

(2001) 12 AP CK 0041

In the Andhra Pradesh High Court

Case No : Company Application No. 552 of 2001 in Company Petition No. 84 of 1997

Asia Pacific Investment Trust Ltd. (In Liquidation)

APPELLANT

Vs

Shaw Wallace and Co. Ltd.

RESPONDENT

Date of Decision : 05-12-2001

Acts Referred:

Companies Act, 1956 — Section 446, 446(2), 537
Income Tax Act, 1961 — Section 226(3)

Citation : (2002) 110 CompCas 58 : (2002) 254 ITR 750

Hon'ble Judges : J. Chelameswar, J

Bench : Single Bench

Advocate : Ramalingeswara Reddy, for the Respondent

Final Decision : Allowed

Judgement

Chelameswar, J.—This is an application filed by the official liquidator u/s 446(2) (b) of the Companies Act, 1956, with a prayer as follows :

"(i) to direct the respondent herein to pay to the applicant herein a sum of Rs. 11,60,461 along with interest at 18 per cent, per annum with effect from August 19, 1998, till the date of realization;

(ii) order the costs of this application to come out of the assets of the company."

2. By an order dated August 19, 1998 made in Company Petition No. 84 of 1997, this court directed that the company known as Asia Pacific Investment Trust Limited be wound up and the official liquidator attached to this court was appointed to be the liquidator of the said company. The liquidator, on examination of the records of the company, came to the conclusion that the respondent herein owes an amount of Rs. 11,60,461 along with interest with effect from August 19, 1998, to the company in liquidation, and therefore called upon the respondent by his notice dated June 8, 1999, to pay the above mentioned amount due to the company in liquidation. The respondent by its

letter dated August 24, 1999, informed the official liquidator that the Assistant Commissioner of Income Tax, Central Circle-3, Hyderabad, had issued a notice to the respondent-company to remit the amount due and payable to the company in liquidation to the Income Tax Department on the ground that an amount of Rs. 461.75 lakhs was due to the Income Tax Department from the company in liquidation, and, therefore, the respondent would not be in a position to comply with the notice of the official liquidator. Some further correspondence took place between the parties to the application, the details of which may not be necessary for the purpose of present case. Thereafter, the official liquidator came up with the present application.

3. Notice was ordered on August 27, 2001. The respondent entered appearance and filed its counter, wherein it is stated that the Assistant Commissioner of Income Tax, Central Circle-3, Hyderabad, issued a notice dated February 17, 1998, purported to be one u/s 226(3) of the Income Tax Act, 1961, calling upon the respondent-company to remit the amount due and payable to the company in liquidation and, therefore, the respondent-company is not in a position to comply with the notice issued by the official liquidator.

4. In the background of the above-mentioned facts, the following two questions arise for the consideration of this court.

(i) In view of the winding up order passed by this court against the company now in liquidation on August 19, 1998, whether the Income Tax Department can seek to recover any amount, which is said to be due from the company in liquidation either from the company or from any debtor of the company without the leave of this court as stipulated u/s 446(1) of the Companies Act.

(ii) Whether the order u/s 226(3) of the Income Tax Act issued by the Assistant Commissioner of Income Tax, dated February 17, 1998, would entitle the Income Tax Department to enforce that order against the debtor of the company on the ground that such an order was issued prior to the date of winding up order passed by this court, i.e., August 19, 1998.

5. In my view, the issue is no more *res integra* and is covered by a judgment of the Federal Court reported in *Governor-General in Council v. Shiromani Sugar Mills Ltd.* [1946] 14 ITR 248. It was a case where the respondent-company was assessed to Income Tax for a certain amount for the assessment year 1941-42. The order of assessment was in fact made on February 25, 1943. In the meanwhile, the petition for winding up of the respondent-company was filed on November 26, 1941. On December 7, 1941, the provisional liquidator was appointed and on April 17, 1942, an order was passed by the Allahabad High Court directing that the company be wound up. The Income Tax Department issued a demand notice on the official liquidator on March 10, 1943. The official liquidator informed the Income Tax Department that the proper procedure for them would be to lodge a claim before the liquidator, but the Income Tax Department chose to initiate proceedings u/s 46 of the Indian Income Tax Act,

1922. Dealing with the legality of the said proceedings, the Federal Court held that proceedings such as the one initiated u/s 46 of the Indian Income Tax Act, 1922 was an "other legal proceeding" within the meaning of Section 171 of the Indian Companies Act, 1913 (corresponding to Section 446 of the present Companies Act), and therefore, the State was required to make an application for the leave of the company court before initiating the proceedings u/s 46(2) of the erstwhile Income Tax Act, in the following words (page 258):

"Accordingly, we agree with the learned judges of the Allahabad High Court in holding that the words "other legal proceeding" in Section 171 of the Indian Companies Act, 1913, comprise any proceeding by the revenue authorities u/s 46(2) of the Indian Income Tax Act, and that accordingly before forwarding the requisite certificate u/s 46(2) to the Collector, which would put the machinery for the collection of the arrears of Income Tax as arrears of land revenue into motion, the appellant should have applied in the liquidation u/s 171 of the Companies Act for leave of the winding up court".

6. In the present case, the proceedings issued by the Income Tax Department dated, February 17, 1998, u/s 226(3) of the Income Tax Act are also proceedings seeking to recover certain amounts representing Income Tax dues from the company in liquidation from one of the debtors of the company in liquidation. Section 226 occurs in the group of sections titled, "collection and recovery" under Chapter XVII of the Income Tax Act, which deals with collection and recovery of tax. Sub-section (3) of Section 226 of the Income Tax Act, in so far as it is relevant for the present purpose, reads as follows :

"(3) (i) The Assessing Officer or Tax Recovery Officer may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the Assessing Officer or Tax Recovery Officer either forthwith upon the money becoming due or being held or on or within the time specified in the notice (not being before money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of the arrears or the whole of the money when it is equal to or less than that amount."

7. In substance, the said provision authorizes the Income Tax Department to recover the arrears of Income Tax due of an assessee from any debtor of such an assessee, who happens to hold the amounts belonging and payable to such assessee. Though the proceedings under Sub-section (3) of Section 226 of the Income Tax Act in fact are initiated against a third party, in substance, they are proceedings against the assessee, in the present case happened to be the company in liquidation, in which case the Income Tax Department ought to have obtained leave of this court before initiating such proceedings as required u/s 446(1) of the Companies Act. The purpose behind the requirement of obtaining such a leave is put by their Lordships of the Federal Court in the above-mentioned judgment in the following words (page 257) :

"In our judgment, it need not, and therefore should not, be confined to "original proceedings in a court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint". Section 171 must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer to Section 232. Section 232 appears to us to be supplementary to Section 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the court, will find that such steps are void. The reference to "distress" indicates that leave of the court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary court of law. Moreover, the scheme of the application of the company's property in the pari passu satisfaction of its liabilities, envisaged in Section 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are "outside the winding up" in the sense indicated by Lord Wrenbury in his speech in *Food Controller v. Cork* [1923] AC 647 (HL) are subjected as to their actions against the property of the company to the control of the court".

8. In the present case it is not brought to the notice of this court that the Income Tax Department had obtained the leave of the court as required u/s 446 of the Companies Act. It was suggested at the Bar that in view of the judgment of the Supreme Court reported in *Builders Supply Corporation Vs. The Union of India (UOI)* Represented by the Commissioner of Income Tax, West Bengal and Others, , that in view of Article 372 of the Constitution the doctrine of priority of Crown Debts is made applicable to India and, therefore, the Income Tax Department is entitled to enforce its claims without leave of the company court.

9. No doubt, the Supreme Court held that such a doctrine is applicable to India, but from the very language of Article 372 of the Constitution it is clear that such an application would continue to be in force "until altered or repealed or amended by Legislature or other competent authority". To what extent the claims of the Income Tax Department are entitled for such a priority in the context of a company in liquidation, is a matter which depends on the construction of various provisions of the Income Tax Act and the Companies Act. But I do not propose to go into that question in this case for the reason that even assuming for the sake of argument that the Income Tax Department is entitled to such a priority, that question arises only at the stage of payment of dividends by the official liquidator after collecting all the amounts due to the company in liquidation and ascertaining various liabilities of the company. Until such ascertainment is made, in my view, the Income Tax Department is not entitled to enforce its claims, especially in the absence of leave from this court. If such a leave is sought, what consideration should weigh with this court and upon what conditions such a leave should be granted are matters with which I am not concerned in the present application, as no such application for leave of this court is preferred by the

Income Tax Department.

10. The second question : I am of the opinion that the order u/s 226(3) of the Income Tax Act is anterior to the order of winding up makes no difference as far as the efficacy of the order u/s 226(3) of the Income Tax Act. The language of Section 446 is clear. It prohibits both either the commencement or continuance of any legal proceeding against the company in liquidation, apart from Section 537 of the Companies Act which prohibits the execution, distress etc. In substance, the proceedings u/s 226(3) of the Income Tax Act are proceedings against the effects of the company in liquidation and therefore hit by Section 537 of the Act as such proceedings are without the leave of this court and in contravention of Section 537 of the Act.

11. Section 537 of the Act reads as follows :

537. Avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of court. --(1) Where any company is being wound up by or subject to the supervision of the court-(a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up ; or

(b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement;

shall be void.

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government."

12. In the circumstances, the stand taken by the respondent is not tenable and in view of the specific plea in the counter, "it is further prayed to grant ten equal half-yearly instalments to clear the amounts due to the applicant herein and pass such other order or orders as this honourable court may deem fit and proper in the circumstances of the case", which is substantially an admission of liability, the application is allowed as prayed for, directing the respondent to pay an amount of Rs. 11,60,461 with interest at 18 per cent, per annum with effect from August 19, 1998, till the date of realization within a period of two months from today, failing which the official liquidator is at liberty to recover the same by taking appropriate steps in accordance with law.