

(1991) 10 MAD CK 0048

In the Madras High Court

Case No : Original Side Appeal No. 154 of 1991

Indian Bank

APPELLANT

Vs

V.S. Perumal Raja and others

RESPONDENT

Date of Decision : 07-10-1991

Acts Referred:

Companies Act, 1956 — Section 446, 456, 529, 529A

Citation : (1993) 76 CompCas 787 : (1992) 1 LW 317

Hon'ble Judges : Venkataswami, J; Abdul Hadi, J

Bench : Division Bench

Advocate : T. Dulip Singh, for the Appellant; Agni and T.R. Rajagopalan, for the Respondent

Judgement

Abdul Hadi, J.—This original side appeal is against the order dated January 19, 1990 , in Company Application No. 569 of 1987 in C. P.

No. 58 of 1985 on the file of this court. The applicant therein is the appellant herein. In the said application u/s 446 of the Companies Act, 1956

(hereinafter referred to as ""the Act""), the applicant sought for leave from this court for it to continue its suit against the fourth respondent-company

and the letter's guarantor, on the file of Sub-Court, Tanjore. We are told that the said suit has since been numbered as O. S. No. 57 of 1987. It

was filed on April 20, 1986, and it is for recovery of a sum of Rs. 5,84,895.23. A winding up order has been passed against the said respondent-

company by this, court on August 20, 1986, in the abovesaid C. P. No. 58 of 1985 after the institution of the above suit. Therefore, the abovesaid

application has been filed.

2. The learned trial judge has granted leave subject to the following terms :

(a) The applicant shall, in the event of obtaining a decree in its favour, enforce

the same only against the assets that are proved by the applicant to be held in security by it and not against other assets.

(b) Since the applicant has chosen to ignore the liquidation and is relying on the security, if there is a deficiency by sale of the securities, the

applicant will be excluded from all share in any dividend that may be declared by the official liquidator in the liquidation except and to the extent

provided u/s 529A of the Companies Act, 1956.

(c) In the event of the applicant being declared as a secured creditor in the above suit, the applicant can realise the security and appropriate the

same subject to the right of the workmen under sections 529 and 529A of the Companies Act, 1956.

3. Aggrieved by the conditions imposed in granting the above-said leave, this appeal has been preferred.

4. So far as condition (a), mentioned above, is concerned, there can be no objection since the applicant cannot enforce the decree that may be

obtained by it, against the assets other than those which are proved by it in the abovesaid suit, to be held in security by it. On this aspect, learned

counsel for the appellant could not say anything seriously contra, since, after the winding up order is passed, the applicant cannot itself initiate any

action against the assets which are held by the official liquidator as the custodian of the company court (vide, section 456 of the Act). But learned

counsel for the appellant vehemently argues that the abovesaid clause (b) condition, stating that, if there is a deficiency by sale of the securities, the

applicant will be excluded from all share in any dividend that may be declared by the official liquidator in the liquidation except to the extent

provided u/s 529A of the Act is not correct. Section 529A of the Act says :

Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company

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(a) workmen's dues, and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with

such dues;

shall be paid in priority to all other dues.

(2) The debts payable under clause (a) and clause (b) of sub-section (1) shall be paid in full, unless the assets are insufficient to, meet them, in

which case they shall abate in equal proportions.

5. Section 529(1) of the Act, inter alia, states that, in the winding-up of an insolvent company the same rules shall prevail and be observed, with

regard to the debts provable and the respective rights of secured and unsecured creditors, as are in force for the time being under the law of

insolvency with respect to the estates of persons adjudged insolvent. Proviso (c) therein, inter alia, states that the security of every secured creditor

shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein and where a secured

creditor instead of relinquishing his security and proving his debt, opts to realise his security, so much of the debt due to such secured creditor as

could not be realised by him by virtue of what is stated above or the amount of the workmen's portion in his security, whichever is less, shall rank

pari passu with the workmen's dues for the purpose of section 529A of the Act. The illustration, to section 529 further makes the position. clear

by stating as follows :

The value of the security of a secured creditor of a company is Rs. 1,00,000. The total amount of the workmen's dues is Rs. 1,00,000. The

amount of the debts due from the company to its secured creditors is Rs. 3,00,000. The aggregate of the amount of workmen's dues and of the

amounts of debts due to secured creditor is Rs. 4 00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the

security, that is, Rs. 25,000.

6. So, if, in the above said suit, the appellant is declared, as a secured creditor and the decree is granted accordingly, the decree amount in that suit

can be realised only subject to the abovesaid section 529A read with section 529(1), proviso (c), of the Act. In other words, the workmen will be

secured creditors ranking pari passu with the charge of other secured creditors. That is, the assets of the company in liquidation would remain

charged for payment of the workmen's dues but such charge will be pari passu with the charge of the secured creditors. The unrealised portion of

the claim of the secured creditors or the amount which has been paid to the workmen out of the realisation of securities, whichever is less, shall

have a preferential claim over other creditors of the company u/s 529A of the Act.

7. So, section 529A of the Act enables the secured creditor who has suffered in paying the workmen's dues from out of the realisation of his

security, to recover what he has so suffered from the other assets in the hands of the official liquidator, preferentially. That is, the said amount

suffered by him shall be paid in priority to all other debts. But, this does not mean that he cannot recover at all any other unrealised portion of the

debt due to him. In view of the fact that section 529(1) of the Act says that, in the winding up of an insolvent company, the insolvency law will

apply, section 47 of the Provincial Insolvency Act has to be applied in the present case since the suit that has been laid by the applicant is in

Tanjore.

8. u/s 47 of the Provincial Insolvency Act, a secured creditor has three options. The first one is that he can realise his security and, if there is some

thing left due to him, then to come and prove for the balance. The second option is that he has to give up his security and to come into liquidation,

ranking with other creditors and take a share in the distribution of dividends. The third option is to value a security and come into liquidation and

prove for any dues that, according to him, remain outstanding in respect of his debts, on the value of his security. In the present case, the applicant

has exercised the first of the abovesaid three options. So, there is no prohibition for it to prove for the balance due to it, after deducting any amount

realised no doubt subject to the provisions of the Act. To illustrate, as regards interest, in the case of an insolvent company, the creditors whose

debts carry interest, are entitled to add the same for purposes of dividend only up to the date of the presentation of the winding up petition. Only in

the event of surplus, they can claim subsequent interest. This rule will apply even to a decree debt.

9. While the legal position stands as stated above, we think that the abovesaid condition (b) stipulated by the learned trial judge that ""the applicant

will be excluded from all share in any dividend"" except to the extent provided u/s 529A of the Companies Act, 1956, is not quite correct. No

doubt, as stated above, to the extent provided u/s 529A of the Act, the applicant will have priority. But, even beyond that, he can prove for the

balance yet due to him, just like other creditors and it is for the official liquidator

to dispose of that claim in accordance with law.

10. Then, so far as the above said condition (c) is concerned, there can be no objection by the applicant, in view of what is stated above.

11. So, the, abovesaid condition (b) alone needs modification. However, we feel there is actually no necessity at this stage to specify any condition

for granting the leave sought for. After all, even the conditions stipulated by the learned trial judge only purport to incorporate the provisions of law

contained in the Act. So even when those conditions are not specified, the said company law will automatically apply. That apart, after the leave is

granted in the aforesaid suit, the applicant-plaintiff would have to amend the cause title so as to state that the defendant-company therein is,

thereafter, represented by the official liquidator, (it having gone into liquidation and a notice of the suit will go to the official liquidator). Then, she

official liquidator can take necessary steps for bringing to the notice of the court the abovesaid relevant provisions of the Act. In such a situation,

the court, after it comes to a conclusion that the debt claimed in the suit is payable by the defendant-company, has to pass decree taking into

account the above-said provisions of the Act. Thus, opportunity is there, for the official liquidator to make proper representations to the said court.

Therefore, strictly, there is no necessity to impose the above-said conditions which only purport to engraft the statutory provisions, while leave is

granted. It may also be stated that in *M. K. Ranganathan v. Government of Madras* (1955) 25 Comp Cas 344, it has also been held that, if the

secured creditor files a suit for the realisation of his security, he is bound to obtain leave of the winding-up court as provided under the Act,

although such leave would almost automatically be granted.

12. In the above circumstances, we feel, after having explained the legal position as stated above, that there is no necessity to specifically mention

any conditions stipulated by the Act since even without such mentioning of those conditions, they would apply. After all, u/s 446 of the Act, leave

is sought for by the applicant, for it to ""proceed with"" the above suit against the said company.

13. In the result, the order of the learned trial judge is modified so as to grant leave as prayed for, without specifically mentioning any condition for

granting the said leave. The appeal is allowed accordingly. No costs.