BOMBAY HIGH COURT

Bilasrai Joharmal

Vs.

Akola Electric Supply Co., Private Ltd

O. C.J., Appeal No, 70 of 1957, I.C. No. 81 of 1957

(M.C. Chagla, C.J. and S.T. Desai, J.)

07.03.1958

JUDGMENT

M.C. Chagla, C.J.

1. This is an appeal against an order of Mr. Justice Coyajee dismissing a petition under the Companies Act. The petition was presented for the winding up of the first respondent company and in the alternative a prayer was made for appropriate orders under Sections 397, 398 and 402. At the hearing of the petition the prayer for winding up was given up; and substantially the controversy before Mr. Justice Coyajee was whether any directions should be issued under Sections 397 and 398 of the Companies Act.

2. A preliminary objection has been taken by Mr. Bhabha and that is that Mr. Justice Coyajee was in error in hearing the petition without notice having been given to the Central Government under Section 400 of the Companies Act. Section 400 of the Companies Act provides

> "that the Court shall give notice of every application made to it under Section 397 or 398 to the Central Government and shall take into consideration the representation, if any, made to it by that Government, before passing a final order under that section."

Mr. Bhabha contends that the provisions of Section 400 are mandatory and that no order can be passed on a Petition which constitutes an application under Section 397 or Section 398 without notice being given to the Central Government and, what is more without the Court taking into consideration the representations, if any, made by that Government. Section 397 Sub-Section (1) deals with a complaint made by any members of a company who complain that the affairs of the company are being conducted in a manner oppressive to any member or members; and Sub-Section (2) confers the power upon the Court to make, instead of a winding up order, any order which it thinks fit to bring to an end the matters complained of. Section 398 enables a member to complain that the affairs of a company are being conducted in a manner prejudicial to the interests of the company or with regard to the various matters set out in sub-clause (b) of Sub-Section (1); and under Sub-Section (2), if the Court is of opinion that the affairs of the company

are being conducted in the manner complained of,, the Court may make such order as it thinks fit with a view to bringing to an end or preventing the matters complained of or apprehended. Section 399 lays down the qualifications for a member of the company to apply and it is not disputed in this case that the petitioner had the necessary statutory qualification under Section 399 as far as share holding is concerned. Now, what is urged by Mr. Bhabha is that, as soon as a complaint is received by the Court under Section 397 or Section 398, it is incumbent upon the Court to give notice of this complaint to the Central Government and no action can be taken by the Court on the petition preferred under Section 397 or Section 398 without such notice being given and the representations, if any, of the Central Government being considered.

3. Now, in this case, what happened was this. This was a composite petition, as it were, both for winding up and for directions under Section 397 and Section 398. It came before Mr. Justice K.T. Desai and he admitted it and directed notice to be served upon the company. Pursuant to that notice the company appeared before Mr., Justice Coyajee and Mr. Justice Coyajee, after considering the various aspects of the matter, ultimately dismissed the petition. Now it is very desirable that we should lay down the proper prartice that should be followed with regard to the giving of notice to the Central Government under Section 400. Recently in *Western India, Theatres Ltd v. Associated Bombay Cinemas Ltd*[1]. my brother Dixit and myself were considering the practice that should be followed in the case of admission of petitions for winding up and we were called upon there to construe Rule 733 of the High Court Rules; and in that Judgment we pointed out that the proper practice - which was the practice followed by this Court and which was in conformity with that rule was that when a petition for winding up is presented to a Judge, it is open to him to dismiss it summarily or to accept it and direct that notice should be given to the company. When he does that, it does not constitute its admission for the purpose of Rule 733 and it does not become obligatory for the Court to advertise the petition. When the petition comes up on that notice before the Court, it is open to the Court that stage to dismiss the petition or to direct that advertisement should be given; and if the direction is given for advertisement, then the petition would be heard after this direction was carried out and it would then be heard finally on the merits. Now it is necessary that that practice should be approximated to the practice which now must be laid down with regard to notice to be given to the Central Government under Section 400 of the Companies Act.

4. Turning first to the proper interpretation of Section 400, two extreme views have been pressed before us one by Mr. Bhabha and the other by Mr. Gupte. Mr. Bhabha's contention is, as we have already indicated, that as soon as a complaint is made under Section 397 or Section 398, which complaint takes the form of a petition, the Court without more must issue a notice to the Central Government. The other view, which has been pressed for by Mr. Gupte, is that Section 400 has no application at all when the Court dismisses a petition. It has only application when the Court proposes to pass an effective order under Section 397 or Section 398 or an order under Section 402, and, according to Mr. Gupte, inasmuch as the Court in this case dismissed the petition and did not pass any effective order, no question of giving notice to the Central Government arose. In our opinion, both the extreme views are untenable. As in other matters of life so also in law, a happy compromise is better than an extreme attitude. Now turning first to Mr. Bhabha's contention, in our opinion, it cannot be suggested that an application made

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by a member who does not possess the statutory qualifications under Section 399 is a petition which could not be summarily dismissed by the Court without giving notice to the Central

Government. The reason for taking that view is that it does not constitute an application at all under Section 897 or Section 398 and what Section 400 requires is an application which is made under Section 397 or Section 398. Equally so, if on reading the petition the Court comes to the conclusion that the averments do not satisfy what is required by Section 397 and Section 398, then it is not an application under Section 397 or Section 398 and the Court may dismiss it summarily without directing a notice to be given to the Central Government. With regard to Mr. Gupte's contention, the object of Section 400 is that the Court should not pass any final order on merits one way or the other, in favor of the petitioners or against the petitioners, in favor of the company or against the company, under Section 397 or Section 398 without giving an opportunity to the Central Government to put forward its views before the Court. It is impossible to accept the view that Government's view should only be sought when the Court is going to take one view of the petition and not the other; and the other insuperable difficulty in the way of accepting Mr. Gupte's contention is that the Court cannot make up its mind at the stage of giving notice to the Central Government whether it is going to dismiss the petition or grant it. Therefore, according to Mr. Gupte, the question whether a notice was required to be served upon the Central-Government or not would have to be decided ex-post-facto after knowing what the decision of the Court was. In view of what we have said, therefore, the proper practice would be this if a petition is presented to the Court-let us say a petition which is a composite petition, as in this case-it would be open to the Court or to the Company Judge to dismiss it summarily and not to admit it at all. That would apply both with regard to the prayer for winding up and with regard to the directions under Section 397 and Section 398. But the Court may not want to dismiss it summarily and the Court may want it to be admitted at least for the purpose of giving notice to the company so that the company should be heard. If the Company Judge takes that view at that stage, then we will direct that not only a notice should be given to the company, but also to the Central Government, so that all difficulties with regard to Section 400 would be obviated. It would also lead to this useful result, that when the petition comes up before the Company Judge after it has been accepted, not only the Company will be before the Company Judge, but also the Central Government. At that stage the learned Judge will give such directions as he thinks proper. With regard to winding up, if he wishes to go further into the matter, he would have the petition advertised as required under the High Court Rules. If, on the other hand, he thinks that there is no case for winding up, he may dispose of that part of the petition and with regard to Sections 397 and 398 e would give such directions as the Companies Act provides, as we have just pointed out, after hearing both the company and the Central Government. If the petition is not a composite petition and is only a petition under Sections 397 or 398, we suggest that a similar practice should be followed. The Judge may summarily dismiss it and the summary dismissal would arise under circumstances which we have already indicated in the judgment. But if he does not summarily dismiss it and admits or accepts it then the office will immediately issue notice to the Central Government and the petition will come up for hearing after the Central government has been served.

5. In this particular case, Mr. Justice K.T. Desai did not summarily dismiss the petition; Mr. Justice Coyajee heard it for three days; and it would be stretching the meaning of the term if we were to say that the effect of Mr. Justice Coyajee's judgment is that there was a summary dismissal of this, petition. Not only it was not a summary dismissal, but Mr. Justice Coyajee in terms says in his judgment that he dismissed the petition after a fair and full hearing. Now strictly Mr. Bhabha would be entitled to the order of Mr. Justice Coyajee being set aside, there being a remand and Mr. Justice Coyajee hearing this petition after proper notice being given to the

Central Government under Section 400. But we do not think that this is a case where costs should be unnecessarily wasted. What we, therefore, propose to do is to adjourn the hearing of this appeal, direct the office to give a notice to the attorneys for the Central Government and this appeal will come up after the notice has been duly served as we would like to hear what the Central Government has got to say with regard to the order of Mr. Justice Coyajee. If after hearing the Central Government and the other parties we think that a remand is necessary, we will so direct. If, on the other hand, we feel that we are in a position to dispose of the appeal without a remand, we will proceed to do so.

6. The appeal shall be adjourned till the income-tax matters are over and it shall be placed on Board after Appeal No. 54 of 1957.
Order accordingly.