(2004) 05 AHC CK 0008

In the Allahabad High Court

Case No : Company Application No. 11 of 2000 in Company Petition No. 30 of 1998

In Re: Videsh Sanchar Nigam Ltd.

Date of Decision : 12-05-2004

Acts Referred:

Companies Act, 1956 — Section 446, 446(1), 446(3), 466

Citation : (2005) 128 CompCas 436 : (2005) 63 SCL 192

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Yaswant Verma and Sharad Verma, for the Appellant; S.K. Saxena and Ram, for the Respondent

Judgement

Tarun Agarwala, J.—The applicant, M/s. Videsh Sanchar Nigam Ltd. has filed an application u/s 446 of the Companies Act, 1956 (hereinafter referred to as ''the Act'') praying that permission be granted to the applicant-company to further proceed against Srishti Video Corporation Ltd. in suit No. 1011 of 1998 (hereinafter referred to as ''the respondent-company in liquidation'') pending before the Delhi High Court on such terms and conditions as this Court may impose.

2. The relevant facts, in brief, as set out in this application are that the company in liquidation approached the applicant-company by a written request dated 9-2-1995 to reserve space segment on the Intelsat Satellite IS-704 at 66 degree East, a guaranteed 36 Mhz bandwidth transponder on a non-pre-emptible lease basis for a period of 10 years with a start date of 1-4-1995 in the C-band spot beam transponder covering the Indian sub-continent and the Middle East. The applicant-company agreed to arrange and provide the above requested space segment capacity to the respondent-company and an agreement dated 31-7-1996 was entered. By virtue of this agreement, the applicant-company granted intelsat lease capacity for a period of 10 years with a start date of 1-4-1995 to the respondent-company on such terms and conditions contemplated in the agreement. It was also contended that Clause 14 of the agreement contemplated that the respondent-company was to provide to the

applicant-company a bank guarantee for an amount equal to one year lease rental charges. The respondent company also undertook to review annually the bank guarantee for the entire term of the agreement. The applicant-company stated that UTI bank gave a bank guarantee for Rs. 4.20 crores on behalf of the respondent-company for due and faithful performance of the terms and conditions of the agreement. Under the terms and conditions of the bank guarantee, the UTI Bank undertook and assured the applicant-company that if the respondent-company in any way fails to observe or perform the terms and conditions of the agreement and commit any breach of its obligations thereunder, the UTI Bank shall, on demand, by the applicant-company and without any objection or demur undertake and agree to pay to the applicant-company a sum of Rs. 4.20 crores of such lesser amount as the applicant-company may demand.

3. The applicant-company submitted that the respondent-company failed to perform the terms and conditions of the agreement and committed the breach of its obligations under the agreement. As a consequence thereof, and in accordance with the terms and conditions of the agreement, the applicant-company informed the UTI Bank, that the respondent-company had failed to perform as per the terms and conditions of the agreement and had committed a breach of its obligation under the agreement and, therefore, the applicant-company was constrained to invoke the bank guarantee. The applicant-company demanded and called upon the UTI Bank to pay an amount of Rs. 1,62,43,650 immediately. It is alleged that the applicant-company reserved its right to the claim the balance amount of the bank guarantee as and when the applicant-company chose to invoke the balance amount of the bank guarantee.

4. The applicant-company stated further that the UTI Bank informed the applicant-company that the liability of the UTI Bank under the bank guarantee stood extinguished on the payment of the partial amount invoked by the applicant-company and requested the applicant-company to return the original bank guarantee. The applicant-company stated that the stand of the UTI Bank to the effect that the bank guarantee stood extinguished on payment of the invoked amount was incorrect inasmuch as the applicant-company had partially invoked the bank guarantee and reserved its right to invoke the balance amount of the bank guarantee at a later date. On account of this impasse, the applicant-company instituted a suit No. 1011 of 1998 for specific performance of the bank guarantee against UTI Bank and also against the respondent-company. The relief claimed in the said suit is as quoted hereunder :

"(a) direct the specific performance of the bank guarantee being B.G. No. 23/96-97 dated 20-7-1996 in respect of Agreement dated 31-7-1996 executed between the plaintiff and the defendant No. 2; and

(b) direct the defendant No. 1 to make the payment of Rs. 2,57,56,350 to the plaintiff as per the terms and conditions of the bank guarantee being B.G. No. 23/96-97 dated 20-7-1996 in respect of Agreement dated 31-7-1996 executed between the plaintiff and the defendant No. 2; and

(c) direct the defendant No. 1 to pay interest to the plaintiff on the aforesaid amount of Rs. 2,57,56,350 at the rate of 24 per cent per annum from 12-7-1997 till the date of decree or payment in full and final whichever is earlier; and

(d) pass decree in terms of prayers (a) to (c) above; and

(e) pass ex parte orders in terms of prayers (a) to (d) above; and

(f) pass such further order or orders as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case."

5. The applicant-company submitted that during the pendency of the suit, this Court passed an order dated 16-8-1999 for winding up the respondent-company and the Official Liquidator was appointed as the Liquidator of the company. Accordingly, the Delhi High Court directed the applicant-company to seek appropriate permission from this Court u/s 446 of the Companies Act to continue with suit No. 1011 of 1998.

6. This Court by an order at 17-5-2000 issued notice to the Official Liquidator. The Official Liquidator in his counter-affidavit has stated that the suit should not be continued before the Delhi High Court at this stage, when the revival application of the Company, namely, Srishti Video Corporation Ltd. is pending. The Official Liquidator further stated that the notices may also be issued to the guarantor, namely, UTI Bank. This Court vide order dated 1-9-2003 issued notices to the UTI Bank. In spite of issuance of notice UTI Bank did not appear before this Court.

7. I have considered the submission made by Sri Yashwant Varma, the learned Counsel for the applicant-bank and Sri S.K. Saxena, the Official Liquidator attached to this Court. No one appeared on behalf of UTI Bank.

8. It may be stated that this Court by an order dated 10-8-2000 passed u/s 466 of the Companies Act directed the winding up order to remain in abeyance. The order dated 10-8-2000 was subsequently vacated by order dated 13-4-2004. Consequently, the winding up order revived.

9. Section 446(1) of the Act cast a clear mandate to the effect that after a winding up order has been made, no suit or legal proceedings shall be proceeded with against the company except with the leave of the Company Court and subject to such terms and conditions as the Company Court may impose. Thus, the applicant-company is bound to obtain permission from this Court as provided in the Act.

10. The question that arises is whether leave should be granted or not in the present case. Admittedly the suit was instituted by the applicant-company before the Delhi High Court in 1998 prior to the winding up order dated 16-8-1999 passed by this Court. The Official Liquidator has contended that the suit should be transferred to this Court u/s 446(3), which lays down that any suit or proceedings 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.

11. No doubt, the winding up Court has the power to transfer before it all the proceedings pending against the company at different places, because it is convenient for the winding up of the company''s affairs expeditiously that all the suits are transferred to the winding up Court. However, the balance of convenience has to be examined not only from the point of view of the Liquidator, but of the totality of the facts and circumstances of a particular case. In the present case, admittedly the suit had been filed on the original side before the Delhi High Court much before the winding up order was passed by this Court. The claim is basically against UTI Bank, which is also located in New Delhi. The suit is pending before the Delhi High Court for the last 6 years. There is, therefore, no reason to refuse the grant of permission to continue the proceedings of the said suit before the Delhi High Court. The Official Liquidator has contended that he has no objection to the continuance of the suit, but the same should be transferred to the winding up Court u/s 446(3) of the Act. The permission to continue with the suit before the Delhi High Court cannot be refused merely because it would be inconvenient for the Official Liquidator to contest the suit before that Court.

12. Thus, in my view, it would not only be just and convenient, but also proper that the suit be continued before the Delhi High Court.

13. Consequently, the application is allowed. This Court grants permission to the applicant-company to continue suit No. 1011 of 1998 before the Delhi High Court subject to the condition that the applicant-company deposits with the Official Liquidator of this Court, a sum of Rs. 25,000 within six weeks from today, towards costs and expenses to be incurred by the Official Liquidator in engaging a counsel and for contesting the suit before the Delhi High Court. I also direct, that in the event the suit of the applicant-company is decreed, the said decree shall not be executed without obtaining further orders from this Court. In the circumstances of the case, there shall be no order as to cost.