deliberately avoided the service with a view to defraud petitioner. The respondent company moved recall application immediately on publication of notice of winding up under Rule 113 of the Companies (Court) Rules of 10.9.2002 in "Pioneer" and 5.9.2002 in "Aaj" showing that the company was fully aware of the fact. In para 7 of the counter affidavit, the petitioner has given details of about thirty one notices which have been sent to the company and directors in June and July, 2001, at the residential addresses of the directors at room No. 109, Babu Rao Jagtap Road, Byculla, Mumbai, as well as at Englishia Line, Varanasi, but all the notices have returned back with endorsement "refusal", "not known", "not claimed", "left", etc. The reply was received

from Mrs. Janki Singh dated 5.7.2001 acknowledging receipt of notice, a letter of demand dated 26.6.2001 stating that the matters pertaining to Shekhranj Hotels (P) Ltd. are looked after by his father-in-law, Sri Raj Narain Singh, who had gone to Bangalore and she will inform on his return about payment of loan. It is immaterial and of no consequence that general powers of attorney were executed by all other directors in favour of Sri Raj Narain Singh and utilisation of money held for the business of the company.

7. In rejoinder affidavit of Sri P.K. Singh, it has been stated that deponent P.K. Singh is director of company in proof of which he has annexed Form No. 32 dated 27 December, 2001, presented by Raj Narain Singh, intimating the Registrar of Companies about the appointment of Sri Pravin Kumar Singh as the director of company with effect from 1.8.2001. It is further alleged that on 27.11.2001, a notice fixing 26.12.2001 was issued for holding extraordinary meeting for shifting the registered office from New Colony, Aam Ghat, Ghazipur, to 292-S-116, Englishia Line, Varanasi, and that on the same, [date ?] a special resolution was passed to which particulars, relating thereto, were submitted to the Registrar of Companies, vide Form No. 23, a certified copy of which has been annexed as Annexure RA-2. The copy of notice dated 27.12.2001 of situation/change of situation of registered office in Form No. 18 has been annexed as Annexure RA-3.

8. On 16.9.2002, learned counsel for respondent company was given ten days" time to file supplementary affidavit annexing therewith the certificate from the Registrar Office with regard to the registered office of the company as on 14.2.2002 and 5.7.2002. In the supplementary affidavit filed on 22.10.2002, it has been stated that, on 26.12.2001, a special resolution was passed for shifting the registered office of the company to 292-S-21/116, Englishia Line, Varanasi, and that the resolution has been registered in accordance with the provisions of Section 192 of the Companies Act. A copy of Form No. 18, giving notice of situation/change of situation, pursuant to Section 146 of the Companies Act, dated 27.12.2001, has been filed which bears the computer generated cash counter receipt dated 15.1.2002 from the office of the Registrar of Companies, bearing proof of the fact that Rs. 500 [was paid] on each document, namely, Form No. 18 and Form No. 23 dated 26.12.2001.

9. Sri R.P. Agarwal has raised objection to the validity of the forms, deposit of fees in pursuance of submission of the forms as well as the genuineness of the resolution. According to him, the date of documents, namely, Form No. 18 and Form No. 23, is. 26.12.2001 on which date the resolution appears to have been passed for change of registered office and that these forms disclosed as the date of submission on 26.12.2001. He submits that these documents have been prepared only for the purposes of filing recall application. According to him, the creditor petitioners took all possible steps, by all available modes, for effecting service on respondent company and its directors. When the notice sent to the company at its address given in the agreement at Plot No. 292-S-21/116, Englishia Line, Sikraul, Varanasi, dated 26.6.2001 and 3.7.2001 returned back unserved with the remarks that the owner resides in Mumbai, demand notices were sent to the directors at Shivanari Building, room No. 109, Babu Rao Jagtap Road,

Byculla, Mumbai, on 26.6.2001 as well as the registered office, disclosed in the agreement on 26.6.2001, 3.7.2001 and 4.7.2001, but all the notices were either refused or returned unclaimed.

10. Before filing the winding up petition, an effort was made to find out the exact location of the registered office of the company. In paragraph 3 of the company petition, it was stated that the office was earlier situate at Plot No. 292-S-21/116, Englishia Line, Sikraul, Varanasi, which was later on shifted to 14/44, Prag Narain Road, Lucknow, and upon the inspection of records of the company on 3.12.2001, petitioners have come to know that the company has shifted its registered office to New Colony, Aam Ghat, Ghazipur. The respondent company filed intimation dated 9.12.2000 in Form No. 18 u/s 146 of the Companies Act. A specific averment was made that the company has not filed any intimation of any further change in the registered address.

11. Sri Shashi Nandan, learned counsel appearing for applicant respondent company, on the other hand, submits that the demand notice, statutory notice and thereafter, company petition were filed giving wrong address as the correct address of the registered office of the company on the date of filing of the company petition was at 292-S-21/116, Englishia Line, Varanasi and, thus the court could not presume service of summons on the respondent company.

12. From the affidavits exchanged between the parties, the agreement executed between respondent company and creditor petitioners and the return filed before the Registrar of Companies, it is apparent that the respondent company has been changing its registered office every year. In the year 1999, the respondent company filed Writ Petition No. 5620(UP) of 1999, between Shekhraj Hotels (P) Ltd. and Uttar Pradesh Financial Corporation (UPFC) and another at Lucknow Bench of this court, giving registered office of the company as 14/44, Prag Narayan Road, Lucknow. In the said writ petition, an interim order was passed on 22.12.1999. In the agreement, executed by respondent company with petitioners through its director, Sri Raj Narayan Singh, which has not been denied by respondent except by stating that Raj Narayan Singh was not authorised to sign the agreement, the address of the registered office of the company on the date of agreement, i.e., 28.3.2000, has been given as Plot No. 292-S-21/116, Englishia Line, Sikraul, Varanasi. The notices of demand dated 26.6.2001 and 3.7.2001 were sent by petitioners to the respondent company, while the postal receipt No. 0010 dated 26.6.2001 and postal receipt No. 4124 dated 3.7.2001 were returned with the endorsement that owners reside in Bombay [and] not at hotel site respectively. The company again changed its registered office vide intimation dated 9.12.2000 to the Registrar of Companies in Form No. 18 u/s 146 of the Companies Act shifting unregistered office to New Colony, Aam Ghat, Ghazipur, and that once again, the company alleges to have changed its registered office vide intimation given in Form No. 18 dated 27.12.2001 w.e.f. 26.12.2001 shifting the office to 292-S-21/116, Englishia Line, Varanasi. Section 146 of the Companies Act provides that notice in every change of situation of the registered office shall be given within thirty days after the date of change. The resolution dated

26.12.2001 appears to have been passed at Varanasi, which is the place from which Form No. 18 dated 27.12.2001 was sent to the Registrar of Companies situate at Kanpur, whereas the date of deposit of fee of Rs. 500 for Form No. 18 was made vide receipt No. 185052 dated 26.12.2001. [From] Form No. 18 appended to the rejoinder affidavit as well as the supplementary affidavit, it appears that whereas the resolution was passed on 26.12.2001, Form No. 18 was prepared on 27.11.2001 and filed on 15.1.2002, along with the receipt of cash deposit of Rs. 500 with the Registrar of Companies on 20.11.2002. The intimation of special resolution in Form No. 23 was also given on 20.11.2002. Section 51 of Companies Act provides for service of documents on company. A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at its registered office. Section 147 of the Companies Act provides that every company shall paint or affix its name and address of its registered office and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible, the company shall have its name and the address of its registered office mentioned in legible character in all its business letters, in all its bill heads and letter paper, and in all its notices and other official publications and that in breach thereof, such officer or person shall be punishable with fine of Rs. 500 for not painting or affixing its name and address of its registered office and for every day during which its name and the address of its registered office is not so kept painted or affixed as provided by Sub-section (2) of Section 147. The object is to make the company itself continually to bring to the notice of all those having any dealings with it, the fact of its being a company with limited liability.

13. On the date of agreement of loan, on 28.3.2000, the respondent company itself disclosed its registered office to be at plot No. 292-S-21/116, Englishia Line, Sikraul, Varanasi, whereas on that date, the registered office of the company was situate at 14/44 Prag Narayan Road, Lucknow. The address given in Form No. 18 submitted by the company to the Registrar of Companies, w.e.f. 9.12.2000, is the above address of Lucknow. The address was changed to New Colony, Aam Ghat, Ghazipur, by notice dated 9.12.2001 ; it was changed to 292-S-21/116, Englishia Line, Varanasi, vide special resolution dated 26.12.2001. The creditor, therefore, rightly sent the demand notice to the address given in the agreement.

14. Before giving the statutory notice, the creditors inspected the record of the Registrar of Companies on 3.12.2001 and found that the office had been shifted to New Colony, Aamghat, Ghazipur, vide intimation dated 9.12.2000 and thus rightly addressed the statutory notice u/s [434] to the changed address at Ghazipur. The creditors also took care to publish the notice in the daily newspaper "Pioneer" published from Varanasi which has wide circulation, both in Lucknow and Varanasi Edition. When the notice sent by this court to the company return unserved the court directed to effect service by substituted service and that publication was made in newspaper "Pioneer" in English published from Lucknow and AAJ published from Varanasi on 28.4.2002. After deeming

the service to be sufficient by substituted service, the notices were published in the newspaper "Pioneer" in English published from Lucknow dated 18.7.2002 and "Aaj" dated 16.7.2002 and Official Gazette dated 27.7.2002. Thus before the winding up order was passed, the respondent company was served by publication on three occasions, firstly, by the creditor petitioner publishing demand notice, and thereafter, twice by this court.

15. There is nothing on record to show the reasons for which the registered office of the company was shifted every year, or that the respondent company had informed creditors including petitioners, with regard to the change of this registered address. The certified copies of Form No. 18 and Form 32 filed with supplementary rejoinder affidavit show that it was registered on 20.11.2002. The resolution was thus registered by Registrar of Companies after the company was wound up. Further, I find that in the application to recall the order dated 9.8.2002, the respondent company has not given the source of information about the winding up proceedings. English newspaper "Pioneer" and Hindi newspaper "Aaj" have wide circulation in Varanasi. In the circumstances, I find that the respondent company was served and had full knowledge of the proceedings of winding up and that as soon as winding up order was made on 9.8.2002, he filed application on 10 September, 2002, to recall the order.

16. On merits, it has not been denied that the amount taken as loan was not credited to the account of company. Sri Raj Narayan Singh was the director of the company and could represent the company, for the purposes of taking and entering into agreement for taking loan. It has not been denied that Sri Raj Narayan Singh was not the director of company on the date loan agreement was executed. He, therefore, could enter into a loan transaction on behalf of company and bind the company with the obligation arising out of the agreement.

17. For the aforesaid reasons, the application to recall the winding up order dated 9.8.2002 is dismissed.