Gujarat High Court
Satellite Television Asian ... vs Kunvar Ajay Desiner Saree (P) Ltd. on 25 April, 2003
Equivalent citations: 2004 118 CompCas 609 Guj, 2004 50 SCL 575 Guj
Author: R R Tripathi
Bench: R R Tripathi
JUDGMENT Ravi R. Tripathi, J.

1. Company Petition No. 210 of 2002 is filed on 20.11.2002 praying that Kunvar Ajay Designer Saree (P) Ltd. having its registered office at B-1, Thakkar Palace, Ghod Dod Road, Surat 395002, be wound up under the orders and directions of this Court. It is also prayed that the Official Liquidator or some other fit and proper person, as this Honourable Court may deem fit and proper be appointed as Liquidator of the company, with all powers under the provisions of the Companies Act, 1956. By way of interim relief it was prayed that, pending hearing and final disposal of the petition, the Official Liquidator or some other fit and proper person as this Honourable Court may deem fit and proper may be appointed as Provisional Official Liquidator of the company with all powers under the Companies Act, 1956. The Court issued notice on 25.11.2002 returnable on 17.12.2002. Before that date the petitioner caused an advertisement in newspapers, Sandesh (Surat and Ahmedabad editions) and Gujarat Samachar (Surat and Ahmedabad editions) on 14.12.2002. Having learnt about the said advertisement the respondent company filed Company Application No. 407 2002 for the prayer, "To dismiss the above mentioned winding up petition of the petitioners therein, Satellite Television Asian Region ltd., for the abuse of the process of the Court by publishing a premature advertisement of winding up in various newspapers without the direction thereof by the Company Court."

It is also prayed in the Company Application that, "To award exemplary costs for the said abuse of the process of this Hon'ble Court."

2. Mr. Soparkar, the learned counsel appearing with the learned advocate fro the respondent company in the Company Petition, which is the applicant in the Company Application submitted that as he has raised a preliminary objection about the abuse of process of Court, he has first 'right of audience'. The Senior Advocate was heard at length. He invited attention of the Court to various provisions of the Company law including various rules of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules"). He submitted that Rule 24 provides for advertisement of the petition. Rule 24 is reproduced herein below:

"R.24. Advertisement of petition -- (1) Where any petition is required to be advertised, it shall, unless the Judge otherwise orders, or these rules otherwise provide, be advertised not less than fourteen days before the date fixed for hearing, in one issue of the Official Gazette of the State or the Union Territory concerned and in one issue each of a daily newspaper in the English language and a daily newspaper in the regional language circulating in the State or the Union Territory concerned, as may be fixed by the Judge.

(2) Except in the case of a petition to wind up a company the Judge may, if he thinks fit, dispense with any advertisement required by these rules."

3. Rule 96 provides for admission of petition and directions as to advertisement. The rule reads as under:

"R.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."

4. The learned counsel submitted that Rule 96 contemplates three things to happen, namely, (i) on filing of the petition posting of the same before the Judge for admission, once it is admitted, (ii) fixing a date for hearing. When that is done, (iii) issuing directions as to advertisement to be published.

5. The learned counsel submitted that the subsequent stages do not automatically follow the earlier one, meaning thereby, merely because a petition is filed it is not necessary that the same will be admitted. After the petition is filed, it is placed before the learned Judge for admission hearing. It is on hearing the learned advocate appearing for the petitioner, Court decides as to whether the petition deserves any cognisance or not. Once it is admitted, its hearing is fixed. The Court then decides about its advertisement and issues necessary directions as warranted in the facts of the case. He further submitted that in fact that is why the Legislature has placed all these stages in a sequence and the learned Judge has to apply his mind at every stage. Even after admitting a petition and fixing its date of hearing, the learned Judge has to consider as to whether the respondent company be given a notice before giving directions fro the advertisement. The learned counsel submitted that if that was not so, the latter part of the rule, namely, ".. .. 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."

would not have been so worded. He further submitted that it is not a necessary corollary of 'admission' of a petition that advertisement must follow. In a given case, in given facts and circumstances, the Judge may think that instead of causing publication of an advertisement, the company be given a notice before advertisement. The learned counsel submitted that it is in view of the aforesaid legal position that the action of the petitioning creditor of publishing the advertisement without there being any direction for the same is required to be considered as a serious abuse of process of the Court and the petition is required to be thrown out only on this short ground.

6. The learned counsel submitted that once the Court issues a direction of causing publication of advertisement, then Rule 24 comes into play and an advertisement is to be caused as provided therein. He submitted that advertising the winding up petition and pre-publication of any sort has inherited commercial harm. That is why the same is viewed as so serious as to prove fatal to the petition. He further submitted that the action of the petitioning creditors of causing an advertisement which they have described as informative and cautionary in nature in their reply filed to Company Application No. 407 of 2002 is to be considered as a serious abuse of process of the court as it has harmed the repute of the company and must necessarily result into summary

dismissal of the petition with exemplary costs. The learned counsel submitted that even in England where an advertisement of winding up petition presented at the office of the Registrar of the Companies Court is a procedural requirement and the petitioner or his solicitor has to file a certificate of compliance that the rules relating to service and advertisement of the petition as provided, a period of not less than seven clear days after the petition is served on the company with a purpose that before notice is advertised the company has opportunity to prevent the advertisement of the petition which may immensely cause injustice to the company, particularly if it is a going concern. The learned counsel submitted that if that is the position in English law wherein advertisement of every petition is to be caused without there being a specific order from the company court, in India when the position of law is that an advertisement can be caused only after a specific direction is issued by the Court, action of the petitioning creditors requires to be viewed very seriously. The learned counsel relied upon a decision of this Court in the matter of American Express Bank Ltd. Vs. Core Health Care Ltd., reported in (1999) 96 Company Cases Page 841, wherein he relied upon the following discussion :

".. .. ..

In this connection it would be apposite to allude to the position obtaining in England as per Palmer's Company Law. A winding up petition to the High Court is presented at the office of the Registrar of the Companies court, who appoints the time and place at which the petition is to be heard. After a petition has been presented, the petitioner or his solicitor must, on a day to be appointed by the Registrar, not less than five days before the day appointed for the hearing of the petition, file a certificate of compliance with the rules relating to service and advertisement of the petition. The law has been stated to be that unless the court otherwise directs, every petition is to be advertised in the Gazette not less than seven clear days (excluding Saturdays, Sundays and public holidays) after it has been served on the company and not less than seven clear days before the day fixed for the hearing."

The difference in procedure has to be noticed that the petition is required to be served on the company and advertisement by public notice is to wait until seven days excluding holidays after service on the company. The purpose for retaining this hiatus is that before notice is advertised the company has an opportunity to prevent the advertisement of the petition which may immensely cause injustice to the company particularly if it is a going concern. The following passage may be illuminating:

"For the purposes of any stay of advertisement which is granted by the Court, pending the resolution of any challenge to the pursuit of the proceedings, the concept of 'advertisement' is a wide one extending to any informal communication to third parties. Thus, the petitioner's act of sending a faxed copy of the winding up petition to the company's bank on the same day as the petition was served on the company was considered by the court in Bill Hennessey Associates Ltd., In re (1992) BCC 386 to justify dismissal of the petition. The faxing of the copy was held to have been an advertisement in violation of rule 11(2) which requires a minimum of seven business days to elapse from the date of service of the petition, and the ulterior purpose of this targeted publicity was judged to have been the putting of pressure on the company to pay the sum demanded. This rigorous

approach is necessitated by the commercial harm which can be inflicted upon a company through the improper use against it of the presentation of a winding up petition."

These observations clearly warn against the inherent commercial harm that lay in advertising the winding up petition and pre-publication of any sort had been viewed as so serious as to prove fatal to the petition.

It appears that there being no separate provisions like admission before making the order of advertisement, the provision for a clear period for abstinence from advertisement has been stipulated in the rules itself giving the respondent company a chance to approach the court and obtain the postponement of advertisement resulting in a public notice of the pending petitions, and to save it from an inherent commercial harm which such public notice may cause. In other words, the hearing of the petition at that stage about the advisability of winding up is envisaged before public notice is advertised or ordered to be advertised, spelling serious adverse consequence in a commercial sense.

.. .. "

7. The learned counsel submitted that in a given case even sending of fax copy of a Company Petition is held to be an advertisement by the courts while in the present case a fulfledged advertisement is issued giving details of winding up petition filed before this Court. He submitted that the advertisement issued by the petitioning creditors is nothing short of an advertisement of a winding up petition inasmuch as it gives the number of the Company Petition which is filed before this Court. He submitted that therefore, the petitioning creditor could not be heard of saying that the said advertisement was caused by the petitioning creditors only with a view to make the members of public aware of their claim against the company so that future multiple proceedings can be avoided.

8. The learned counsel for the company relied upon the judgement of Chancery Division (Companies Court) reported in (1996) 1 BCLC (Butterworths Company Law Cases) 501. The learned counsel submitted that in this case even telephone calls made by the petitioning party to the local office of the Inland Revenue saying that she intended to have the company wound up, was considered to be an advertisement. On that ground the party was non suited. The learned counsel invited attention of the Court to the following para of the judgement.

"Advertisement in the case of contributories' petitions.

There was no dispute between the parties that the communication of the intention to present the petition or the fact of its existence to BCS, the bank and the Inland Revenue constituted 'advertisement'. .. .."

The Court while referring to various decisions referred to the decision in the case Re Signland Ltd. (1982) 2 All ER 609, wherein it is observed that, "... ... ...

In the present case, I understand not only was there a failure to allow the company seven clear days after service of the petition before advertisement took place, but the advertisement in fact took place two days before the petition was served. Furthermore the company has appeared to take the point. While I am quite content to accept the assurance of counsel appearing on behalf of the petitioner to the effect that this breach of the rules was not deliberate, it seems to me to have been a flagrant and serious breach and one of a type which the court must take every step to discourage. .. ..

To advertise before service of the petition appears to me not only an infringement of the rules but a serious abuse of the whole process of advertisement."

Justice Laddie has noted that the aforesaid was the view taken by Slade, J. though he accepted that in so doing the petitioner had not intended deliberately to breach any of the rules. Justice Laddie finally observed that, "It seems to me that to engage in premature advertisement is at least as likely to be an abuse of process in relation to contributories' petitions as it is in the case of creditors' petitions. To engage in advertisement in advance of the court having had an opportunity to determine, in accordance with r.4.23(1)(c), whether there should be any advertisement at all appears to me to be prima facie an abuse. ... ..."

9. The learned counsel submitted that there is a definite purpose behind not permitting a premature advertisement of a winding up petition. He submitted that while discussing the object behind the rules for advertisement the learned Judge Slade in the case of Re Signland Ltd (supra) stated as under:

"As I understand it, the principal reasons why the rules have directed that advertisement shall take place not less than seven clear days after service on the company are (1) to give a company served with a winding up petition the opportunity to discharge the debit in question, if it is undisputed, before advertisement takes place, with all the necessarily potentially damaging consequences to the company, and (2) to enable the company, if it wishes to dispute the debt, to apply to the court to restrain advertisement. As a matter of indulgence, however, it has been my practice during this term to accept premature advertisement where it has taken place less than seven clear days after service on the company and the company has not appeared to take the point."

The counsel submitted that while in India Rule 96 takes care of the aforesaid object. He emphatically submitted that in India advertisement is not a necessary corollary to filing of the petition as it is the case in England. He submitted that in India advertisement has to be caused only after there is a specific order of the Court to that effect. He submitted that without going into desirability of the position of law in England and in India he restricted his submissions that in the present case the petitioning creditors have caused an advertisement and have thus, resorted to abuse of process of the court and therefore, holding that the petitioning creditors are guilty of grave abuse of process of court, the petition should be dismissed on this short ground.

10. The learned counsel appearing with Mr. Soni submitted that, (i) the present application is not maintainable, (ii) the correct, true, admitted facts stated in the advertisement do not constitute, an abuse of process of court. In the alternative the advertisement of correct, true and admitted facts

will not amount to an advertisement under the company law, (iii) discretion should be exercised in favour of the petitioning creditors taking into consideration the facts of the case, (iv) the respondent company has chosen not to file any reply on merits and has only thought fit to take a technical plea of abuse of process of court by the petitioning creditor. He submitted that in view of various provisions of the company law and rules on the subject, the application should not be entertained and the same should be rejected and the company petition be entertained. The learned advocate invited attention of the Court to the provisions of section 443(1)(a). He submitted that under sec.443(1)(a) if at all the petition is to be dismissed the same can be done only on hearing. Hearing in this subsection means fulfledged hearing. Fulfledged hearing can take place only when the respondent company has put forward its case on merits and the court has appreciated the same. He submitted that without doing so dismissing the petition and non suiting the petitioning creditors will result into injustice to the petitioning creditors.

10.1 The submissions of the learned counsel cannot be accepted for the simple reason that even if the term, 'hearing' is to mean 'fulfledged hearing' it cannot be taken to mean that it is only after the company places its case on merits before the court. It may happen that the Company Petition is filed before the Court and the respondent company comes forward and says that here is the registration certificate and that the company is not registered within the territorial jurisdiction of the court taking up the matter. If the submissions of the learned counsel are accepted, the Court will have to direct such company to place its case on merits before the court. After that only the court can direct the petitioning creditor to go to the concerned court. Even otherwise taking into consideration the objection raised by the respondent company as a preliminary objection, if the court is of the opinion that there is substance in the preliminary objection, normally if the court feels that the petitioning creditor is guilty of an act of abuse of process of court, this Court is of the opinion that the respondent company is not required to be called upon to place its case on merits. In that view of the matter the submissions are rejected. The learned counsel placed reliance on the decision of the Bombay High Court in the matter of S. Kantilal and Co. Pvt. Ltd. Vs. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd. reported in (1993) 76 Company Cases page 800. The counsel placed reliance on the following Head Note:

"When a company fails to comply with a notice under sec.434(1)(a) for payment of a debt, the Court has no discretion but to make a winding up order. The sub clause does not merely lay down a presumption of inability to pay, but the word "shall" is of great significance and the creditor is entitled to a winding up order ex debito justitiae. In such a matter a creditor is not required to establish that the company is commercially insolvent, and the fact that the creditor has an alternative means of filing a suit to recover the debt is irrelevant."

11. The learned counsel also relied upon the following observations made by the learned Judge in the said decision, ".. .. According to him, the company is now making various attempts to wriggle out of the situation by all sorts of ways and for that matter whatever has been urged today is some new case de hors whatever has been pleaded or for that matter what is pleaded is not sustainable on facts. .. .. ..

xx xx xx .. ..

According to him, the sole question to ask is whether the claim made by the petitioners is bona fide disputed by the company and if it is not the winding up must follow. .. .."

12. The learned counsel submitted that in the present case also similar question is required to be asked by the Court as to whether the respondent company has bona fide disputed claim of the petitioning creditors and if the answer is 'no', the order of winding up is to be passed. The learned counsel emphatically submitted that in the present case answer can only be 'no', as the respondent company has not filed any reply on merits as a necessary consequence of order of winding up must follow.

13. Having perused the judgement, this Court is of the opinion that the said judgement has no application to the facts of the present case. The Court at present is required to consider firstly the question as to whether the petitioning creditors are guilty of the act of abuse of process of court. If answer is 'yes', the court is not required to go into any other question because when a party is guilty of the act of abuse of process of court, it does not deserve any order under discretionary jurisdiction of the court. There are number of judgements of this Court as well as that of the Honourable the Apex Court to the effect that the order of winding up is not a matter of right. More so in case of a going concern. The court has to consider the desirability of passing of winding up order. The petitioning creditors can only invoke jurisdiction of the court but it is for the court to decide as to whether in a given fact and circumstances of the case an order of winding up is required to be passed or not. In that view of the matter the submissions of the learned counsel having found no substance are rejected.

14. The learned counsel also urged that the advertisement published was bona fide and was only with a view to see that the members of public at large are not defrauded by the respondent company. This Court is not in a position to agree with the submission of the learned counsel inasmuch as Rule 96 wherein it is clearly provided that an advertisement can be caused only after the same is ordered by the Court. An advertisement remains the same irrespective of the purpose for which it is issued. Therefore, it remains to be an act of advertisement amounting to an act of abuse of process of the court. Therefore, this submission is also not accepted. The learned counsel also submitted that the advertisement which was caused cannot be said to be an advertisement under the Company law and therefore, it should not be held to have constituted an act of abuse of process of court. The learned counsel Mr. Soparkar invited attention of the court to the advertisement wherein the number of the Company Petition is mentioned and it is also stated that the petition is filed in the High Court of Gujarat seeking orders of winding up. That being so, only because of the format is different or at variance, it cannot be said that it is not an act of advertisement. Therefore, this contention is also rejected.

15. The learned counsel did try to distinguish the aforesaid three decisions relied upon by the learned advocate for the company, but is not successful.

16. The learned counsel also submitted that the Court should take into consideration the events subsequent to filing of the affidavit in reply in the Company Application as stated in para 3 therein in view of the discussion hereinabove the same is of no consequence.

17. In the result, Company Petition No. 210 of 2002 is dismissed. Company Application No. 407 of 2002 is allowed with cost of Rs. 7500/-, (Rupees seven thousand and five hundred only).