(1995) 11 AHC CK 0078

In the Allahabad High Court

Case No : Miscellaneous Company Application No. (A-18) of 1995 and Miscellaneous Company Application No. 3 of 1990

Industrial Development Bank of India — APPELLANT

Vs

Official Liquidator of Madan Industries Ltd. (In Liquidation) and Others — RESPONDENT

Date of Decision : 16-11-1995

Acts Referred:
Companies Act, 1956 — Section 446(1), 456

Citation : (1995) 11 AHC CK 0078

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

Bench : Single Bench

Advocate : R.P. Agarwal, for the Appellant;

Final Decision : Partly Allowed

Judgement

A.K. Banerji, J.—The above-noted application (A-18) has been filed by the Industrial Development Bank of India (hereinafter referred to as "the applicant-bank"), under Sections 446(1), 453 and 537 of the Companies Act, 1956, inter alia, seeking the following reliefs :

(1) To grant leave u/s 446(1) of the Act for continuation of Suit No. 2945 of 1990 pending in the High Court of Judicature at Bombay.

(2) To grant leave u/s 453 of the Act for appointment and continuation of the receiver of the High Court of Bombay regarding the mortgaged and hypothecated properties of the respondent-company.

(3) To grant leave u/s 537 of the Act for recovery of the applicant''s dues by sale of the movable and immovable properties of the respondent-company charged in favour of such dues and enforcement and other execution and distress proceedings as the Bombay High Court may direct in the above-noted suit.

2. The relevant facts in brief as set out in this application are that the applicant-

bank granted term loans to the respondent-company for modernisation of its textile mills at Hastinapur in the State of U. P., which was secured by the respondent-company and its guarantors, by hypothecation of movable and immovable properties of the company and deposit of title deeds, which charge was duly registered with the Registrar of Companies, Kanpur, u/s 132 read with Section 125 of the Act. Respondent No. 2 also personally guaranteed payment of the applicant''s dues. The applicant-bank made demands against the respondent-company and respondent No. 2 for making payment of the amounts due but they failed and neglected to make the payment, hence the applicant had no option but to file Suit No. 2945 of 1990 before the Bombay High Court for enforcing the mortgaged, hypothecated and other securities. Subsequently, by the order dated December 8, 1993, the Bombay High Court appointed the court receiver as the receiver of the company''s properties in pursuance whereof physical possession of the company''s properties was taken by the receiver on February 3, 1994. It appears that the company became a sick industrial company within the definition of Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985, and made a reference to the Board for Industrial and Financial Reconstruction ("the BIFR" in short), which recommended the winding up of the company, vide its order dated April 17, 1990. On the said recommendation, this court had vide its order dated March 27, 1991, passed in Company Petition No. 3 of 1990 ordered the winding up of respondent No. 1. Subsequently, by the order dated July 10, 1991, this court had directed that the winding up order dated March 27, 1991, be put in abeyance until further orders, as an appeal had been preferred by the respondent-company before the Appellate Authority for Industrial and Financial Reconstruction ("the AAIFR" in short). As the appeal preferred before the AAIFR was dismissed on May 13, 1993, this court vide its order dated April 12, 1994, directed the official liquidator appointed, vide the order dated March 27, 1991, to proceed with the winding up of the respondent-company. The present application has been filed thereafter by the applicant-bank for the reliefs mentioned above.

3. Copy of this application was served on the official liquidator who was has filed a counter-affidavit to the same. A rejoinder-affidavit to the said counter-affidavit has been filed on behalf of the applicant. I have heard Shri R.P. Agarwal, learned counsel for the applicant-bank and the official liquidator. It has been contended by Sri Agarwal on behalf of the applicant that the suit was filed much prior to the winding up order and is pending before the Bombay High Court, consequently, permission to continue the proceedings of the suit should be granted by this court as a matter of course. He has further contended that grant of leave is the rule and refusal the exception. In support of his submission, learned counsel has referred to certain decisions. I am, however, of the view that as I find force in this submission made by learned counsel, it is not necessary to refer to the decisions cited by learned counsel. The language of Section 446(1) of the Act is plain, clear and unambiguous. The mandate of the section is when 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 as the court may impose. In the present case, the suit was filed in the month of August, 1990, and winding up order was passed by this court on March 27, 1991, but was subsequently kept in abeyance. The order was revived by the subsequent order dated April 12, 1994. Prior to this date however, on December 8, 1993, the Bombay High Court had appointed a receiver over the assets of the company (in liquidation) and the receiver had already taken possession on February 3, 1994. The suit before the Bombay High Court is pending for the last five years. There is, therefore, no reason to refuse the grant of permission to continue the proceedings of this suit. That apart, the Supreme Court in M. K. Ranganathan v. Government of Madras [1955] 25 Comp Cas 344 has held that if a secured creditor files a suit for the realisation of his security, he is bound to obtain leave of the winding up court as provided in the Act, "although such leave would almost automatically be granted". The official liquidator has, however, contended that he has no objection for continuing the suit filed by the applicant. However, the same should be transferred to the winding up court u/s 446(3) of the Act, which lays down that any suit or proceedings against the company which is pending in any court other than the winding up court notwithstanding any other law for the time being in force should be transferred to and disposed of by the said court. He has further contended that the official liquidator does not have funds to contest the suit on behalf of the company before the Bombay High Court, whereas, the applicant-bank has its office in the State of U. P. and, therefore, it can continue the proceedings of the suit before this court without any difficulty. I am, however, not impressed with the said argument. Firstly, because there is no such application on behalf of the official liquidator filed before this court praying for the transfer of the suit. That apart, as already noticed above, the suit filed by the applicant-bank was pending before the Bombay High Court for the last over five years, where the proceedings are being pursued. When the suit was filed, the winding up proceedings had not been instituted and the Bombay High Court had jurisdiction to entertain the suit. It would not be expedient, therefore, to transfer the suit to this court only because it would be convenient for the official liquidator to contest the said suit. However, as noticed above an order u/s 446(1) of the Act is subject to such terms as the court may impose. Taking into consideration the said aspect of the matter, I am of the view that the permission to continue the suit as prayed for by the applicant can be granted subject to the condition that the applicant-bank deposits with the official liquidator a sum of Rs. 15,000 only towards the cost and expenses to be incurred by the official liquidator in engaging a counsel and for contesting the suit at Bombay, and, further if the said suit is decreed by the court the decree shall not be executed without obtaining further orders from this court.

4. Shri Agarwal had, however, contended that it will not be reasonable to impose such condition on the applicant-bank. I am, however, unable to agree. It is well-settled that the court is not bereft of power to incorporate any terms while

granting such leave and it is explicitly made clear by the phraseology "subject to such terms as the court may impose", incorporated in Sub-section (1) of Section 446 of the Act. The official liquidator has to safeguard the interest of the general body of creditors, contributories and workmen effected by the liquidation proceedings. For that reason, he will have to contest the proceedings of the suit before the Bombay High Court and will require funds for the said purpose. The condition, therefore, imposed by the court directing the applicant-bank to deposit a sum of Rs. 15,000 with the official liquidator for contesting the proceedings of the suit cannot said to be unreasonable. It is always open to the applicant-bank to seek appropriate directions from the trial court for adding the aforesaid amount to the decree as cost of the suit, in case the suit stands decreed by the said court.

5. Learned counsel for the applicant has further contended that the applicant is also entitled to have an order for continuation of the receiver over the properties of the respondent-company and appropriate orders may be passed by this court u/s 453 of the Act for the continuation of the receiver of the High Court, Bombay, with regard to the mortgaged and the hypothecated properties of respondent No. 1. Section 453 of the Act lays down that a receiver shall not be appointed of assets in the hands of a liquidator except by or with the leave of the court. It has been contended that as the applicant-bank is a secured creditor and all the properties of the respondent-company are mortgaged and hypothecated to the said applicant, it would be in the interest of justice to let the receiver continue and to dispose of the properties of the company for the recovery of the dues by the sale of the said properties charged in favour of the applicant. The official liquidator has on the other had contended that u/s 456 of the Act, where a winding up order has been made and the liqui- dator has been appointed on the property, effects and actionable claims to which the company appears to be entitled shall be taken into the custody and control of the official liquidator. u/s 456(2) of the Act all the property and effects of the company shall be deemed to be in the order for winding up of the company, therefore, there is a bar in the appointment of the receiver. So far as the assets in the hands of the liquidator are concerned, if a receiver has been appointed by the Bombay High Court oblivious of the winding up order passed by this court then the receiver should be ordered to be removed and the official liquidator ought to be allowed to carry on the liquidation proceedings. He has invited the attention of the court to the following observations made by the Supreme Court in Bansidhar Shankarlal v. Mohd. Ibrahim [1971] 41 Comp Cas 21, 24 :

"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 proceedings 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."

6. Placing reliance upon the above observations of the Supreme Court, it has been contended by the official liquidator that the interest of all the creditors including the workmen, if any, who also have a pari passu charge along with the secured creditors has to be taken care of by the official liquidator and it will not be in the interest of the liquidation proceedings to permit the receiver to continue over the assets of the company only for safeguarding the interest of the applicant-bank. Having considered the submissions made by the official liquidator and learned counsel for the applicant, I am of the view that it would not be appropriate for this court to pass any orders on the second and the third prayer made by the applicant-bank. I am further of the view that as the receiver has been appointed by the Bombay High Court, in the suit instituted by the applicant-bank against the respondent-company prior to the winding up order, it would be proper for the official liquidator to approach the Bombay High Court for appropriate orders for the removal of the receiver appointed by the said court in the light of the provisions of Section 446(1) and (2) of the Act, and, further to obtain possession of the assets of the company (in liquidation) from the receiver. I further direct that it shall be open to the parties concerned to approach the winding up court for further orders, if necessary, after the parties obtain appropriate orders from the Bombay High Court with regard to the continuance of the receiver and the sale of the assets of the company in liquidation.

7. As a result, the application (A-18) is partly allowed in the light of the observations made above and subject to the condition that leave to continue the proceedings of Suit No. 2945 of 1990 pending in the High Court of Judicature at Bombay to the applicant-bank u/s 446(1) of the Companies Act, 1956, is granted with this condition that the said applicant will deposit a sum of Rs. 15,000 with the official liquidator within six weeks from today and, further, that the decree, if any obtained by the applicant-bank in the aforesaid suit shall not be executed without obtaining further orders from this court where the winding up proceedings are pending.