
(1992) 03 MAD CK 0011
In the Madras High Court

Cotton Corporation of India Ltd. APPELLANT
Vs
Radhakrishna Mills Ltd. RESPONDENT

Date of Decision : 13-03-1992

Acts Referred:

Arbitration Act, 1940 — Section 20
COMPANIES ACT, 1956 — Section 391, 446, 518, 529
Criminal Procedure Code, 1973 (CrPC) — Section 144
Provincial Insolvency Act, 1920 — Section 4

Citation : (1993) 76 CompCas 637

Hon'ble Judges : A.R. Lakshmanan, J

Bench : Single Bench

Judgement

Lakshmanan, J.—Company Application No. 720 of 1990 was moved on May 3, 1990. It is an application u/s 446 of the Companies Act,

1956, read with rule 117 of the Companies (Court) Rules, 1959, to grant leave to continue to prosecute Suit No. 1291 of 1980 pending on the file

of the High Court of Judicature, Bombay.

2. Company Application NO. 2311 of 1991 was filed by the official liquidator u/s 446(3) of the Companies Act, 1956, read with rules 9 and

11(b) of the Companies (Court) Rules, 1959, to transfer the suit pending now on the file of the Bombay High Court in Suit No. 1291 of 1980

instituted by Messrs. Cotton Corporation of India Ltd. against Radhakrishna Mills (in liquidation) to this court and dispose of the same and for

other reliefs.

By an order dated July, 3, 1987, in Company Petition No. 17 of 1984, this court ordered winding up of the company in question, viz.,

Radhakrishna Mills Ltd. Pursuant to the winding up order, the official liquidator

attached to this court has taken into his custody and control the available assets of the company in liquidation. The applicant in Company Application No. 720 of 1990 is Cotton Corporation of India Ltd., a Government of India undertaking. They filed Suit No. 1291 of 1980 on the file of the High Court of Judicature at Bombay in the year 1980, claiming a sum of Rs. 27, 36,851.14 with interest thereon at 20 per cent. per annum till the date of realisation being the loss purported to have been incurred by the said company on account of a breach of contrary the winding up order.

3. The case of the Cotton Corporation of India Ltd., the plaintiff in the said suit, is that though the company in liquidation, some time in the year

1977, contracted to purchase Russian cotton for about Rs. 32 lakhs it failed to honour its commitment and thereby had committed a breach of

contract. Since the company in liquidation failed to buy the above cotton, the respondent-company claims that it sold the same for a low price and,

in that process, it had suffered a loss of Rs. 27,36, 851.14 and, in respect of the said loss suffered, Cotton Corporation of India has filed the

above said suit in the Bombay High Court. In view of the passage of the winding-up order, the Cotton Corporation of India has filed an application

in Company Application No. 720 of 1990 u/s 446 of the Act for grant of leave to continue the said suit in the High Court of Judicature at Bombay.

It is also noteworthy to see that, in the liquidation process, this court, in Company Application No. 1325 of 1990, has permitted the official

liquidator to call for claims from the creditors with the ultimate object of settling the list of creditors and also fixed December 15, 1990, as the last

date for submission of claims before the official liquidator. The Coimbatore branch manager of the respondent-company has lodged a claim with

the official liquidator, claiming Rs. 27,36,851. 15 together with interest thereon. This claim has been numbered as Claim No. 121 in the office of

the official liquidator.

While so, Cotton Corporation of India Ltd. filed Company Application No. 720 of 1990 for grant of leave to prosecute Suit No. 1291 of 1980

filed for recovery of a sum of Rs. 27,36,851.14 with further interest at 20 per cent. per annum on the file of the Bombay High Court against the

company in liquidation through the official liquidator. The said application was

resisted by the official liquidator on two grounds : (1) that the claim filed by the Cotton Corporation of India before the official liquidator for Rs. 27,36,851.14 which is numbered as Claim No. 121 will be

adjudicated by the official liquidator, and (2) that the subject-matter in the above claim and the subject-matter in the suit are one and the same.

Therefore, there is no need for the applicant to pursue the suit at Bombay since the official liquidator is competent and has jurisdiction to entertain

and dispose of the simple claim for damages. The official liquidator has also stated that, if, for any reason, this court is inclined to grant the leave

sought for, then the court which has power to impose conditions while granting leave can grant leave on the following conditions.

(1) The applicant cannot proceed against the assets and effects of the company in liquidation by way of attachment before judgment.

(2) The applicant, in the event of obtaining a decree in the above suit, cannot proceed against the assets and effects of the company in liquidation

and he has to prefer his claim before the official liquidator on the basis of the said decree as an unsecured creditor.

While this application was pending, the official liquidator himself has filed Company Application No. 2311 of 1991 u/s 446(3) of the Companies

Act to transfer the pending suit from the file of the Bombay High Court to this court for disposal of the same by this court. Both the applications

were heard together by consent of parties. I have heard the arguments of Mrs. M.S. Krishnan on behalf of the petitioner in Company Application

No. 720 of 1990 and Mrs. S. Srinivasan, the official liquidator on behalf of the company in liquidation. Let me first dispose of Company

Application NO. 720 of 1990. Before dealing with the same, it is useful to refer to section 446 of the Companies Act, 1956, which is reproduced

as under :

446. Suits stayed on winding up order. - (1) When a winding up order has been made or other legal proceeding shall be commenced, or if

pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms

as the court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have

jurisdiction to entertain, or dispose of -

- (a) any suit or proceeding by or against the company ;
- (b) any claim made by or against the company (including claims by or against any of its branches in India) ;
- (c) any application made u/s 391 by or in respect of the company ;
- (d) any question of priorities or any other question whatsoever. whether of law or fact, which may relate to or arise in the course of the winding up to the company ;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arisen or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies

(Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is

proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

The provision is on the lines of section 4 of the Provincial Insolvency Act, section 7 of the Presidency Towns Insolvency Act and section 45B of

the Banking Companies Act. The object of winding up the company by the court is to facilitate the protection and realisation of its assets with a

view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general

scramble among creditors and others. Consequently, once the court taken the assets of a company under its control or has passed an order for its

being wound up, it will not be proper to allow proceedings to be started or continued against the company and embarrass the administration of its

affairs. The present section is intended to safeguard the assets of a company in winding up against wasteful or expensive litigation in regard to

matters capable of being determined expeditiously and cheaply by the winding up court itself. The object of section 446 is to see that the assets of

the company are brought under the control of the winding up court to avoid, wherever possible, expensive litigation and to see that all matters in

dispute which are capable of being expeditiously disposed of by the winding up court are taken up by that court. This does not, however, mean that all disputed wherein a company is involved should be proceeded with only by the company court or that if they are pending with other statutory bodies, leave of the company court should be obtained. Section 446 is wide in its terms and is not restricted to any category of suits or any classes of plaintiffs. It is wide enough to cover all suits and other legal proceedings, whoever may be the plaintiff. The section does not prohibit proceedings being taken by the company against any director or officers or other servants of the company. One thing is very clear. Once a winding up order is made, no proceeding can continue or be commenced afresh except by leave of the court. Section 446 comes into play only when there is a suit by or against the company. The conflicting decisions of the several High Courts, some holding that leave of court is a condition precedent for commencing any suit or other legal proceeding and that the court had no jurisdiction to grant leave subsequent to the institution the court had no jurisdiction to grant leave subsequent to the institution of the same so as to have retrospective effect, while others held that leave could be given even after the commencement of a proceeding provided that, at the time of application for leave, the proceeding was in time, have been set at rest by the decision of the Supreme Court in *Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another*, which has accepted the reasoning of the Calcutta High Court in *Suresh Chandra Khasnabish v. Bank of Calcutta Ltd.* [1951] 21 Comp Cas 110 and the Andhra Pradesh High Court in *Godavari Sugars and Refining Ltd. v. Kambhampati Gopalakrishnamurthy* [1960] 3 Comp Cas 104, where, after examining in some detail the decision of the English courts, the court held that it had jurisdiction to grant leave to proceed with a suit or other proceeding against a company in liquidation, even if such leave had not been obtained for the commencement of the suit or proceeding. In the view of the Supreme Court, "the proceeding may be best be regarded as instituted on the date on which the leave was obtained from the High Court".

4. Though the case dealt with by the Supreme Court was u/s 171 of the Indian Companies Act of 1913, the principle governing the grant of leave

is the same under both section 171 of that Act and section 446(1) of the Act of 1956. To quote the Supreme Court (at page 25) :

....We do not think that there is anything in the Act (the same will apply to the 1956 Act also) 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 is obtained, but once leave is obtained the proceeding will be deemed instituted on the date of granting leave.

5. The leave of the court is not granted as a matter of course or merely for the asking. On a formal application being made, the court will examine the facts and circumstances of each case and exercise its discretion judicially and not in a capricious or arbitrary manner. In the exercise of its discretion, it may grant leave unconditionally or on terms or may refuse it absolutely. Even in the case of a secured creditor who is outside the scope of winding up, and as such, is ordinarily given leave to sue on his security, the court may, on special grounds, refuse leave. In *Purushottam and Co. v. Provisional Liquidators Subhodaya Publications Ltd.* [1955] 25 Comp Cas 49, or Court (Ramaswami J.) summed up the working points in terms of the following proposition. The general principles on which leave is granted in an action may be shortly summarised as follows (at page 52):

The leave of the court cannot be obtained merely for the asking. It is not to be granted automatically or as a matter of course. The court has got to examine the facts of each case separately and exercise its discretion. Such discretion must be exercise of its discretion the court may refuse leave even in the case of an application by a secured creditor : *Hansraj v. Official Liquidator* ILR [1929] All 695. The court may in the exercise of its discretion grant leave unconditionally or may impose terms as a condition of granting leave.

Likewise, the grant of leave to continue a pending suit is not a mere formality. The court has to examine the facts of each case in deciding whether or not leave should be granted. In all cases where the question of granting leave has to be considered, the court will also see that the company in winding up is not exposed to unnecessary litigation and costs. Where the court feels that the matter can be disposed of in winding up proceeding itself, it will certainly refuse to grant leave for the institution of a separate suit or

proceeding which will only add to costs and delay the winding up.

6. The court has the power to incorporate any terms while granting leave, and this is explicit by the words ""except by leave of the court and subject

to such terms as the court may impose"" in sub-section 446(1).

7. In *Canara Bank Vs. Official Liquidator*, the court has granted leave to the secured creditor subject to the following conditions, among others ;

(a) In the event of the secured creditor obtaining a decree, it will not execute it against the assets and effects of the company in liquidation not

forming part of the suit property.

(b) In the event of the secured creditor obtaining a decree and realising the security, it is precluded from proving before the official liquidator for any

deficiency arising out of the sale of the security except and to the extent provided in section 529.

(c) In the event of the secured creditor obtaining a decree and realising the security, the sale proceeds of the security can be appropriate subject to

and without prejudice to the rights and claims of the workmen of the company in liquidation.

(d) The secured creditor can prove only for the deficiency of the balance amount representing the principal and interest calculated up to the date of

the order of winding up : *Canara Bank Vs. Official Liquidator*, For another example of conditional leave, see also *Canara Bank Vs. Official*

Liquidator,

8. The incorporation of such terms is perhaps contemplated to safeguard the interests of the general body of creditors, contributories and workmen

affected by the liquidation proceedings.

9. In *Canara Bank Vs. Official Liquidator*, our High Court (Janarthanam J.), while granting leave to the secured creditors, has imposed the

aforesaid conditions as has been reproduced by me in paragraph No. 10 supra. In the background of the said principles laid down by our High

Court and also by other courts, I am of the view that though the applicant herein has filed the suit before the Bombay High Court and also filed a

claim petition before the official liquidator when he called for claims from the creditors of the company, he should be granted leave as prayed for

subject to the following conditions.

(1) The applicant cannot proceed against the assets and effects of the company in liquidation by way of attachment before judgment.

(2) The applicant, in the event of obtaining a decree in the above suit, cannot proceed against the assets and effects of the company in liquidation

and he has to prefer his claim before the official liquidator on the basis of the said decree as an unsecured creditor.

10. In so far as the application filed by the official liquidator in Company Application No. 2311 of 1991 for transfer of the suit now pending on the

file of the High Court of Judicature at Bombay to this court is concerned, I am of the view that the same should be ordered in view of the following

facts.

11. This court, as a court winding up the company in liquidation, has jurisdiction to transfer the case now pending on the file of the High Court of

Bombay to its file and dispose of it. Apart from filing the above suit, the Cotton Corporation of India Ltd. has also preferred a claim before the

official liquidator in Claim No. 121. However, the Cotton Corporation of India Limited was granted leave to continue the suit subject to certain

conditions stipulated above. Nothing presents this court, as a winding up court, to hear the said suit and, for that purpose, can also grant leave. The

official liquidator submits that the records of the company in liquidation are now in the custody of the official liquidator and it would be convenient

for him and for the administration of the said company in liquidation in winding up its affairs if the said suit is transferred to this court for trial and

disposal. The official liquidator further submits that the company in liquidation had disputed the claim of the respondent-company (Cotton

Corporation of India Ltd.) due to the breach of contract and that there has been an arguable case made out. The official liquidator is also exploring

the possibility of reviving the company under a scheme of compromise and arrangement and, for this purpose, he feels that the settlement of the list

of creditors is necessary. He, therefore, says that there is an urgent need for expeditious disposal of the suit. That part, as the amount claimed is

huge and the ground on which the amount is claimed is being disputed, the amount due, if any, requires to be decided after a due enquiry and, in a

proper enquiry in the suit claim, several witnesses have to be examined on behalf of the company in liquidation and some documents have to be

marked as exhibits in the said suit. In short, according to the official liquidator, there exists a prima facie case for contesting the suit claim made by

the Cotton Corporation of India Ltd. Above all, the official liquidator who is not having uncommitted funds to incur expenditure in engaging lawyers

at Bombay and sending the witnesses to Bombay for being examined by the court at Bombay feels that he will not be in position to have the case

conducted at Bombay expeditiously and properly. According to the official liquidator, if the suit is transferred to this court, it would enable him to

take such steps as are necessary for expeditious disposal of the suit with a minimum cost. Balance of convenience is also in favour of the suit being

tried by this court which is winding up the above said company in liquidation, viz., Radhakrishna Mills Ltd. Thus, the official liquidator states that, in

exercise of powers u/s 446, this court shall take on its file the suit pending on the file of the High Court of Judicature at Bombay and dispose of it.

12. This application is resisted by the Cotton Corporation of India Ltd. by filing a counter-affidavit dated February 5, 1992. According to the said

company, the company in liquidation is contenting the suit filed by them in the High Court of Judicature at Bombay and the same is ripe for trial. It

further states that voluminous documents have been filed by both sides in the suit on the file of the High Court of Judicature at Bombay and if, at this

juncture, the suit is transferred on the file of this court, the respondent company would have to suffer huge expenditure for conducting the trial

before this court. Further, the company in liquidation is already represented by a pleader in the suit pending before the High Court, Bombay, and

the official liquidator's apprehensions to the contrary are baseless. It further states that several technical and expert witnesses based at Bombay have

to be examined and if the suit is transferred to the file of this court, the respondent-company would have to incur huge expenses for bringing the

witness to Madras in addition to the amounts already due from the company under liquidation. The respondent-company being a Government

undertaking the transfer of the suit on the file of this court would involve heavy expenditure of public money and that if the suit is continued at the

High Court of Bombay, the matter can be decided expeditiously and further delay also can be avoided. According to the respondent in Company

Application No. 2311 of 1991, the official liquidator has not made out a valid case for having the suit transferred to the file of this court and the

claim has been lodged by the respondent-company under Claim No. 121 without prejudice to their contentions in the suit and has been lodged

only to bring to the notice of the official liquidator that a suit in which the company in liquidation is a party is pending.

13. I have carefully considered the rival submissions made by both learned counsel. Though the argument of Mr. M. S. Krishnan, learned counsel

for the Cotton Corporation of India Ltd. appears to be attractive at first blush yet, on a reconsideration of the same, it appears to be untenable and

against the very many rulings of our High Court and also of other courts. The power of transfer is a discretionary remedy and this court has to

consider the balance of convenience of both parties before ordering transfer. The law is well-settled on this issue. Chhadami Lal Jain Vs. Veer

Industries Ltd. (In liquidation) and Others, is a case directly on the point. The Delhi High Court, in the said case, has held as follows (headnote) :

Held, (i) that in view of section 446(3), the rule laid down in cases decided u/s 171 of the Indian Companies Act, 1913, to the effect that

permission to continue the suit in the court in which it was instituted should normally be granted would not apply ;

(ii) that the power u/s 446(3) to direct that proceedings pending in another court be transferred to the winding up court was discretionary, but the

discretion had to be exercised judiciously and in the interests of all the parties concerned ;

(iii) that the interest of the creditors and shareholders of the company could be safeguarded only if the suit was tried by the same court which was

the charge of the liquidation proceedings ;

(iv) that since the Additional District Judge had taken all the relevant factors into consideration before ordering the transfer of the suit to his court,

the High Court ought not to interfere with his order.

14. In my view, u/s 446, the power is only in the winding up court to transfer any proceedings filed against a company which is pending before any

other court. This power is discretionary, but the discretion has to be exercised judiciously and in the interest of all the parties concerned. The

transfer of case under this sub-section is neither a rule nor an exception. The discretion has to be exercised taking into consideration the facts and

circumstances of each case. Thus, considering the facts and circumstances of this

case, I feel that leave should be granted for continuing the proceedings in this court but of course, subject to the conditions stipulated above. Likewise, while exercising powers u/s 446(3), this court can transfer the proceedings pending in any other court to the winding up court though the power is discretionary. The discretion has to be exercised in this case in the interest of the company and also creditors and others concerned.

15. In *United Provinces Commercial Corporation, In re* [1983] 53 Comp Cas 441, a learned single judge of the Calcutta High Court, while

construing the scope of section 446(3) of the Companies Act, has held as under (headnote) :

The purpose and object of the power conferred on a court u/s 446(3) of the Companies Act, 1956, are that it should be exercised for the benefit

of the company and its creditors and contributories when a company is insolvent and the question of any inconvenience on the part of the Union of

India cannot arise, as the Union of India is deemed to be residing all over India and there is no difficulty for any department of the Union as plaintiff

to produce the necessary documents before the the court at the time of hearing. If a number of suits were pending before other courts which had

not been diligently pursued by the plaintiff for any disposal for a number of years and the official liquidator has been unable to get any papers and

documents in respect of the said pending suits, when quite a number of suits and proceedings are pending before the winding-up court and all the

records of the company as delivered by the ex- management are lying in the custody of the official liquidator at Calcutta, it will be convenient for

the administration of the said company in liquidation in winding-up its affairs expeditiously if all the suits are transferred to the winding up court, all

the requirements of the section would be satisfied, and the court must exercise the power to transfer all the suits and try them before itself.

16. In *Canara Bank Vs. Official Liquidator, Janarthanam J.*, while granting leave, has imposed certain conditions which have already been

extracted above.

17. In this context, it will be useful to refer to *Timber (P.) Ltd. (in liquidation) v. Conservator of Forests* [1981] 51 Comp Cas 18 (P & H). That

was a case in which an application u/s 20 of the Arbitration Act, 1940, was pending in the Jammu and Kashmir High Court before a winding up

petition was filed against a company in the Punjab and Haryana High Court. Subsequently, the company was ordered to be wound up by the

Punjab and Haryana High Court. Therefore, an application was filed by the official liquidator before the Punjab and Haryana High Court praying

that the proceedings pending in the Jammu and Kashmir High Court be transferred to the file of the Punjab and Haryana High Court in view of the

provisions of section 446(3) read with rule 9, because it was not possible for the official liquidator attached to the Punjab and Haryana High Court

to pursue the proceedings in the other court effectively. The application was opposed by the State of Jammu and Kashmir. Justice B. S. Dhillon of

the Punjab and Haryana High Court has held in that case as follows (Headnote) :

Held, that the provisions of section 446(3) of the Companies Act, 1956, read with rule 9 of the Companies (Court) Rules, 1959, have been

enacted with the view to give jurisdiction to the company court to deal with all matters concerning a company which has been ordered to be

wound up. It would be in the interest of justice that the proceedings pending before the Jammu and Kashmir High Court were transferred to the file

of the Punjab and Haryana High Court because the matter was at a preliminary stage and the only proceeding pending before the Jammu and

Kashmir High Court was the application u/s 20 of the Arbitration Act. Only if the application succeeded and the agreement was ordered to be filed

in court, the case had to proceed further.

18. In Arrah Sasaram Light Railway Company Ltd. v. District Board, Rohtas [1982] 52 Comp Cas 326, the Calcutta High Court, while

considering the application of the official liquidator to transfer the suit to the winding up court and while considering the power and jurisdiction of

the winding up court to transfer and dispose of a suit, has held as follows (headnote) :

Held, allowing the application, that most of the material evidence, both documentary and oral, was lying at Calcutta. Further, the claim of the

respondent-District Board, Rohtas, was a money claim and it might involve interpretation of certain documents and the same could be conveniently

tried by the winding up court at less expense within a minimum time. The conduct of R-1 by instituting proceedings u/s 144 of the Criminal

Procedure Code, 1973, one after another and finally filing the suit at Sasaram

and obtaining an ex parte injunction restraining the liquidator and the purchaser from going near the railway track and removing the assets made it quite clear that the whole intention of R-1 was to obstruct the winding-up proceedings and prevent the purchaser from removing the goods or taking delivery of the goods pursuant to the sale effected by the joint liquidators in their favour in the course of the winding-up of the company.

This was a fit and proper case where the court should exercise its power and transfer the said suit u/s 446(3) read with section 518(1)(b) of the Companies Act, 1956.

Thus, it will be seen that the winding up court has power to transfer before it suits pending against the company in liquidation at different places

because it is convenient for the winding up of the company's affairs expeditiously. I see much force in the contention of the learned official

liquidator and I prefer to exercise my discretion in favour of the official liquidator for the reasons stated in the report of the official liquidator, dated

November 10, 1991.

19. In view of the foregoing discussion, I am of the view that the official liquidator has made out as case for transfer of the pending suit is Suit NO.

1291 of 1980 on the file of the High Court of Judicature at Bombay, instituted by the respondent-Corporation against Radhakrishna Mills Ltd. (in

liquidation) to this court and dispose of the said suit. The costs of this application will also come out of the assets of the company.

20. No other argument has been raised to oppose the transfer of the proceeding. For the reasons stated above, I direct that the proceedings

pending before the High Court of Bombay in Suit No. 1291 of 1980 be transferred to this court. A copy of this order will be forwarded to the

Registrar of the High Court of Judicature at Bombay to enable him to transfer the suit together with all records, etc. filed by both parties to this court.