

(2005) 05 DEL CK 0181

In the Delhi High Court

Case No : Co. Application No. 473 of 2004 in Co. Petition No. 256 of 2002

In Re: Hill Packaging Ltd.

Date of Decision : 04-05-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 4
Companies Act, 1956 — Section 16, 442, 446, 446(1)

Citation : (2005) 122 DLT 424

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Gita Sharma, Adv Yogesh Kalra, Adv Mukul Chandra, Adv Pankaj Chaudhary, for the Appellant;

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—This application is filed by the ex-directors of the company M/s. Hill Packaging Limited (in liquidation) u/s 442 of the Companies Act, 1956 (for short "the Act") and the prayer made in the application is that the proceedings in four cases pending against the company be stayed and the plaintiffs in those suits be restrained from proceeding with the said suits. Particulars of suit/OAs as given in the application are as under:

S. OA No. plaintiff/Applicant Court Purpose NDOH No. 1. 102/2003 SBI v. Hill Packaging DRT for filing 6/5/2004 Ltd. and Anr. Lucknow of W/s 2. 178/99 IFC Ltd. and Ors. v. Hill Packaging DRT Delhi for final 22/4/2004 Ltd. and Anr. Judgment 3. Suit No. SCJ Master Batches Court of 4/2004 v. Hill Packaging Smt. Sunita Ltd. and Anr. Gupta ADJ, Tis Hazari for filing Court Delhi W/s 28/4/2004 4. Suit No. SCJ Plastic Ltd. Court of 54/2004 v. Hill Packaging Sh. Prashant Ltd. and Anr. Kumar for filing CJ Delhi W/s 3/5/2004 2. On 27th August, 2004, while issuing notice in this application, prayer of the applicant for stay of OAs filed by the banks/financial institutions and pending before the DRT, Lucknow and DRT, Delhi was rejected in view of the judgment of the Supreme Court in the case of Allahabad Bank Vs. Canara Bank and Another, . Notice was issued in respect of other two proceedings and interim order was passed to the

effect that further proceedings in these two cases be stayed in the meantime.

3. Perusal of the particulars of the aforesaid two suits indicates that the plaintiffs in both the cases belong to the same group. After notice to the said plaintiffs, they have filed their reply objecting to the prayer made in the application. Brief history of both the suits is given in the reply and thrust of this reply is that the material was supplied to the company (in liquidation) during the period November, 2000 to February, 2001. According to the objections, the company had approached the BIFR in the year 1999 u/s 16 of the Act for its revival as, according to the company, it had become a sick company. It is further stated that in those proceedings, pursuant to the directions issued by the BIFR, advertisement was published in the newspaper on 17th November, 2000 for takeover/merger/Malgamation/leasing of the company. From these facts, it is sought to urge that the Managing Director/Directors of the company knew fully well that the company did not have financial capacity to make payment of the goods and still it had placed orders with the plaintiffs for supply of those goods. This is treated by the plaintiffs as an act of fraud on the part of the Managing Director/directors of the company. It is for this reason, the objectors state that in the suits which are filed by them against the company, the Managing Director/directors are also pleaded in their personal capacity and the plaintiffs/objectors have prayed for passing of decree against them as well as it is the submission that in case of fraud it would be joint and several liability of the Managing Director/directors. Learned Counsel appearing for the objectors, while referring to the averments made in the plaint, has supported this plea by citing the following judgments:

(1) William C. Leitch Brothers, Ltd., In re (1933) CC 97.

(2) Regina v. Grantham 1984 (2) WLR 815.

(3) Parnami Press v. Vinedale Distilleries Ltd. 94 (1998) CC 926.

(4) State Bank of India v. Indian Electric and Ors. (1989) II Delhi 212.

4. The principle laid down in Regina v. Grantham (supra) is that where a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is in general, a proper inference that the company is carrying on business with intent to defraud. In Parnami Press v. Vinedale Distilleries Ltd. (supra), Andhra Pradesh High Court held that where a sick company incurs debts subsequent to the scheme framed by the Board of Industrial and Financial Reconstruction for rehabilitation, no permission is required from the BIFR for taking action against the debtor company including for filing an application for winding up the company. Consequently, in the winding up case, proceedings could not be stayed because debts had been incurred by the respondent-company subsequent to the scheme framed by BIFR for rehabilitation of the respondent company.

5. Learned Counsel for the applicant, on the other hand, submits that in the written statement filed by the defendants, including the Managing Director/directors to the said suits, the case set up by the defendants is that there was no intention to defraud the plaintiffs. The company had even been making payments. In fact it could not make further payments only because on 19th/20th July, 2001 a fire broke out in the company and the property worth Rs. 1 crore and the records of the company were burnt. It is for this reason that the scheme of revival could not be prepared and ultimately the BIFR in July, 2002 recommended winding up of the company on the basis of which CP No. 256/2002 was registered by this Court and winding up orders passed. Submission of the applicants is that there is a difference between inability to pay and intention not to pay and it is a case of inability and, Therefore, there is no fraud committed by the Managing Director/directors.

6. The respective stands of the parties, as noted above, would reflect that the suits filed by the objectors are not against the company (in liquidation) but against the Managing Director/directors as well in their personal capacity and decree is prayed for against them as well on the ground that they committed fraud. No doubt the Managing Director/directors have contested the suits on the ground that there was no such fraud committed by them, the appropriate forum where this issue is to be decided, is the Civil Court where those suits are pending. Needless to mention, in order to decide this issue, evidence is required and the Court can come to some definite findings only after giving opportunities to the parties to lead their respective evidence and the issue to be decided is as to whether Managing Director/Director of the company defrauded the plaintiffs and are personally liable to make payments to the plaintiffs. With this issue the company, and consequently the Company Court, is not concerned with. Proposition of law has been laid down by this Court in (1989) II Delhi 212 in the following words:

"10. The language of Section 446(1) is plain, clear and unambiguous. The mandate of the Section is that when a winding up order has been made no suit or other legal proceedings shall be proceeded with "against the company" except with the leave of the Company Court. When the Section states that the suit or other legal proceedings shall not be proceeded with "against the company" can it be said that suit or other legal proceedings shall not be proceeded with against other defendants also. My answer is "No". The reasons are many. Firstly, Section 446 is applicable only to the Companies under the Act and other defendants before me are not companies and are different and distinct legal entities. Secondly had the Legislature intended that no suit or legal proceedings to which the company is a party shall proceed even against other after winding up order in respect of the company is made it would have said so expressly and would not have said that. "...No suit or other legal proceedings shall ...be proceeded with, against the company, except by leave of the Court...." Thirdly, the liability of other defendants may be independent, separate and distinct from that of the company. Fourthly, in proceedings plaintiff may be seeking no relief and/or

interim relief against the company. Even in the present case, the plaintiff has not claimed any relief against defendant No. 4 in this application. In my view, there is no substance in the contention that proceedings in the suit against defendants 1 and 2 cannot continue because of order of winding up of defendant No. 4. Mrs. Shroff, in my opinion, has rightly relied upon Order 1 Rule 4, C.P.C. Inter alia, providing that judgment may be given against such one or more of the defendants as maybe found to be liable, according to their respective liabilities. Defendants have not raised any other objection to the sale of the goods."

7. It would be appropriate if the suits are allowed to continue before the Civil Court where they are pending, particularly when the decree is prayed for against the Managing Director/Director in their personal capacity.

8. The prayer made in this application is accordingly rejected. Interim order is hereby vacated. The Official Liquidator shall represent the company (in liquidation) through Counsel in those proceedings.