
(2001) 01 DEL CK 0037
In the Delhi High Court
Case No : Company Appeal 18 of 2000

D.K. Kapur

APPELLANT

Vs

Reserve Bank of India and Others

RESPONDENT

Date of Decision : 19-01-2001

Acts Referred:

Citation : (2001) 2 AD 259 : (2001) 105 CompCas 643 : (2001) 90 DLT 127

Hon'ble Judges : Surinder Kumar Aggarwal, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Mr. Kapil Sibal, Mr. Rajiv Dhawan and Rajiv Kapur, for the Appellant;
Mr. Rajiv Nayar Mr. H.S. Parihar, for the Respondent

Judgement

S.K. Agarwal, J.—This appeal is against the order dated 27th October, 1998 passed by the Company Judge, on the application of Reserve Bank of India (hereinafter the complainant/RBI) u/s 446(1) of the Companies Act 1956 read with Rule 117 of the Companies(Court) Rule 1959 (for short "the Rules") granting leave to pursue its criminal complaint for the offences under Sections 58B(5)(aa), 58B(6) read with Section 58C of the Reserve Bank of India Act 1934 (for short RBI Act), against JVG Finance Limited (Respondent company) and directing the trial court to consider the objections raised on behalf of the appellant.

2. We have heard Sh. Kapil Sibal and Sh. Rajeev Dhawan, learned Senior Advocates, for the appellant and Sh. Rajeev Nayar, learned Senior Advocate for the complainant/RBI and have been taken through record. Learned Counsel for the parties argued that in the appeal maintainability of the criminal complaint against the appellant is questioned Therefore, appeal be finally heard and disposed of at this stage itself. We propose to do so accordingly.

3. Facts in brief necessary for the disposal of this appeal are: that on 4th June, 1998 complainant-RBI filed the petition u/s 433 of the Companies Act read with Section 45 of the RBI Act for winding up of JVG Finance Limited (Respondent

Company), before the learned Company Judge. On 5th June, 1998, official liquidator attached to this Court was appointed as provisional liquidator. The complainant-RBI also filed a criminal complaint under Sections 58B(5)(aa) read with Section 58C of the RBI Act against the said company and others alleging that it was a non-banking company governed by the provisions of Chapter IIIB of RBI Act and Non-Banking Financial Companies(RB) Directions, 1977 and that it was prohibited from accepting deposits from the public by an order dated 10th October, 1997. The respondent company and others violated these directions and thereby committed the said offences punishable up to three years imprisonment and fine. The Magistrate took cognizance on the complaint, and issued summons against accused persons except the appellant; Process against the appellant was not issued on the ground that there was no material to show that the appellant was working in the capacity of an Executive Director(Finance) of the said Company. Feeling aggrieved against the order complainant-RBI filed two Revisions which came up for hearing before Justice M S A Siddiqui, who vide orders dated 24th April, 2000 accepted both Revision Petitions and set aside the order passed by the trial court declining to issue summons against the appellant. While passing the order learned Judge took note of the Audit Report filed in support of the complaint containing allegations against the appellant. Para 2.4 of the Audit Report reads as under:-

"2.4. One of the most intriguing features of the management of the group, was the involvement of the statutory auditors, Sh. D.K. Kapoor, in the day to day affairs of the company. Sh. D.K. Kapoor was the de-facto Executive Director (Finance) of the group, and known in the organisation by such designation. He was controlling the Finance, Banking and Accounting functions of all the group companies. After Mr. V.K. Sharma, he was the most important man in the group and had direct control over the finances of the group. He was the authorised signatory for the operation of various bank accounts of the companies and almost all the cheques were signed/approved by him. The inspecting officer saw salary sheets of the group employees signed by him with the designation of ED (Finance). He also signed different agreements with the outside parties on behalf of the company, in his capacity as the ED (Finance). Needless to point out that performance of such exclusive functions in the group, directly conflicted with the functions of the statutory auditor, and writing of audit report was only done as a merely statutory obligation which the company has to comply with. As such there was no auditor of the company which checked the financial and accounting accuracy of the group companies, as what was to be supposedly checked was done by the same man."

4. The Special Leave Petition, (SLP CrI. No. 2547/2000), filed by the appellant against the above order was dismissed by the Supreme Court on 28th August, 2000 observing:

"We are not interfering with the High Court order as the petitioner has got every right to approach the trial court and convince at the appropriate stage of the

proceedings that either he is not a Director or that he is not liable to the offence alleged. The said right of the petitioner is not scuttled by the impugned order. The SLP is disposed of accordingly."

5. The complainant-RBI, also filed an application u/s 446(1) of the Companies Act read with rule 117 of the Rules before the Company Court, seeking leave to continue above said criminal complaint against JVG Finance Limited (respondent company) and others. On 27th October, 1998 the Company Judge passed the impugned order granting leave to the complainant-RBI to proceed with said criminal complaint against the company and directing the trial court to consider the objections raised on behalf of the appellant. It was observed:-

"Till such time winding up proceedings are pending, the RBI cannot be debarred from continuing with the proceedings initiated against the company. It is under these circumstances that the permission as sought for is hereby granted. So far as the question of locus standi of the RBI to institute the winding up petition is concerned the same will be considered on the next date of hearing. So far as the question of exemption of Chartered Accountant from prosecuted that will be looked into by the criminal Court."

6. Learned counsel for the appellant argued that the impugned order on the said application of complainant/RBI was passed without notice to the official liquidator and to all other parties including appellant, which is an essential requirement of rule 117 of the Rules and thus, the same is not sustainable being arbitrary, illegal and without jurisdiction. It was argued that the appellant is practicing Chartered Accountant and was a statutory auditor of some of the JVG Group of Companies and that in the winding up petition he was not imp led as the party. The company in their reply to the application of the RBI had inter-alia challenged their locus standi to institute winding up proceedings and had pleaded that the appellant was their statutory auditor and not the executive director thus he could not be prosecuted. It was argued that the Learned Company Judge did not consider these submissions and abdicated its function to the Magistrate, by directing him to go into these questions. Learned Counsel for the respondent on the other hand argued that the expression "suit or other legal proceedings" or "suit or proceedings" in Sections 446(1) and 446(2) of the Company Act do not include the "criminal prosecution", Therefore, no permission was in fact required either against the company or against its Directors. It was argued that the expression "legal proceedings" or "other legal proceedings" must be read ejusdem generis with the expression "suit", if so read it can only refer to any civil proceedings and not to criminal proceedings.

7. From the rival contentions questions which arise for consideration in this appeal are: whether the expression "suit or other legal proceedings" in Section 446(1) and the expression "suit or proceedings " in Section 446(2) of Chapter II in part VII of the Companies Act 1956 encompasses criminal proceedings against the company or not? If the answer to this question is in affirmative, whether the appellant ought to have been given an opportunity of being heard in terms of

Rule 117 of the Company(Court) Rules 1959 before passing of the impugned order?

8. For construction of an expression in statutes- The object of the statute and the context in which the expression is used, have to be examined. Reference in this regard can be made to the following observation of the Supreme Court in S. Gopal Reddy Vs. State of Andhra Pradesh, :-

"Interpretation of statutes Construction of expression in statute -Text and context of entire Act must be looked into-Court must look to object which statutes seeks to achieve."

9. The object of section 446 of the Act is to protect the assets of the company during the winding up proceedings so as to avoid any wasteful expenditure. Reference in this regard can be made to the Supreme Court decision in Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others, : wherein it was held:-

"In the absence of a provision like Section 446(2) under the repealed Indian Companies Act, 1913 the Official Liquidator in order to realise and recover the claims and subsisting debts owed to the company had the unenviable fate of filing suits. These suits as is not unknown, dragged on through the trial Court and Courts of appeal resulting not only in multiplicity of proceedings but would hold up the progress of the winding up proceedings. To save the Company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding up proceedings, the Parliament devised a cheap and summary remedy by conferring jurisdiction on the Court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and Therefore, it must receive such construction at the hands of the Court as would advance the object and at any rate not thwart it".

(Emphasis supplied)

10. The Supreme Court again summarised the law on the subject in Central Bank of India Vs. M/s. Elmot Engineering Co. and others, ; It was held:-

"This section aims at safeguarding the assets of a company in winding up against wasteful or expensive litigation as far as matters which could be expeditiously and cheaply decided by the company Court are concerned. In granting leave under this section, the Court always takes into consideration whether the company is likely to be exposed to unnecessary litigation and cost.

(emphasis supplied)

11. For finding out the meaning and scope and meaning of the phrase "suit or other legal proceedings" in section 446 of the Act it would be useful to notice some other provisions of the Act wherein similar expressions are used.

(i) Section 391 of the Act deals with power to compromise or to make arrangement with creditors and members. Sub-Section (6) of Section 391 reads:

391. Power to compromise or make arrangements with creditors and members-

(1) xxxxxxxx

(2) xxxxxxxx

(3) xxxxxxxx

(4) xxxxxxxx

(5) xxxxxxxx

(6) The court may at any time after an application has been made to it under this Section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(ii) Section 442 of the Act empowers the court to stay or restrain the proceedings against company, at any time after the presentation of a winding up petition and before a winding up order has been made. Sub section (h) of this section empowers the court to stay any suit or the proceedings pending against the company prior to the appointment of an official liquidator. Section 446(1) empowers the Court to stay "the suit or other legal proceedings" after the appointment of an official liquidator. Section 446 of Companies Act reads as under:

"446. Suits stayed on winding up order:

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit 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 proceedings by or against the company;

(b) xxxxxxxxxx

(c) xxxxxxxxxx

(d) xxxxxxxxxx

(iii) Section 454 of the Act provides that where the court has made winding up order or appointed an Official Liquidator, the statement as to the affairs of the company is to be made out and submitted in the prescribed form to the Official Liquidator unless otherwise directed by the court. Non furnishing of the same has been made an offence. Under sub-Section (5) of section 454 reads:

454. Statement of affairs to be made to Official Liquidator-

(1) xxxxx

(2) xxxxx

(3) xxxxx

(4) xxxxx

(5) If any person, without reasonable excuse, makes default in complying with any of the requirements of this section, he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one hundred rupees for every day during which the default continues, or with both".

Sub-section (5A) of Section 454 of the Act empowers the Company Judge to take cognizance of an offence committed under sub-section (5) on receipt of a complaint of facts Constituting such an offence and try the offence itself in accordance with the procedure laid down in the Code of Criminal Procedure for trial of summons cases by Magistrates.

(iv) Sub-section (a) of Section 45 (sic) of the Act empowers the liquidator to institute or defend any suit, prosecution or other legal proceedings with the leave of the court. It reads as under:-

457. Powers of Liquidator - (1) The liquidator in a winding up by the Court shall have power, with the sanction of the Court, -

(a) to institute (sic) criminal, in the name and on behalf of the company."

(b) to (e) xxxxxx

(v) Section 542 of the Act deals with liability for the company for any fraudulent conduct of business by the company. Sub-section (1) of Section 542 of the Act provides that in the course of the winding up of a company if it appears that business of the company has been carried on with an intent to defraud its creditors or other persons or for any fraudulent purpose, the Court on the application by the official liquidator may declare any person personally liable/responsible for the same. Sub section (3) of section 542 provides that every person who knowingly was party to the carrying on of business in the manner aforesaid shall be punishable with imprisonment for a term which may extend to two years or with fine up to five thousand or both.

(vi) Section 621 of the Act makes offences against the Act to be cognizable only on the complaint in writing by Registrar or shareholder or Government except for an offence with respect to which proceedings are instituted u/s 545 of the Act.

12. Mere look at the aforesaid provisions would show that on the one hand, in Section 457 of the Act, the legislature has empowered the liquidator to institute or defend any "suit" or "prosecution" or "other legal proceedings" civil or criminal in the name and on behalf of company after permission from the court;

and by Section 454(5A) of the Act the legislature has empowered the Company Court itself to take cognizance of the offence under sub section (5) of section 454 of the Act and to try such offenders as per the procedure provided for trial of summons cases under the Code of Criminal Procedure , 1974; but on the other hand in sections 442 and 446 of the Act the legislature has used only the expression "suit or other legal proceedings". The words "prosecution" or "criminal case" are conspicuously missing in these sections. It appears quite logical as purpose and object of sections 442 and 446 of the Act is to enable the Company Court to oversee the affairs of the company and to avoid wasteful expenditure. Therefore the intention of the legislature under these sections does not appear to provide jurisdiction to the Company Court over criminal proceedings either against the company or against its directors. Wherever legislature thought it necessary to provide such jurisdiction it has used the appropriate expressions.

13. Further section 621 makes the offences against the Act to be cognizable only on the complaint by Registrar, shareholder or the Government. No permission of the Company Court is required. However, u/s 446(1) of the Act, suit or other legal proceedings cannot be instituted without permission of the company court. Therefore, Section 621(1) itself indicates that the company court has no jurisdiction over other offences except the offence u/s 545 of the Act?

14. The scope and meaning of expressions "other legal proceedings" or "proceedings" u/s 446(1) came up for consideration before the Supreme Court in the context of Income tax proceedings in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, . It was observed that the expression "other legal proceedings" in this section cannot be extended to Income Tax proceedings as these cannot appropriately be dealt with by the company court. It was held:-

"While holding these assessment proceedings the Income Tax Officer does not, in our view, perform the functions of a Court as contemplated by Section 446(2) of the Act. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446 read as a whole, it appears to us that the expression "other legal proceeding" in sub-section (1) and the expression "legal proceeding" in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court.

It was further held: The liquidation Court, in our opinion, cannot perform the functions of Income Tax Officers while assessing the amount of tax payable by the assessee even if the assessed be the company which is being wound up by the Court. The orders made by the Income Tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of

Income Tax. It would lead to anomalous consequences if the winding up Court were to be held empowered to transfer the assessment proceedings to itself and assess the company to Income Tax.

15. The reasoning adopted by the Supreme Court in the above case would be fully applicable to the facts at hand. Complaints under the penal provisions of other statutes against the company or its directors, (except those provided under the Companies Act) cannot be appropriately dealt with by the company court. Orders passed by the criminal court are subject to the appeal and revision etc. under the Code of Criminal Procedure. If the (sic) court is held to be empowered to transfer these criminal proceedings to itself it would lead to anomalous consequences.

16. While considering the prosecution of directors for violations of the provisions of Provident Fund Act, the Supreme court in Rabindra Chamria and others Vs. The Registrar of Companies, West Bengal and others, considered the scope of the expression "Any proceedings" in section 633 of the Act and held that it cannot save directors of the company from liability or prosecution for violating these provisions. It was observed that such a relief can be granted only in case of proceedings arising under the Companies Act and not under other acts. It was held:-

"Under S.633 of the Companies Act relief cannot be extended in respect of any liability under any Act other than the Companies Act. The expression "any proceeding" in S.633 cannot be read out of context and treated in isolation. It must be construed in the light of the penal provisions. Otherwise the penal clauses under the various other Acts would be rendered ineffective by application of S.633. Again, if Parliament intended 633 to have a coverage wider than the Act, it would have specifically provided for it as, otherwise, it is a sound rule of construction to confine the provisions of a statute to itself. The powers under sub-s. (2) of S.633 must be restricted in respect of proceedings arising out of the violation of the Companies Act. Sub-section (2) cannot apply to proceeding instituted against the officer of the company to enforce the liability arising out of violation of provisions of other statutes.

17. While dealing with the provisions of Section 179 of the Companies Act, 1913 (corresponding to section 457 of the Companies Act, 1956) the Supreme Court in Jeswantrao Manilal Akhaney Vs. The State of Bombay, 1956 S.C. 575 observed that in Section 179(457) of the Act cannot be construed to restrict powers of the criminal court to take cognizance of an offence or powers of the police or even of a private citizen to move the machinery of the criminal courts. It was held:-

"There is nothing in Section 179 of the Companies Act, 1913 which can be construed as restricting the powers of the Court to take cognizance of an offence or the powers of the police to initiate prosecution or even of a private citizen to move the machinery of the criminal Courts to bring an offender like the managing director of a company to justice. For a prosecution for breach of trust

even by a director of a company no such condition precedent as the previous sanction of any authority is contemplated by law, unless it is a prosecution in the name and on behalf of the company by the official liquidator who has to incur expenses out of the Funds of the company. Section 179 is an enabling provision to enable the liquidator to do certain things with the sanction of the Court. It does not control the general law of the land.

18. When the powers of criminal court to take cognizance and power of an aggrieved person to institute any criminal proceedings against the company under liquidation are fully protected, can it said that power of a citizen would be subject to the sanction u/s 446 of the Companies Act? The answer has to be in the negative.

19. In this regard some light can also be drawn from a recent decision of Supreme Court in BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., . In this case the Apex Court construed scope and ambit of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 (for short "SICA") while considering the maintainability of criminal complaints u/s 138 read with section 141 of Negotiable Instruments Act, 1881, against the companies, which have approached the Board for Industrial Finance and Reconstruction seeking declaration under SICA, that they have become sick. It was held that:-

"The said contention is (sic) of merits. The word "suit" envisaged in Section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is (sic) to "recovery of money or for enforcement of any security against the industrial company (sic) of any guarantee in respect of any loans or advance granted to the industrial company". As the suit is clearly decline (sic) in the provision itself, the context would not admit of any other stretching process."

20. Learned counsel for the appellant in support of their contention heavily placed reliance on the judgment of a Single Judge of Gujarat High Court in Harish C. Raskapoor and Ors. Vs. Jafebrhai Mohmedbhai Chhatpar (1989) 65 Comp Case 163 wherein it was observed that the expression "proceedings" u/s 391(6) of the Act includes "criminal proceedings" as well wherein reliance was placed on a Single Bench decision of this court in Official Liquidator Vs. R.C. Abrol (1977) 47 Comp Case 537. In that case Official Liquidator had filed criminal complaint against Directors and other officials of the company under sections 538 and 541 of the Act on account of their failure to hand over books of account and records of the company in the High Court which had ordered its winding. Learned Judge, after examining the various provisions of the Code of Criminal Procedure (for short Cr.P.C.) held that cognizance of an offence can be taken only by the Magistrate's court and that the High Courts power to take cognizance of a complaint was (sic) to complaints filed under sub section (5A) of sections 454 of the Act. It was held that High Court had no jurisdiction to take cognizance of any other offence. It was in this context observed that u/s 446(3) of the Act read with section 407 Cr.P.C. High Court could transfer criminal complaint from the Magistrate's court to itself for trial. Learned Judge neither examined nor decided

the issue whether the expression "suit" or "other legal proceedings" occurring u/s 446 of the Act include criminal proceedings. The focus of the entire discussion was not that whether criminal complaint can be construed to be included in the expression "other legal proceedings" u/s 446(1) of the Act. We are unable to agree with the observations made therein that the expression "other legal proceedings" u/s 446(1) also includes the criminal proceedings. The expression "other legal proceedings" must be read in ejusdem generis with the expression "suit" in section 446 of the Act. If so read it can only refer to any civil proceedings and criminal proceedings have to be excluded. Therefore, no permission was required to be taken from Company Court for filing criminal complaint either against the company or against its directors.

21. This conclusion also finds support by the view taken by Bombay and Andhra Pradesh High Courts in the cases reported in Firth (India) Steel Co. Ltd. (in Liqn.), ; Orkay Industries Limited and others Vs. The State of Maharashtra and others, and Nagarjuna Finance Ltd. Vs. Kanosika Laboratories Ltd. (In Liquidation) 1998 94 Comp Case 127.

22. As we have held that the expression "suit" or "other legal proceedings" in section 446(1) and expression "suit or proceedings" u/s 446(2) of the Companies Act, 1956 do not include a "criminal proceedings". Therefore, we need not address ourselves to the other question whether opportunity of being heard under rule 117 of the Company Court Rules 1959 ought to have been given to the appellant or not.

For the foregoing reasons we find no merit in the appeal and the same is dismissed. No order as to costs.