(2000) 10 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Civil Suit No. 21 of 1996

Himachal Pradesh State Electricity Board APPELLANT

Vs

Shivalik Casting Pvt. Ltd. and Others RESPONDENT

Date of Decision : 19-10-2000

Acts Referred:
Companies Act, 1956 — Section 446

Citation : (2003) 115 CompCas 310 : (2004) 50 SCL 212

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; Ramakant Sharma, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Khurana, J.—The plaintiff, H. P. State Electricity Board, has filed the present suit against the defendants for the recovery of Rs. 44, 18,842 towards electricity consumption charges.

2. Defendant No. 1, Shivalik Castings Private Limited is a private limited company duly registered and incorporated under the Companies Act, 1956. It has its registered office at Chandigarh and is carrying on the business of manufacture of castings of different spare parts and mechanical parts at village Jharmajri, Barotiwala in District Solan. Defendant No. 1 was granted induction load of 2975 K.W. by the plaintiff on October 18, 1986, vide Service Connection Order No. 62/05530. Account No. LP-56 LS was allotted to defendant No. 1. The requisite agreement in Form CS-I(B) came to be entered into between the parties. Defendants Nos. 2 and 3 stood surety for defendant No. 1 for compliance with the terms of the agreement and payment of the charges for the electric power consumed.

3. Defendant No. 1 was irregular in the payments of electricity charges. A sum of Rs. 18,39,000 was outstanding against defendant No. 1 by the end of April, 1989. This outstanding amount also included the sum of Rs. 5,89,050 towards

electricity consumption charges for the period June, 1988, to August, 1988, and for the month of February, 1989. On the default of defendant No. 1 to pay the outstanding amount, the electricity connection to defendant No. 1 was temporarily disconnected with effect from January 17, 1989.

4. Defendant No, 1 on May 19, 1989, was allowed to pay the outstanding amount in six instalments. One instalment of Rs. 3,39,000 was paid by defendant No. 1. On the request of defendant No. 1, it was allowed to pay the balance amount of Rs. 15,00,000 in twelve equal monthly instalments. However, no payment was made by defendant No. 1 in spite of repeated opportunities having been granted. The arrears as in November, 1989, rose to Rs. 22, 10,896. As a result, the electricity connection was again temporarily disconnected on November 3, 1989. On the request of defendant No. 1, the plaintiff on December 5, 1989, allowed it to pay the outstanding amount in twelve instalments. The amount due was cleared by defendant No. 1 by the end of December, 1990. From December, 1990, to March, 1991, the electricity charges were regularly paid by defendant No. 1. It again became a defaulter and the following amounts became due :

Rs.

(i) Amount outstanding as on 31-2-1991

18,89,403

(ii) Amount due as MMC with effect from 6/91 to 12/91

7,87,500

(iii) Amount due on account of slow running of the meter

4,87,691

(iv) Amount due on account of surcharge

37,580

(v) Collection charges of outstation cheque

15,980

Total

32,18,154

Less : Security advance adjusted

2,32,450

Net due

29,85,704

5. Since the above amount was not paid, the electricity connection was again temporarily disconnected on May 31, 1991. Again on the request of defendant

No. 1, a sum of Rs. 17,45,449 was allowed to be paid in six instalments. No amount was paid and the electricity connection was permanently disconnected on June 30, 1991. According to the plaintiff, it is entitled to interest on the outstanding amount of Rs. 29,85,704 at the rate of 12 per cent. per annum, which amount of interest comes to Rs. 14,33, 135. Hence the present suit for recovery of Rs. 44, 18,842 against defendant No. 1 as principal debtor and against defendants Nos. 2 and 3 as guarantors.

6. Defendants Nos. 1 and 3 did not put in appearance in spite of service. They were accordingly proceeded against ex parte.

7. The suit is being resisted and contested only by defendant No. 2-United Polyfab, one of the alleged guarantors for defendant No. 1. It was pleaded that defendant No. 2 never stood as a surety for defendant No. 1. The surety, if any, guaranteed by the erstwhile partnership firm was not binding on the present partnership firm which came into being on April 1, 1991. Even otherwise, the surety furnished is illegal since defendant No. 2 being a consumer of L. T. connection could not have stood surety for a consumer of H. T. connection. It is further pleaded that defendant No. 1-company has been ordered to be wound up on February 4, 1994, by the High Court of Punjab and Haryana in Company Petition No. 110 of 1987 and as such the suit is not maintainable. The correctness of the outstanding amount has also been denied. Objections as to absence of cause of action, limitation and estoppel were also raised.

8. On the pleadings of the parties, the following issues were framed on March 22, 1999 :

(1) Whether the plaint does not disclose any cause of action, as alleged ? OPD

(2) Whether the plaintiff is guilty of concealing the material facts and the present suit is not maintainable, as alleged ? OPD

(3) Whether the suit of the plaintiff is time-barred, as alleged ? OPD

(4) Whether the plaintiff is estopped by its acts of omission and commission and conduct, as alleged ? OPD

(5) Whether the electric connection to defendant No. 1 was granted by the plaintiff on the surety of defendant No. 2, if so, its effect ? OPP.

(6) Issue No. 5 is decided in the affirmative whether defendant No. 2 is not liable to pay the suit amount, as alleged ? OPD

(7) Whether the plaintiff is entitled to the interest, if so, at what rate ? OPP

(8) To what amount towards the principal and interest is the plaintiff entitled and if so, from whom ? OPP

(9) Relief.

9. I have heard learned counsel for the parties and have also gone through the

record of the case. My findings on the above issues are as under :

Issues Nos. 2 and 3 :

Both these issues are being taken up together as the findings on either of them would have a bearing on the other.

The amount claimed by the plaintiff is as on December 31, 1991. The present suit has been filed on January 11, 1996. The defendant has contended that the suit having been filed beyond the prescribed period of limitation of three years is not within the time and is liable to be dismissed on that short ground alone.

10. It is in evidence that a reference u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, for declaring defendant No. 1 a sick company was made to the Board for Industrial and Financial Reconstruction (for short the BIFR) in the year 1990. Such proceedings terminated on February 8, 1993, when the BIFR recorded its opinion that the company defendant No. 1 should be wound up.

11. Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, provides that where in respect of an industrial company an enquiry u/s 16 is pending, no suit for the recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company, shall lie or be proceeded with except with the consent of the BIFR or, as the case may be, the appellate authority. Sub-section (5) of Section 22 further provides :

"In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."

12. Learned counsel for the plaintiff has contended that in view of the above provisions and the fact that enquiry u/s 16 of the Sick Industrial Companies (Special Provisions) Act, 1985, was pending against defendant No. 1 till February 8, 1993, no suit for recovery of the suit amount could have been filed and the period till February 8, 1993, will have to be excluded. Excluding such period, the present suit filed on January 11, 1996, is within time.

13. The defendant has averred in para. 2 of the preliminary objections of the written statement in the following terms :

"That the plaintiff is guilty of concealing material facts and has not approached this court with clean hands inasmuch as defendant No. 1-company stood wound up vide order dated February 4, 1994, passed by the High Court of Punjab and Haryana in Company Petition No. 110 of 1987. Therefore, the present suit is not maintainable and unless and until an appropriate permission to file the suit from the authorities appointed by the High Court of Punjab and Haryana is obtained, the suit is liable to be dismissed."

14. Section 446(1) of the Companies Act, 1956, provides :

"When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceedings shall be commenced, or if pending at the date of 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."

15. PW-2 S. K. Gupta, Director (Planning) of the plaintiff, during the course of cross-examination has admitted to the following facts :

"It is correct that an order with regard to winding up of defendant No. 1-company was passed by the High Court of Punjab and Haryana on February 4, 1994. It is correct that no permission was obtained from the High Court of Punjab and Haryana before the filing of the present suit."

16. P.W.-5 Shri Jai Kishan, a senior assistant of the plaintiff-Board, has also admitted that defendant No. 1-company has since been wound up.

17. Exhibit PA is the copy of the order dated February 4, 1994, passed by the High Court of Punjab and Haryana in Company Petition No. 110 of 1987 ordering the winding up of defendant No. 1-company.

18. In view of the admitted fact that an order of winding up of defendant No. 1 stood passed on February 4, 1994, much before the filing of the present suit, the plaintiff was required to obtain the requisite leave u/s 446 (quoted above) from the court ordering the winding up of defendant No. 1-company.

19. The plaintiff has averred in the replication that the requisite permission u/s 446 of the Companies Act, 1956, was obtained by the plaintiff from the High Court of Punjab and Haryana on July 9, 1998. A certified copy of such order has been placed on the record.

20. As stated above, the present suit was filed on January 11, 1996. The requisite permission u/s 446 of the Companies Act, 1956, was obtained about 21/2 years after the institution of the suit. The winding up order was passed on February 4, 1994. Therefore, the following two questions arise for determination, namely :--

(i) Whether the permission required u/s 446 of the Companies Act, 1956, is a condition precedent for commencing a suit or such permission can be obtained even after the commencement of the suit or other legal proceedings ?

(ii) If permission/leave of the court can be obtained even during the pendency of the suit or other legal proceedings, what would be the effect thereof ?

21. Section 446 of the Companies Act, 1956, in substance is the same as Section 171 of the Indian Companies Act, 1913. Section 171 reads :

"When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose."

22. In Suresh Chandra Khasnabish v. Bank of Calcutta Ltd. [1951] 21 CompCas 110 (Cal) a question arose before a Division Bench of the Calcutta High Court as to whether the court u/s 171 has the jurisdiction to grant leave to proceed with a suit or other legal proceedings against a company in liquidation, when such leave was not obtained before the commencement of the suit or other legal proceeding. In the said case the winding up order was passed on April 1, 1949. An appeal was filed against the order dated February 14, 1949, against the company on April 1, 1949, without obtaining the requisite leave u/s 171. The leave was sought during the pendency of the appeal. A learned single judge refused the leave holding that he had no jurisdiction to give leave to continue the appeal. The Division Bench held that the court has jurisdiction to grant leave to proceed with a suit or other legal proceeding against a company in liquidation, even though such leave was not obtained before its commencement.

23. A contrary view has been taken by a Division Bench of the Bombay High Court in Eastern Steamship Private Ltd. v. Pucto Private Ltd. [1971] 41 CompCas 43. Dealing with Section 446 of the Companies Act, 1956, it has been held that leave to commence a suit or to proceed with it could only be granted before the suit is commenced and no leave can be granted to continue it or to proceed with it if it is commenced after the date of the winding up order.

24. In Star Engineering Works Ltd. v. Official Liquidator of the Krishnakumar Mills Company Ltd. (In Liquidation) [1977] 47 CompCas 30 the High Court of Gujarat dissented from the view of the Bombay High Court and held that failure to obtain leave before institution of the suit or other legal proceeding would not entail dismissal of the suit or proceeding. The suit or proceeding instituted without leave of the court would be ineffective until leave is obtained. Once leave is obtained the suit or proceeding would be deemed instituted on the date of granting leave.

25. The abovesaid ratio of the Gujarat High Court was followed by the High - Court of Madras in State Bank of India v. Official Liquidator, Straps (India) Private Ltd. [1979] 49 CompCas 514 and it was held that obtaining of leave of the court to proceed with a suit against a company in liquidation is not a condition precedent for instituting the suit and even though a suit had been instituted against a company in liquidation without obtaining leave, such leave can be applied for and obtained even subsequently. However, the suit will be effective only from the date such leave was granted.

26. Similar is the view of the High Court of Punjab and Haryana in United Commercial Bank v. State of Jammu and Kashmir [1986] 60 Comp Cas 653 and the High Court of Madras in Asain Travels (India) Pvt. Ltd., In re [1990] 3 CompLJ 114.

27. The Supreme Court in Bansidhar Shankarlal v. Mohd. Ibrahim [1971] 41 CompCas 21 has also held that the suit or proceeding instituted without the leave of the court may be regarded as ineffective until leave is obtained but once

leave is obtained the proceedings will be deemed instituted on the date granting leave.

28. Since the requisite leave u/s 446 of the Companies Act, 1956, was admittedly obtained by the plaintiff on July 9, 1998, the present suit, though instituted on January 11, 1996, would be deemed to have been instituted on July 9, 1998, the date on which leave was granted. Therefore, the suit having been filed more than three years after the termination of inquiry by BIFR on February 8, 1993 is, on the face of it, barred by time. The two issues are decided accordingly.

Issues Nos. 1 and 5 :

29. These two issues being co-related and interconnected are being taken up together. The case of defendant No. 2 is that since it never stood as a surety for defendant No. 1, the plaintiff has no cause of action against it.

30. Exhibit PW-4/B is the surety bond alleged to have been executed by defendants Nos. 2 and 3 in favour of the plaintiff. Admittedly, defendant No. 2 is a. partnership firm, while defendant No. 3 is a limited company duly incorporated under the Companies Act, 1956, The surety bond exhibit PW-4/B is alleged to have been signed and executed by one Ravi Kumar, partner of defendant No. 2 firm and K. K. Punchhi, director of defendant No. 3-company. The surety has been furnished to the extent of Rs. 5,00,000. The surety alleged to have been furnished by defendants Nos. 2 and 3 reads :

"(1) Ravi Kumar,

(2) K. K. Punchhi,

hereby declare ourselves sureties for the above bounden and guarantee that he shall do and perform all that he has above undertaken to do and perform, and in case of his omission, default or failure therein, we hereby bind ourselves jointly and severally to forfeit to the HPSEB (hereinafter referred to as "the Board"), which expression shall unless excluded by or repugnant to the context include his successors in office and assigns) the sum of Rs. 5 lakhs only (hereinafter referred to as "the said sum") in which the above bounden has bound himself or such other lesser sum as shall be deemed to be sufficient by the Board to recover any amount of dues payable by the above bounden and remaining unpaid and also to recover any loss, damages, costs or expenses, which the Board may sustain, incur or pay by reason of such omissions, default or failure.

And we agree that the Board may without prejudice to any other right or remedies of the Board, recover the said sum from us jointly and severally, as arrears of land revenue and/or fine imposed by any authority under the said Act.

And we also agree that neither of us shall be at liberty to terminate this suretyship except upon giving the Board six calendar months notice in writing of his intention so to do and our joint and several liabilities under this bond shall continue in respect of all acts, omissions, defaults, failure and insolvency on the part of the above bounden until the expiration of the said period of six months."

31. A bare perusal of the above shows that the surety was furnished by Sarvshri Ravi Kumar and K. K. Punchhi in their personal capacities and not for and on behalf of defendants Nos. 2 and 3, the firm and company, respectively. Therefore, it can be safely held that the electric connection to the defendant No. 1 was not granted by the plaintiff on the surety of defendant No. 2 and/or defendant No. 3. The plaintiff as such has no cause of action. The two issues are decided against the plaintiff and in favour of defendants Nos. 2 and 3.

Issue No. 6 :

32. In view of the findings recorded under issue No. 5 above, neither defendant No. 2 nor defendant No. 3 is liable to pay the suit amount to the plaintiff. The issue is decided in favour of the defendants. Issue No. 4 :

33. This issue was not pressed during the course of hearing. The same is as such decided against the defendants.

Issues Nos. 7 and 8 :

34. In view of the findings recorded under issues Nos. 1, 2, 3, 5 and 6 above, the plaintiff is neither entitled to recover any amount from any of the defendants nor to any interest. The two issues are decided against the plaintiffs.

Relief :

35. As a result, the present suit fails and the same is dismissed, leaving the parties to bear their own costs.

