

(2001) 10 AP CK 0011

In the Andhra Pradesh High Court

Case No : Company Application No's. 179 and 188 of 2001 and Company
Petition No. 131 of 1999

In Re: Pennar Paterson Ltd.

Date of Decision : 30-10-2001

Acts Referred:

Companies Act, 1956 — Section 446, 446(1), 633
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 187B, 391(6), 397, 406, 457
Penal Code, 1860 (IPC) — Section 4, 5

Citation : (2002) 2 ALD 78

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Advocate : M. Subbarayulu, for the Appellant; Prakash Puyanik and L.
Venkateswara Rao, for the Respondent

Judgement

Sinha, C.J.—Whether the expression "other legal proceedings" occurring in Section 446(1) of the Companies Act, 1956 ("the Act") does include the criminal proceedings is the question involved in these applications.

2. Application No. 179 of 2001 has been filed by the official liquidator to direct the first respondent herein to transfer Criminal Complaint No. 1026 of 2000 on the file of the Judicial Magistrate of First Class, Nagpur to this Court and to order costs of this application to come out of the assets of the company. Application No. 188 of 2001 has been filed to stay the proceedings in the said criminal complaint.

3. This Court by an order dated 24-11-1999 appointed the official liquidator attached to this Court as the provisional liquidator of Pennar Paterson Ltd. The Liquidator pursuant to the said order took over the assets of the company. It was found that a criminal complaint against the aforementioned company and its Director has been filed knowing that a provisional liquidator has been appointed in relation to the said company and without bringing on record the official liquidator.

4. The learned single Judge, having regard to the fact that this Court by an order dated 19-1-2001 held in Company Application No. 360 of 2000 that the expression "other legal proceedings" does not include prosecution relying on a decision of this Court in Nagarjuna Finance Ltd., Hyd. Vs. Kanosika Laboratories Ltd. and Another, , and the ratio in three decisions cited viz., Khosla Fans (India) (P.) Ltd., In re [1983] 53 Comp. Cas. 858 (Punj. & Har.), D.K. Kapur v. Reserve Bank of India [2001] 105 Comp. Cas. 643 and J. Burrows (Leeds) Ltd., In re [1982] 2 All ER 882 being contra thereto, referred the matter for an authoritative pronouncement on the question.

5. Mr. Adinarayana Rao, the learned counsel on behalf of the applicant would contend that the provisions contained in Section 446 must be given widest interpretation. The learned counsel would contend that as official liquidator is an officer of the Court, it was incumbent upon the complainant to obtain prior permission before lodging proceedings. It was urged that having regard to the provisions contained in Section 450(3) of the Act, even a provisional liquidator would come within the purview of the definition of "Official Liquidator".

6. Mr. S.R. Ashok, the learned counsel on the other hand would submit that the Parliament has used different expressions keeping in view different situations. The learned counsel would contend that whereas in Section 446(3), the expression "suit or other legal proceedings" had been mentioned.

7. Our attention in this connection has been drawn to the fact that while granting benefit of stay to the trustees, the word "prosecution" has not been used in Section 391(6) of the Act. The learned counsel would urge that the offences committed by the company or by the Directors thereof would come within the purview of the Act. The learned counsel would contend that in fact Section 457 of the Act is a pointer to show that the official liquidator is required to obtain permission of the Company Court for defending any suit or criminal action on behalf of the company. It was submitted as against the official liquidator merely a fine of Rs. 5,000 can be imposed. It was urged that in a case of this nature, the official liquidator can only file an application before the concerned Court in terms of section 633 of the Act. On the aforementioned premise, the learned counsel would contend that the prosecution initiated in the Court of Judicial Magistrate First Class at Nagpur cannot be directed to be transferred to the Company Court in exercise of powers u/s 446. Strong reliance has been placed on the decisions in Nagarjuna Finance Ltd's case (supra), Raghunath Cotton & Oil Products Ltd. v. Ramarao Cotton Co. [1999] 95 Comp. Cas. 852 and a recent decision of the Delhi High Court in D.K. Kapur's case (supra).

"The Court" has been defined in Section 2(11) of the Act to mean

(a) with respect to any matter relating to a company (other than any offence against this Act), the Court having jurisdiction under this Act with respect to that matter relating to that company, as provided in Section 10;

(b) with respect to any offence against this Act, the Court of a Magistrate of the

First Class of, as the case may be, a Presidency Magistrate, having jurisdiction to try such offence;

Section 446 deals with the suits stayed on winding up order and it reads:

"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 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.

(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."

8. Section 450 of the Act, deals with appointment and powers of provisional liquidator. Under Sub-section (3) of Section 450, the Court may limit and restrict the powers of a provisional liquidator appointed by the Court, but otherwise he shall have the same powers as a liquidator. The powers of the liquidator have been laid down in Section 457 and he will have the power to institute or defend any suit, prosecution, or other legal proceedings -- civil or criminal -- on behalf of the company that has been wound up.

9. A bare perusal of the aforementioned provisions would clearly go to show that in terms thereof, transfer of a criminal case from one State to another is not contemplated. The Supreme Court alone has been conferred with the power to transfer a criminal case from one State to another u/s 406 of Code of Criminal Procedure, 1973. Therefore, in our opinion, such power cannot be exercised by a

Company Court.

10. The question as to whether the expression "other legal proceedings" would include prosecution may now be considered. Section 446 has been enacted for the purpose of protection of the assets of the company. By reason of the said provision, the personal criminal misconduct on the part of the company or its Directors is not saved.

11. We may notice that even Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 provides for stay of suit or other legal proceedings. Even if a matter relating to Sick Industrial Undertaking has been referred to Board for Industrial and Financial Reconstruction ("BIFR"), an offence cannot be said to be included in the expression "other legal proceedings" in terms of Section 22 thereof.

12. In BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., , the Apex Court held:

"15. The fallacy of the above contention is two fold. First is that maintainability of prosecution proceedings is not to be tested on the touchstone of any practical hurdle in enforcing the sentence which might be imposed on a company after conviction. Second is, there is no insurmountable hurdle for recovery of the fine covered by the sentence even from a sick industrial company because the ban contained in Section 22(1) is only conditional as could be discerned from the last limb thereof which reads thus : "Except with the consent of the Board or, as the case may be, the Appellate Authority". It means that with such consent the court would be in a position to resort to proceedings for distress against the properties of the sick industrial company. Hence the aforesaid contention has no merit at all. (p. 743)

It was clearly held that legal proceedings would not include a prosecution. In Nagarjuna Finance Ltd's case (supra), a learned single Judge of this Court has clearly held :

". . . Looked at from any angle, I am of the view that for prosecuting pending criminal proceedings u/s 138 of the Negotiable Instruments Act against a company, no leave is required to be obtained from the company court for prosecuting the said case. As far as the directors are concerned, Section 446 of the Companies Act has no application even by stretching the provisions because the provision's only meant for prosecution against companies and not against the directors. In view of this position of law, no leave as sought is necessary."

The aforementioned decision has been quoted with approval by a Division Bench of this Court in Raghunath Cotton & Oil Products Ltd's case (supra) in the following terms :

In this context also the observations of the single Bench judgment of this Court in Nagarjuna Finance Ltd. v. Kanosika Laboratories Ltd [1998] 94 Comp. Cas. 127 ought to be noted wherein the learned single judge observed that the words

"other legal proceedings" will not embrace proceedings like those u/s 138 of the Negotiable Instruments Act. The learned single Judge went on to observe that these criminal proceedings, particularly like Section 138 of the Act, have no bearing whatsoever on the purposes for which this section has been enacted.

The matter has since been considered by a Division Bench of Delhi High Court in D.K. Kapur's case (*supra*). In the aforementioned decision, the Division Bench referred to the decision of the Apex Court in *S.V. Kondaskar, Official Liquidator & Liquidator of the Colaba Land & Mills Co. Ltd. v. V.M. Deshpande* [1912] 42 Comp. Cas. 168.

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 Section (1) and the expression "legal proceeding" in Section (2) convey the same sense and the proceedings in both the sections must be such as can appropriately be dealt with by the winding up court.

13. It has clearly been held that a prosecution does not come within the purview of Section 446 *inter alia* on the ground that the said provision has been enacted for the purpose of saving the assets of the company and having regard to the provisions contained in Sections 187B, 391(6) and 457, prosecution would not come within the purview thereof. It is now well settled principles of law that where different expressions have been used in different sections of the statute, the same should be given different meanings.

14. The words "suit and other legal proceedings" may be read *ejusdem generis*. Had the intention of the Legislature been to include prosecution within the expression "other legal proceedings", there was no reason as to why it could have been said so. Although the heading of section is not relevant for construction of a statute, where the wordings of the section are clear, the same in the case of obscurity can be referred to for ascertaining the true meaning of the provision.

15. In *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others*, it was held :

That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each

word is meant and designed to say as to fit into the scheme of the entire Act.

16. In *Gurudevdatla VKSSS Maryadit and Others Vs. State of Maharashtra and Others*, it has been held :

"26. Further we wish to clarify that it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver...." (p. 552)

17. In *Dental Council of India and Another Vs. Hari Parkash and Others*, it was held:

The intention of the Legislature is primarily to be gathered from the language used in the statute, thus paying attention to what has been said as also to what has not been said. When the words used are not ambiguous, literal meaning has to be applied, which is the golden rule of interpretation.

18. In *Dadi Jagannadham v. Jammulu Ramulu* AIR 2001 SCW 3051, the Apex Court held:

The settled principles of interpretation are that the Court must proceed on the assumption that the Legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction, which will carry out the obvious intention of the Legislature. Undoubtedly if there is a defect or an omission in the words used by the Legislature, the Court could not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there.

Further more, in India the power of the Courts are considered having regard to the hierarchy thereof. In *M.M. Thomas Vs. State of Kerala and Another*, , a reference is made to Halsbury's Laws of England (4th Edn. Vol. 10, para 713) as regards the jurisdiction of the Courts wherein it is stated thus:

""The chief distinctions between superior and inferior courts are found in connection with jurisdiction. *Prima facie*, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court. An objection to the jurisdiction of one of the superior

courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is necessary. The High Court, for example, is a court of universal jurisdiction and superintendency in certain classes of actions, and cannot be deprived of its ascendancy by showing that some other court could have entertained the particular action."" (p. 543)

19. It is now trite that even assuming that prosecution has been launched illegally, the remedy of the official liquidator would be either to file an application u/s 633 of the Act and/or to file an application before the concerned High Court to which the Court of Magistrate is subordinate either under Article 226 or 227 of the Constitution of India or u/s 482 or 397 of the Code of Criminal Procedure. The order taking cognisance by criminal Court can be interfered with either by a Magistrate, Sessions Judge or by the High Court.

Furthermore, Section 457 clearly postulates the prosecution as against an official liquidator in view of the fact that the said section provides for obtaining sanction of the Company Court to defend him either in civil or criminal proceedings. Whenever a criminal case is initiated, the provisions of the Code will apply. Sections 4 and 5 of the Code clearly postulate that all offences under Indian Penal Code have to be enquired and tried under the Code. The offences under laws other than Indian Penal Code shall also be tried thereof. This aspect of the matter has been considered in *C.V. Raman v. Government of A.P.*

20. For the reasons aforementioned, we hold that the Company Court has no jurisdiction to transfer a criminal case from one State to another and the expression "other legal proceedings" occurring in Section 446(1) does not embrace within its fold a criminal prosecution. The reference is answered accordingly and the company application is disposed of. There shall be no order as to costs.