

(2017) 02 GAU CK 0040

GAUHATI HIGH COURT

Case No: 8 of 2015

Madhusudan Mandal

APPELLANT

Vs

Apposite Benefit Society Limited

RESPONDENT

Date of Decision: Feb. 22, 2017**Acts Referred:**

- Companies Act, 1956, Section 439, Section 434, Section 433, Section 419(4) - Provisions as to applications for winding up. - Company when deemed unabl

Hon'ble Judges: Suman Shyam**Advocate:** N. Dasgupta, S.S. Roy

Judgement

1. Heard Mr. N. Dasgupta as well as Mr. S.S. Roy, learned counsel appearing on behalf of the petitioner. None appears for the respondent.

2. This petition has been filed under Section 433, 434 and 439 of the Companies Act, 1956 seeking an order for winding up of the respondent company and for other consequential measures.

3. Notice in this case was issued by the order dated 14/08/2015, pursuant where to, steps had also been taken by the petitioner for service of notice upon the respondent company. However, during the pendency of this proceeding, the Government of India, Ministry of Corporate Affairs had issued a Gazette notification dated 07/12/2016, inter-alia, providing that all pending applications for winding up, wherein the petition has not been served on the respondent, as required under Rule 26 of the Company (Court) Rules, 1959, shall be transferred to the Bench of the Company Law Tribunal having jurisdiction over the matter. A question, therefore, arose in the present case, as to whether this petition is also required to be transferred to the Company Law Tribunal. For the purpose of ascertaining as to whether this winding up petition deserves to be transferred before the Bench of the

Tribunal, the following factual background is required to be taken note of :

I. Pursuant to the order dated 14/08/2015, the petitioner had taken steps by registered post for service of notice upon the respondents. However, records reveals that notice could not be served upon the sole respondent.

II. On 01/10/2015, the petitioner filed an affidavit bringing on record a computer generated track report of the article booked under Registration No. RS468071536IN dated 20/08/2015 in support of his contention that the notice was delivered at the Esplanade Office of the respondent on 07/09/2015.

III. Taking note of the contents of the affidavit dated 01/10/2015, this Court had passed an order dated 05/10/2015 directing the Registry to verify and submit a report as to whether notice was issued upon the sole respondent under the aforesaid registration number and furnish a report.

IV. Registry's report dated 18/11/2015 indicates that notice was issued upon the sole respondent by registered post on 19/08/2015 but neither any AD Card nor any un-served notice had been received back from the sole respondent.

V. On 02/02/2016, the learned counsel for the petitioner made a prayer before this Court seeking leave to take fresh step for service of notice upon the sole respondent, which prayer was allowed by this Court making the notice returnable on 01/04/2016. Even on this occasion, although notice was issued by registered post, yet, no service report was available. Therefore, on 01/04/2016, the learned counsel for the petitioner once again made a prayer before this Court to permit him to take fresh step on the respondent company at its corporate address at Kolkata by registered post. The said prayer was allowed. But even on this occasion, service of notice could not be completed upon the respondent.

VI. On 23/05/2016, the learned counsel for the petitioner appeared before this Court and submitted that notice could not be served upon the respondent; therefore, a prayer was made to permit substituted service upon the respondent company. The order dated 23/05/2016 passed by this Court permitting service of notice by substituted method, is quoted herein below for ready reference :-

"23/05/2016

Mr. SS Roy, learned counsel for the petitioner submits that steps taken by registered post could not be served. He submits that there is reason to believe that notice cannot be served upon the respondent by usual process as the respondent must be avoiding service. He prays that he be permitted to take steps by substituted process.

Prayer is allowed.

Appellant shall take steps within 6(six) weeks by publishing notices in two local newspapers, one in English and another in Bengali. The two newspapers shall be produced before this court alongwith an affidavit after six weeks. The date of appearance of the appellant shall be shown as 29.8.2016."

VII. In terms of the leave granted by this Court by the order dated 23/05/2016, the petitioner had published notice of this case in 2 (two) daily newspapers, viz, "The Telegraph" in its issue dated 15/07/2016 and "Dainik Jugashanka" in its issue dated 28/07/2016.

VIII. On the basis of the newspaper publication referred to above, this Court had passed order dated 31/08/2016, accepting service of notice upon the sole respondent.

4. When the matter was pending before this Court, the notification dated 07/12/2016 was issued by the Government of India, notifying the Companies (Transfer of Pending Proceedings) Rules, 2016, which contains a provision in the form of Rule 5, providing for transfer of pending proceedings of winding up on the ground of inability to pay debt providing that all pending proceedings where copy of the petition has not been served upon the respondent as required under Rule 26 of the Company (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 in the matter.

5. Resisting any order from this Court transferring the present petition before the

Company Law Tribunal Bench established at Guwahati, Mr. Dasgupta submits that in this case steps had been taken by registered post with A/D along with the copy of the petition for service upon the respondent company and there are materials on record to prima facie establish that the notice has been delivered at the Corporate office of the respondent at Kolkata.

6. By referring to Clause 27 of the General Clauses Act, Mr. Dasgupta submits that since no un-served notice has returned back from the addressee, this is a case where this Court ought to have drawn presumption regarding sufficiency of service. In support of his aforesaid argument, Mr. Dasgupta has relied upon the following decisions of the Supreme Court.

i. (2006) 6 SCC 456 (D. Vinod Shivappa Vs. Nanda Belliappa),

ii. (1997) 7 SCC 510 (K. Bhaskaran Vs. Sankaran Vaidhyan Balan and another).

iii. AIR 1980 SC 630 (Ms/. Madan and Co. Vs. Wazir Jaivir Chand).

7. Before dealing with the submissions made by the learned counsel for the petitioner, it would be apposite to quote Rule 5 of the Rules of 2016:-

"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."

8. A reading of the aforesaid Rule goes to show that service of the petition as required under Rule 26 of the Company (Court) Rules, 1959 would be sine qua non for the continuance of any pending proceeding for winding up of a Company before the forum of High Court. Rule 26 of the Company (Court) Rules, 1959 provides as follows :-

"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."

9. A conjoint reading of Rule 5 with Rule 26 of the Company (Court) Rules, leaves no room for doubt that every petition for winding up where a copy of the petition has not been served upon the respondent, the matter has to be transferred for hearing before the bench of the Company Law Tribunal (CLT) and in all such cases, the High Court would cease to have jurisdiction to proceed further in the matter.

10. It would be important to note herein that service of notice upon the respondent without the proof of service of petition would not be sufficient to prevent the transfer of the proceeding before the Tribunal unless there is any order dispensing with the service of copy of the petition. In the present case, as has been noted above, this Court had not accepted the service of notice upon the respondent by invoking Clause-27 of the General Clauses Act. As a matter of fact, even the petitioner's counsel has accepted the fact that no notice could be served upon the respondent company. It is on such count that notice of this petition was directed to

be served by substituted method and the same having been done, the matter was fixed for admission hearing. Needless to mention herein that when notice is served upon the respondent through substituted method by making newspaper publication, the question of serving the petition upon the respondent cannot arise. Therefore, in this case, there was no service of petition of the winding up application upon the respondent, preventing the operation of Rule 5 of the Rules of 2016.

11. Mr. Dasgupta has strenuously argued that even if notice was served by newspaper publication in this case, yet, there are evidence to show that earlier notices accompanied by copy of the petition have been delivered to the respondent company. The said submission of the learned counsel cannot be accepted in view of the stipulation contained in Rule 32 of the Company (Court) Rules, 1959, which reads as follows :-

"32. Mode of Service and service when deemed to be effected : "Save as otherwise provided by these Rules or by an order of Court, all notices, summons, and other documents required to be served on any person may be served either personally by delivering a copy thereof to such person or upon his Advocate where he appears by Advocate or, except where personal service is required by pre-paid registered post for acknowledgement due addressed to the last known address of such person. In the case of service by registered post where no acknowledgement signed by the addressee or his duly authorised agent is received, orders of Court shall be obtained as to the sufficiency of service or as to the further steps to be taken for service as the Court may direct.

Provided that where a notice, summons or other document has to be served on any class of persons such as shareholders, debenture-holders, creditors and the like, the same may be sent by prepaid registered post or by ordinary post under certificate of posting, as may be provided by these rules or by an order of Court, and unless otherwise ordered by the Court, the service shall be deemed to be effected at the time when the said notice, summons or other document ought to be delivered in the ordinary course of post by the post office, and notwithstanding the same is returned undelivered by the post office.

(2) Where notice of any petition, application, summons or other proceeding has to be given to the Central Government under these rules, it shall be addressed to and served on the Secretary to Government of India, department of Company Law Administration, New Delhi, or such other officer at the Central Government may authorise to receive notices on its behalf.

(3) Where any person has to be served at an address outside India, the notice or other process to be served on him shall, subject to orders of the Court, be sent to such address by prepaid airmail registered post for acknowledgement due."

12. It is, therefore, evident that even in a case involving issuance of notice by means of pre-paid registered post in the last known address of the addressee, an order of the Court regarding sufficiency of service would be necessary. As mentioned above, there is no such order in this case. On the contrary, the successive orders passed by this Court goes to show that this Court had never accepted the service of notice upon the respondent Company through registered post.

13. The only issue arising in this proceeding at this stage is whether service of notice without being accompanied by a copy of the petition would amount to compliance of Rule 26, so as to prevent Rule 5 of the Rules of 2016 to come into operation. The recent decision of the Bombay High Court in the case of West Hills Realty Private Ltd. Vs. Neelkamal Tower Pvt. Ltd. [Company petition No. 331/2016] is precisely on this point. In the said decision, it has been categorically held that service of a copy of the petition upon the named respondent would be necessary for completing the process indicated in Rule 26 of the Company (Court) Rules, 1959 and, therefore, mere service of notice without the accompanying petition would not amount to compliance of Rules 26. I am in respectful agreement with the aforesaid view expressed by the learned Single Judge of the Bombay High Court .

14. The decisions of the Supreme Court relied upon by Mr. Dasgupta are all on the point of proof of service of notice but in the present case we are concerned with proof of "service of petition" upon the respondent in compliance with Rule 26 of the Company (Court) Rules, 1959. As such, the decisions relied upon by Mr. Dasgupta would be of no assistance to him.

15. For the reasons stated hereinabove, this court is left with no option but to direct that this winding up petition be transferred to the Guwahati Bench of the Company Law Tribunal (CLT) in accordance with Rule 5 of the Rules of 2016.

16. Registry to take steps in the matter accordingly.

17. Upon such transfer, the learned Company Law Tribunal may cause fresh notice of the proceeding be issued to both parties after renumbering the petition.