

(2012) 08 SHI CK 0023
In the High Court Of Himachal Pradesh
Case No : OSA No. 1 of 2001

H.P. State Electricity Board, Vidhut Bhawan, Shimla	APPELLANT
Vs	
M/s. Shivalik Casting Pvt. Ltd. and M/s. H.P. Rubklame Ltd.	RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Companies Act, 1956 — Section 171, 179, 391, 442, 446
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 22(5)

Citation : (2012) 175 CompCas 203 : (2013) 1 ShimLC 595

Hon'ble Judges : Rajiv Sharma, J;Deepak Gupta, J

Bench : Division Bench

Advocate : K.D. Sood, with Mr. Sanjeev Sood, for the Appellant; Ashwani Sharma, counsel for R-1, for the Respondent

Judgement

Deepak Gupta, J.—The following interesting question of law arises in this appeal:

Whether in case the plaintiff seeks leave of the Company Court u/s 446 of the Companies Act, 1956 after institution of the suit, will the permission relate back to the date of filing of the suit or will the suit be deemed to be validly instituted only after such permission has been granted."

To appreciate the aforesaid question, it would be relevant to refer to Section 446 of the Companies Act, 1956 which reads as follows:

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) Court 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 course of the winding up of the company, whether such suit or proceeding has been instituted or is instituted or such claim or question has arisen or arises 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 (65 of 1960).]

(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."

2. A bare perusal of this Section shows that after a winding up order has been made or official liquidator appointed no suit or proceedings can be commenced or if already pending be proceeded with against a Company except with the leave of the Court.

3. In the present case, M/s.Shivalik Casting Company which is the main defendant owed a huge amount of money to the H.P. State Electricity Board (hereinafter referred to as the Board) and according to the Board it was entitled to recover a sum of Rs.29,85,704/- alongwith interest @ 12% p.a. and accordingly a suit for recovery of Rs.44,18,842/- was filed on 11.1.1996 on the original side of this Court. The original loanee did not put in appearance and the suit was contested by the guarantors. The main issue raised was that the suit is not within limitation.

4. Admittedly, the amount claimed by the plaintiff in the suit was calculated as on 31.12.1991 and the suit was filed on 11.1.1996. However, it is apparent that a reference u/s 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 for declaring the main defendant Shivalik Casting a sick Company was filed before the Board for Industrial and Financial Reconstruction (BIFR) some time in the year 1990. These proceedings terminated on 8.2.1993 when the BIFR recommended that the Company be wound up on 8.2.1993. Against this order, the Company filed an appeal before the Appellate Authority and finally the winding up order was passed by the learned Company Judge on 4.2.1994. The suit in question was filed on 11.1.1996.

5. Section 22(5) of the Sick Industrial Companies (Special Provisions) Act, 1985 reads as follows:

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.

6. In view of the provisions of this Act, no suit could be filed till 8.2.1993 and if this period up to 8.2.1993 is excluded the suit which was filed on 11.1.1996 would be within time.

7. The main issue in this case is with regard to Section 446. Admittedly, when the suit was filed in this Court on 11.1.1996 the plaintiff Board had not obtained leave of the Company Judge u/s 446 of the Companies Act. Such leave was obtained only on 9.7.1998. The learned Single Judge relying upon the judgment of the Apex Court in *Bansidhar Shankarlal vs. Mohd. Ibrahim and another*, (1971) 41 Com. C 21, held that the suit is deemed to have been effectively instituted only on 9.7.1998 and even if the time up to 8.2.1993 is excluded the suit was not within limitation and hence dismissed the suit as being time barred.

8. At this stage, it would be pertinent to make reference to the observations made in *Bansidhar's* case (*supra*) by the Apex Court. The Apex Court dealing with Section 171 of the Companies Act, 1913 which is similar to Section 446, quoted above, held as follows:

This section is in terms analogous to Section 231 of the English Companies Act, 1948 (11 and 12 Geo. 6. Ch. 38). The object of Section 171 is plain. It is intended to ensure that the assets of a company ordered to be wound up by the Court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain an advantage over others by instituting or prosecuting proceedings against the Company. The section is intended to maintain control of the Court which has made an order for winding up on proceeding which may be pending against the Company or may be initiated after the order of winding up, and the Court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion.

The Apex Court further held as follows:

Even granting that sanction u/s 179 does not dispense with the leave u/s 171 of the Act, to institute a proceeding in execution against a Company ordered to be wound up, 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 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."

(Emphasis supplied)

9. Relying upon the last lines that the proceedings will be deemed to be instituted on the date granting leave the learned single Judge held that for purposes of limitation the suit would be deemed to be effectively instituted only on 9.7.1998.

10. Sh. K.D. Sood, learned counsel for the appellant has drawn our attention to

the decision of the Bombay High Court in *Vysya Bank Ltd. vs. Official Liquidator, Shreeniwas Cotton Mills Ltd. (In Liquidation)*, (1995) 84 Comp. Cas. 493, wherein a Division Bench of the Bombay High Court not only considered the judgment in *Bansidhar's* case but also a large number of other judgments rendered in other cases.

11. Examining the scope of Section 446, the Bombay High Court held as follows:

Thus, u/s 446, no suit or other legal proceeding against the company shall be commenced or if pending at the date of winding up order shall be proceeded with, when a winding up order has been made or the official liquidator has been appointed as provisional liquidator, except by the leave of the court. In short, the effect is that all pending suits and legal proceedings against the company are stayed and no fresh suit or legal proceeding can be commenced without the leave. Pending actions can be continued and fresh actions can be commenced only with the leave of the court. The court is given full control over pending as well as proposed suits or legal proceedings against the company and is also empowered and has jurisdiction to dispose of any suit or legal proceeding or any claim whether pending or commenced after the winding up order. Even in respect of the interregnum period between the presentation of a petition for winding up and the passing of the winding up order, the court is empowered u/s 442 of the Act to stay or restrain proceedings against the company. The object of section 446 is to safeguard the company from being subjected to the liability or being deprived of its rights and claims without the knowledge of the winding up court. While granting the leave, false, frivolous, fraudulent or time-barred suits and legal proceedings can be weeded out.

Dealing with the question in hand the Bombay High Court observed as follows:

This takes us to the next question, viz., does failure to obtain leave entail dismissal of the suit and whether as regards limitation the suit instituted without leave be regarded ineffective until leave is granted? This is Mr. Kadam's submission which is based on the observation, viz., "the suit or proceeding... granting the leave" in *Bansidhar Shankarlal* [1971] 41 Comp Cas 21 (SC). This submission found favour with the learned single judge. The Supreme Court, after unequivocally holding that leave is not a condition precedent, observed as above. This observation has to be read in harmony with what the Supreme Court held a little earlier in the same paragraph, viz., leave is not a condition precedent. Correctly interpreted it would mean that a suit or a legal proceeding pending at the time of the winding up order or commencement thereafter would be "ineffective" unless it is activated by leave. "Ineffective" would only mean ineffective qua the official liquidator only who has power, inter alia, to defend any suit or other legal proceeding in order to protect all the property, effects and actionable claims to which the company is entitled. Thus, the observation cannot be stretched to non-suit a plaintiff whose suit when filed is otherwise within limitation. To give such an interpretation to this observation can result in only setting at naught what is held by the Supreme Court. The bar of limitation is a

creature of the statute and cannot be imposed or read into the otherwise unambiguous language of section 446. The observation in question speaks of a legal fiction and cannot be interpreted to read into the said provision any legal bar. In these circumstances, we cannot accede to Mr. Kadam's submission. The learned single judge was clearly in error in holding as he did.

12. On the other hand Sh. Ashwani Sharma, relying upon the judgment in Bansidhar's case and also the observations of the learned Single Judge submits that the suit would be deemed to be legally instituted only after the leave was obtained.

13. We are in total agreement with the view laid down by the Bombay High Court in Vysya Bank's case (supra). One line of the Apex Court cannot be read out of context. If we read the entire judgment in Bansidhar's case, it is more than apparent that the Supreme Court in no uncertain terms held that grant of leave is not a condition precedent to the filing of the suit. Once grant of leave is not a condition precedent, then why should the period prior to grant of leave be not taken into consideration for calculating the limitation. What the Apex Court held and as has been clearly explained by the Bombay High Court is that the proceedings will be "ineffective" till leave is granted. Ineffective cannot be equated with non-existent. In the present case the suit when filed was within limitation. Merely, because the leave was granted after the period of limitation had expired does not mean that the suit which was otherwise filed within the period of limitation will be deemed to be beyond time. If such an interpretation is given then this would be totally against the law laid down by the Apex Court that grant of leave is not a condition precedent to filing of the suit. Once leave is granted by the Company Judge then in our opinion the leave will relate back to the date of filing of the suit.

14. We are, therefore, not in agreement with the learned single Judge and are in respectful agreement with the views expressed by the Bombay High Court. Accordingly, we answer the question posed in the beginning by holding that once the Company Judge grants permission to file the suit, even if such permission is granted ex-post-facto, it shall relate back to the date of institution of the suit. We, therefore, hold that the suit was within limitation. Since the learned single Judge has not given any other findings on the merits of the case, the matter is remanded to the learned Single Judge who shall after hearing the parties decide the same on merits. The appeal is allowed in the aforesaid terms. Parties through their learned counsel are directed to appear before the learned single Judge on 12th September, 2012.