

(1971) 02 MAD CK 0032

In the Madras High Court

Case No : C.P. No's. 83 of 1968 and 2 of 1970 in Comp. Application No's. 328 and 404 of 1970

Burmah-Shell Oil Storage and Distributing Co. of India Ltd.
and Shankar Service Station

APPELLANT

Vs

Associated Industrial and Engineering Corporation Ltd.

RESPONDENT

Date of Decision : 23-02-1971

Acts Referred:

Companies Act, 1913 — Section 171

Companies Act, 1956 — Section 446

Citation : (1974) 44 CompCas 488

Hon'ble Judges : Palaniswami, J

Bench : Single Bench

Advocate : C. Harikrishnan, in C.A. 328 of 1970 and S. Balasubramanian, in C.A. 404 of 1970, for the Appellant; Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

Palaniswamy, J.—These two applications raise a common question of law. The question is whether, u/s 446 of the Companies Act, 1956,

leave to proceed with a proceeding against a company in liquidation can be granted, even though the proceeding was instituted after the passing of

the winding-up order. Messrs. Associated Industrial and Engineering Corporation Ltd. has been in C.P. No. 2 of 1970 ordered on April 3, 1970,

to be wound up. Messrs. Shankar Service Station, a partnership concern doing business at Ranipet, Bellary District, Mysore State, claiming to

have supplied petrol, oil, etc., to that company to the value of Rs. 9,946, instituted O.S. No. 86 of 1970 on the file of the Principal District

Munsiff, Hospet, on April 18, 1970, without obtaining leave of this court to institute that suit. On coming to know of the order of winding-up, the

plaintiff-firm has taken out Application No. 238 of 1970, praying for leave to continue the said suit or in the alternative to transfer that suit to the file of this court for disposal.

2. Messrs. Gannon Dunkerley and Company Ltd. has been in C.P. No. 83 of 1968 ordered by this court to be wound up by order dated March

14, 1969. One Ekambaram, an employee of that company, has filed Claim Petition No. 344 of 1969 on the file of the Labour Court, Madras, u/s

33-C(2) of the Industrial Disputes Act, 1947, praying for an award for Rs. 3,311 said to be due to him by way of salary, etc. Before instituting

that claim petition, he did not obtain the leave of this court. On coming to know about the winding-up order, he has filed Company Application

No. 404 of 1970 praying that leave may be granted to continue the said claim petition.

3. The official liquidator opposes these applications contending that as the aforesaid proceedings were instituted after the respective company was

ordered to be wound up and as the leave of this court was not obtained before the commencement of those proceedings, leave cannot be granted

to proceed with those proceedings. A similar question arose before me in C.P. No. 23 of 1958, in which a private limited company had been

ordered to be wound up. Claiming the company's assets as an item of joint family property, some members of a Hindu joint family instituted a

partition suit, impleading, among others, the official liquidator as a defendant, but without obtaining the leave of the court. On the objection taken

by the official liquidator that the suit was not competent, inasmuch as the leave of the court was not obtained, the plaintiffs in that partition suit

moved this court for leave to continue the suit. On a consideration of Section 446 and the authorities, I held that the suit instituted without obtaining

the prior leave of the court was incompetent and leave could not be granted to enable the continuation of the suit. That decision is reported in Sri

Murugan Oil Industries Private Ltd., In re [1970] 40 Comp. Cas. 77 (Mad). After I rendered that judgment, the Supreme Court in Bansidhar

Shankarlal Vs. Mohd. Ibrahim and Another, . had to consider a case arising under the Companies Act of 1913, in which the provision regarding

taking leave of the court before institution of proceedings against a company in liquidation was enacted in Section 171. In that case, leave was

granted to continue an execution petition filed against a company in liquidation after the liquidation order. The party aggrieved by that grant of leave failed in first appeal and second appeal and the High Court of Calcutta refused to certify the appeal under Article 133 of the Constitution, after dismissing the second appeal filed by the said aggrieved person. That person filed two petitions before the Supreme Court, one against the order dismissing his second appeal and the other against the order of the High Court refusing to certify. The Supreme Court dismissed the petition against the order of the High Court in second appeal but granted special leave against the order of the High Court refusing to certify the case. In dealing with that case, the Supreme Court incidentally considered the question whether leave could be granted u/s 171 of the Companies Act, 1913, so as to validate the institution of the proceeding without taking the prior leave of the court. Construing Section 171 of the old Act, the Supreme Court held that there was nothing in that section to make the leave a condition precedent to the institution of a proceeding and that failure to obtain leave before institution of the proceeding would not entail the dismissal of the proceeding. In view of this decision it was contended on behalf of the applicants in these cases before me that my decision already referred to would require reconsideration. It is in these circumstances that these applications have come up for consideration before me.

4. For a proper understanding of the decision of the Supreme Court in relation to Section 446 of the Companies Act, 1956, it is necessary to have a comparative study of Section 171 of the 1913 Act, to which that decision relates, and Section 446 of the 1956 Act. Section 171 of the 1913 Act was modelled on Section 231 of the English Companies Act, 1948. For easy reference the following table would be useful:

1956 Act.	1913 Act.	English Act of 1948.
446. Suits Stayed on 171 . Suits stayed on 231. Actions stayed on		
winding order.- (I) When a winding-up order. - When a winding-up order. - When a		
winding up order has been made winding-up order has been made winding-up order has been		
or the official liquidator has been (or a provisional liquidator has made or a provisional liquidator		

appointed as provisional been appointed) no suit or other has been appointed, no action or

liquidator, no suit or other legal legal proceeding shall be proceeding shall be proceeded

proceeding shall be commenced, proceeded with or commenced with or commenced against the

or if pending at the date of the against the company except by company except by leave of the

winding-up order, shall be leave of the court, and subject court and subject to such terms

proceeded with, against the to such terms as the court may as the court may impose.

company, except by leave of the impose.

court and subject to such terms

as the court may impose...

5. Section 171 of the 1913 Act has been construed in two ways. The Calcutta High Court in Harnarain Misra v. Kanhaiyalal Lohawala, [1940] 10

Comp. Cas. 146 (Cal.) and the Andhra Pradesh High Court in Godavari Sugars and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy,

[1960] 30 Comp. Cas. 104 (A.P.) took the view that the leave of the court which has ordered winding up of a company is a condition precedent

to the institution of proceedings against the company in liquidation and that proceedings instituted without obtaining the leave of the court in the first

instance must be dismissed. The Allahabad High Court in People's Industrial Bank, Ltd. Vs. Ram Chander Shukul and Others, took a contrary

view and held that leave was not a condition precedent. A Full Bench of the Lahore High Court in Nazir Ahmad v. Offi. Liq., People's Bank of

Northern India, [1943] 13 Comp. Cas. 1 (Lah.) overruling a Bench decision of that court in People's Bank of Northern India (In liquidation) v.

Fatehchand & Co. Ltd. (In liquidation), [1936] 6 Comp. Cas. 48 (Lah.) took a similar view and observed that, since the words used in Section

171 were borrowed from English law, where those words had recognised a particular legal meaning, it should be assumed that the same meaning

was assigned to those words in the Indian Companies Act, 1913, and that a suit instituted against a company in liquidation without obtaining prior

leave u/s 171 should not be dismissed on that ground alone. The Full Bench held that limitation should be calculated in the same way as if the suit

had been originally instituted with leave.

6. In *Suresh Chandra Khasnabish v. Bank of Calcutta Ltd.*, [1951] 21 Comp. Cas. 110 (Cal.) a Bench of the Calcutta High Court, dissenting

from its earlier view taken by a single judge in *Harnarain Misra v. Kanhaiyalal Lohawala* and following the aforesaid Full Bench decision of the

Lahore High Court, held that u/s 171 of the 1913 Act the court had jurisdiction to grant leave to proceed with the suit or other legal proceeding

against a company in liquidation even though such leave was not obtained before the commencement of such suit or proceeding. But in that case

the leave was asked for by a secured creditor in respect of money due to him. The same view was followed by that High Court in *Roopnarain*

Ramchandra Private Ltd. Vs. Brahmapootra Tea Co. (India) Ltd. and Another, .

7. In *Balaji Patekar v. Official Liquidator*, [1967] 2 Comp. L.J. 262 (All.) the suit was instituted against a company in liquidation and others

without obtaining the prior leave of the court u/s 446 of the 1956 Act. On the objection taken by the official liquidator, the plaintiffs applied for

leave. But, by then, limitation for instituting a suit had run out. A single judge of the Allahabad High Court dismissed that application holding that,

inasmuch as the suit had become barred by time on the date of the application, leave could not be granted. But, at the same time, the learned judge

observed that though a literal interpretation of Section 446 would bar the suit against the firm since the requisite leave had not been obtained prior

to its commencement, there was abundant authority for the proposition that leave could be obtained even after the institution of the suit. He came

to that view by observing that a suit instituted without leave remained dormant and could come into life only when the leave of court was sought for

and given and therefore leave must be sought for at a time when the suit was still within time and that otherwise it would be that leave would be

granted to commence a time-barred suit which it could not do.

8. Section 171 of the 1913 Act does not make a distinction between a proceeding commenced before the winding-up order and a proceeding

commenced after the winding-up order. In respect of both categories of proceedings that section says that it shall not be commenced or

proceeded with except by leave of the court. The language used in Section 171 is capable of the inference that there are two stages at which the

party could ask for the leave of the court after a company is ordered to be wound up. He may before commencing the proceeding seek the leave

of the court for the purpose of commencement of the proceeding. If leave is granted in such a case, there would be compliance with Section 171.

But if the proceeding is commenced without obtaining the leave of the court in the first instance, is he without a remedy for the purpose of

proceeding with the proceeding ? If he wants to proceed with that proceeding, he can ask for the leave of the court and there is no bar to grant

such leave, having regard to the language used in Section 171. That section does not say that the proceeding should have been pending to apply

for leave to proceed with the proceeding. Though the commencement without prior leave would be in violation of Section 171, the continuance of

such proceeding with the leave of the court would be in compliance of that section.

9. As already pointed out, in the case before the Supreme Court in *Bansidhar Shankarlal v. Mohd. Ibrahim*, leave to continue the execution

proceeding was granted by the company judge, even though prior to the institution of the execution proceeding the concerned company had been

ordered to be wound up. The validity of the grant of such leave was confirmed in the first appeal and second appeal. The Supreme Court rejected

the application filed against that order, but granted leave against the order of the High Court refusing to certify the case. In considering that

application, Shah J., as he then was, speaking for the court, observed at page 25 :

.....we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of

a decree against the company and that failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or

proceeding instituted without leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained

the proceeding will be deemed instituted on the date granting leave.

10. His Lordship made this observation with reference to the language employed in Section 171 of the 1913 Act. In that case, the conflicting

decisions of the High Courts referred to above were brought to the notice of his Lordship and having regard to the language of Section 171 the

learned judge observed that both on principle and on the authorities he could not agree with the view that leave was a condition precedent to the

institution of a proceeding. In that connection, the counsel for the appellant submitted that the court was not concerned in that appeal with the

correctness of one or the other of the two conflicting views and that what the court had to consider was only regarding the correctness of the view

of the Calcutta High Court refusing to grant the certificate. In rejecting this contention, the learned judge observed at page 26 :

In our judgment, it would be a futile exercise if we come to the conclusion that the view taken by the High Court on the merits of the case is true,

still to certify the case for appeal. The proposed appeal only involves the question about the maintainability of the execution proceeding

commenced by the plaintiff and against the company in liquidation without leave of the High Court which has ordered the company to be wound

up. We entertain no doubt that the High Court was right in the view it has taken on the merits and the contentions raised.

11. In view of this clear pronouncement it should be taken that u/s 171 of the 1913 Act leave of the court is not a condition precedent to the

institution of a proceeding and that even if a proceeding is commenced against a company in liquidation without obtaining the leave of the court in

the first instance, leave can be granted to proceed with the proceeding.

12. The question is whether the aforesaid principle should be applied even to Section 446 of the 1956 Act. In enacting this section, the legislature

has made a substantial change in the law contained in Section 171 of the 1913 Act. The difference in the language of Section 446 and that of

Section 171 calls for careful examination. In Section 171 of the 1913 Act, the word ""commenced"" occurred after the expression "" proceeded

with"". But in Section 446 of the 1956 Act that word precedes the expression "" or if pending at the date of the winding up order "" and thereafter

occurs the expression ""shall be proceeded with"". It is not merely a case of interchanging the places of the words ""commenced "" and ""proceeded

with as occupied by them in Section 171 of the 1913 Act. After making this change, the legislature has also added the expression "" or pending at

the date of the winding-up order "" after the word ""commenced "" . Thus, in effecting this change, the legislature has clearly comprehended two situations. The first is commencement of a suit or other legal proceeding and the second is proceeding with a suit or other legal proceeding if such suit or proceeding was pending at the date of the winding-up order. In the latter case, the proceeding must be a proceeding pending at the date of the winding-up order. Only in such a case, the leave of the court for further proceeding with the proceeding would arise. But in the case of a proceeding to be commenced, there is no question of a proceeding being proceeded with. If a proceeding is commenced without the leave of the court and subsequent to the commencement, leave is asked for the continuation of that proceeding, it would not be a proceeding pending at the date of the winding-up order within the meaning of Section 446 of the 1956 Act, and obviously no leave can be granted u/s 446 for that purpose.

This conclusion is irresistible, having regard to the use of the expression ""pending at the date of the winding-up order "" . It should be presumed that the legislature deliberately introduced these words in enacting Section 446 even though Section 171 was in the statute book for several decades.

Construing the plain language adopted by the legislature, it follows that if a proceeding is commenced without obtaining the leave of the court previously, no leave could be granted for proceeding with that proceeding, as it was not a proceeding pending at the date of the winding-up order.

If it were to be held that even if a proceeding is instituted without the leave of the court, it could be permitted to be proceeded with by granting leave, then the expression "" if pending at the date of the winding-up order "" would be without any meaning and rendered purposeless. That could not have been the intention of the legislature in making this change in the law. The obvious intention of the legislature is that leave could be granted to commence a proceeding only if leave is sought for before the commencement of the proceeding and that leave could be granted to proceed with a proceeding only if the proceeding was pending at the date of the winding-up order. That is the only rational way of interpreting the language employed in Section 446.

13. Mr. Harikrishnan, appearing for the applicant in Company Application No. 328 of 1970, contended that though the change effected in Section

446 may give room for that interpretation, the decision of the Supreme Court seems to lay down the principle that even though a proceeding or a suit is instituted without the leave of the court, still leave can be granted so as to make it effective at least from the date of the grant of leave. I am unable to accept this contention. What their Lordships were concerned with was the interpretation of Section 171 of the 1913 Act and there was no need or occasion for their Lordships to consider the change made in Section 446 of the 1956 Act. I have already pointed out that the language employed in Section 171 of the 1913 Act is capable of two interpretations, and their Lordships have already pointed out that the language does not warrant the inference that leave is a condition precedent to the institution of a proceeding. The decision has to be understood only in the light of the language of Section 171 which arose for consideration and, therefore, I am unable to accept the argument that the same principle should be applied in interpreting Section 446 of the 1956 Act also. On a plain reading of Section 446 of the 1956 Act, it follows that for commencing a proceeding against a company in liquidation, leave is a condition precedent and that if a proceeding is commenced against such a company without obtaining prior leave of the court, no leave can be granted for proceeding with that proceeding, as the leave to proceed with a proceeding can be granted only if the proceeding was pending on the date of the winding-up order. In the face of the plain language, there is no scope to apply the theory that, by the grant of leave, the proceeding can be deemed to be commenced on the date of grant of leave. A similar view has been taken by the Bombay High Court in *Eastern Steamship Private Ltd. Vs. Pucto Private Ltd. and Another*, . As I have already pointed out in *Sri Murugan Oil Industries Private Ltd.*, In re, the object of Section 446 is to safeguard the assets of the company in winding up against the wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding-up court itself with a view to ensure equitable distribution of the assets among those entitled thereto and also to prevent the administration from being embarrassed by a scramble among the creditors and others having rights against the company. It may be that an innocent creditor, not knowing the winding-up order, may institute a proceeding without obtaining the leave of the court beforehand. On coming to know the winding-up order, he cannot, having regard to the

language of Section 446, ask for leave to proceed with the proceeding, however honestly and bona fide he might have commenced the proceeding.

14. The claims of these two applicants are money claims which are provable in liquidation proceedings. They were said to be in time on the date of commencement of the winding-up proceeding of the respective companies. Therefore, even on considerations of equity, the applicants have no

case to urge. There is no need to transfer to this court the suit filed by the applicant in Application No. 328 of 1970. In the result, both the

applications fail and are dismissed and, in the circumstances, without costs.