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**(1982) 11 KAR CK 0007**

**In the Karnataka High Court**

**Case No :** Company Application No''s. 1764, 1816 and 1839 of 1981

Karnataka Light Metal Industries P. Ltd. APPELLANT

Vs

Provisional Liquidator, Karnataka Steel and Wire Products Ltd. and Others RESPONDENT

**Date of Decision :** 12-11-1982

**Acts Referred:**
Companies Act, 1956 — Section 446 (1), 446 (2), 446 (2) (b)

**Citation :** (1985) 58 CompCas 417 : (1983) 1 KarLJ 28

**Hon'ble Judges :** M.P. Chandrakantaraj, J

**Bench :** Single Bench

## Judgement

Chandrakantaraj Urs, J.—This is an application presumably under s. 446(2)(b) of the Companies Act, 1956 (hereinafter referred to as "the Act"), made by the applicant, Karnataka Light Metal Industries P. Ltd., Bangalore (hereinafter referred to as the "Light Metals"), seeking directions of this court to the official liquidator who has been appointed as provisional liquidator of M/s. Karnataka Steel and Wire products Ltd. to permit it to remove a Two-stand Tandem Flattening Mill together with its accessories and spare parts listed in annexure-1 to the application from the premises of the aforementioned Karnataka Steel and Wire Products Ltd. (hereinafter referred to as the "Steel Wires") on Mysore Road near Kengeri Town, as the said Tandem Mill belongs to Light Metals and does not together with the accessories and spare parts form part of the assets of the Steel Wires which have been taken over by the provisional liquidator after his appointment as such. The respondents are the official liquidator attached to this court who was appointed the provisional liquidator of the Steel Wires and the State Bank of India, Rajajinagar Branch, Bangalore, to which the Tandem Mill has been hypothecated by the Light Metals.

2. It is alleged by the Light Metals that it imported the Tandem Mill together with its accessories and the spares in its own name under import licence granted by the Government of India bearing No. P/CG/2063893/R/KK/43/H/35-36/CG. IV

(CIL/A/72/31/GO1) dated May 27, 1972. It is further alleged that the Light Metals has in its possession the invoices for the import of Tandem Mill in its own name. It is alleged that the machinery was located in the factor premises of the Steel Wires within a separate enclosure at the request of the Steel Wires who wanted the complete utilisation of the capacity of the Tandem Mill for the use of the Steel Wires in the manufacture of cable armoured wires which was the main product of the Steel Wires.

3. The Light Metals has also alleged that at the time of the inspection by the provisional liquidator for the purpose of taking possession of the properties lying in the factory premises of the Steel Wires, the Light Metals as well as the representative of the State Bank of India, second respondent, had made it clear to the provisional liquidator that the Tandem Mill in question belonged to the Light Metals and that was duly noted by the provisional liquidator in his report to this court in Report No. 66 of 1981 dated February 4, 1981. It is also stated that the provisional liquidator had called upon the Light Metals to furnish certain information in regard to the ownership of the Tandem Mill and the same was furnished by letter dated July 21, 1981.

4. The official liquidator as well as the petitioner in C.P. No. 8 of 1979 have objected. In addition to the above two objectors, the Dena Bank, Kempegowda Road, Bangalore, and the State Bank of Mysore who are secured creditors of the Steel Wires which is sought to be wound up in C.P. No. 8 of 1979 have also filed their objections.

5. The sum and substance of the objections is that the machinery found in the premises of the Steel Wires should be presumed to belong to the Steel Wires and, therefore, the Light Metals should establish its ownership before this court and also that the application was premature as this court had no jurisdiction to entertain an application of this kind before the winding-up order was made and in that circumstance the application should stand over or be rejected with liberty to approach this court again after the winding-up order is made and in any event the title to the Tandem Mill being in dispute, the applicant should be directed to agitate in a civil court and obtain appropriate orders from such civil court having jurisdiction.

6. By consent of parties certain documents have been marked as Exs. P-1 to P-28 and Exs. R-1 to R-10. In fact many of the documents marked are the original import licence, invoices, hypothecation deed in favour of the second respondent, State Bank of India, etc. Certain statement of accounts are filed and in some cases true or photostat copies of some of the exhibits have also been marked.

7. It would be necessary at this state itself to state that the second respondent, State Bank of India, has no objection for the grant of prayer made by the applicant as it feels that return of the machinery to the Light Metals would enable the Light Metals to discharge its loan to the State Bank earlier than if it is locked

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up in the premises of the Steel Wires and linked to the proceedings pending in this court.

8. In the light of these contentions and the pleadings it was felt appropriate that an enquiry should be held and parties permitted to lead oral evidence. Accordingly, in support of the application, the managing director of the Light Metals has examined himself and the director of the Steel Wires has been examined by the court as a court witness.

9. What has come out in the oral evidence is that while the Light Metals is really a family concern of the managing director, V. K. Menon, his father, his sister and brother-in-law, the Steel Wires is a public limited company in which Menon family has vital interest. In fact the Steel Wires has also been in the control and management of the aforementioned Menon family, the members of the family being either directors or chairman and director of both.

10. The documents marked by consent have been identified by P.W. - 1, V. K. Menon, as documents of title relating to the Tandem Mill. In the course of his evidence, he has traced the history of the Light Metals as evidenced by Exh. P-2. He has stated that there was a proprietary concern known as Indian Light Metal Industries which had originally obtained the import licence for the Tandem Mill and that proprietary concern was taken over by the Light Metals which was incorporated in 1973 and the name changed to Karnataka Light Metal Industries P. Ltd. In that circumstance, as already stated, Exh. P-2 was issued by the Government of India, Ministry of Finance, to the State Bank of India that the Indian Light Metal Industries, Bangalore, was the importer. Similarly, Exh. P-4 is an authorisation issued by the State Bank of India, London, indicating that the Karnataka Light Metal Industries P. Ltd. was the licensee to import. Exhibit P-6 is a true copy of the letter written by the Light Metals to M/s. Marshal Richards Barcro Ltd., England, requesting them to amend the contract it had with the Indian Light Metal Industries by substituting the Karnataka Light Metal Industries P. Ltd. in its place. Exhibit P-10 is the bill of lading of Cunard Brockle Bank in favour of Marshall Richards Barcro Ltd. for putting on board vessel Mahseer Two-stand Tandem Machine, Power Driven Edger and Hydraulically Traversing Take up Real. The port of loading is indicated as London and Port of discharge as Madras. There are other documents which evidence that the Karnataka Light Metal Industries P. Ltd. cleared the cargo from Madras Port through their shipping agents and brought the same to Bangalore and located the same in the premises of the Steel Wires. This is also supported by the oral evidence of P.W. 1, V. K. Menon.

11. However, at one stage of the proceedings, the court felt that a proper identity of the machinery imported and the machinery located should be established. In that behalf, a Commissioner was appointed to inspect the factory premises and he was required to give a report. Accordingly, he submitted a report dated December 4, 1981. From the report, it is seen that machine serial number CM 520016 tallies with Exh. P-15, the invoice of the Tandem Mill issued

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by Marshall Richards Barcro Ltd., London. Even the court made spot inspection to satisfy itself that the Tandem Mill, its accessories and spares were in fact located separately in the premises of Steel Wires.

12. Mr. R. K. Menon, director, in charge of the Steel Wires, substantially corroborates the oral evidence of his brother, V. K. Menon, managing director of the Light Metals. Merely because he is related, his oral evidence cannot be ignored having regard to the other documentary evidence including the resolutions of the board of directors of the Steel Sires passed on certain dates concerning the establishment of the Tandem Mill by the Light Metals in the premises of the Steel Wires. It is clear that the Tandem Mill is in fact the property of the Light Metal Industries and the Light Metal Industries has established its title to the Tandem Mill, the accessories and the spares.

13. No doubt, the hypothecation deeds in favour of the second respondent, Sate Bank of India, do not give a full description of the machinery. But that in itself does not detract from the fact the ownership of the Light Metals. I, therefore, hold that having regard to the evidence adduced, the Tandem Mill, the accessories listed and he spares are the properties of the Light Metal Industries.

14. The question is whether they are entitled to remove the same at this stage having regard to the fact that the winding up proceedings are still pending in this court. Mr. Khanna, the learned counsel appearing for the petitioner-company, in C.P. No. 8 of 1979, seriously disputed the jurisdiction of this court to exercise the power under s. 446(2)(b) of the Act at the present stage. This line of argument has been adopted by others opposing the application. Section 446 of the Act is as follows :

"446. (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."

15. It is clear from the language of sub-s. (1) of s. 446 of the Act that a suit or other legal proceeding shall not be commenced in another court or before other authorities by or against the company except by leave of the court which is seized of the winding up proceedings. Similarly, the non-obstinate clause in sub-s. (2) of s. 446 of the Act reads as follows :

"(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 .....").

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16. If the section is read as a whole, the court acquires jurisdiction either on the presentation of the company petition for winding up the company or having regard to the language in sub-s. (1) of s. 446 of the Act definitely after the appointment of the provisional liquidator or when the winding up order has been made.

17. Mr. Khanna made a strenuous attempt to persuade this court to take the view that the expression "the court which is winding up the company" should be construed as the court "which has passed the winding up order". If that was the real intention of the Legislature, then the Legislature would have employed the language which would not leave any doubt and put in sub-s. (1) of s. 446 of the Act "when a winding up order has been made" instead of "the court which is winding up". The expression "is winding up" being in present continuous tense grammatically provides a clue to the true intention of the Legislature and that is that even before a winding up order is actually made, the court which is seized of the proceedings can and may in its discretion entertain or dispose of any claim made by or against the company.

18. I, therefore, see no reason to read any ambiguity into the language of sub-s. (2) of s. 446 of the Act to construe it as acquiring jurisdiction only after the winding up order is made. I, therefore, must reject the contention advanced for the objectors and also hold that this court has jurisdiction to give directions to the provisional liquidator when there are claims made against the company which is sought to be wound up as the provisional liquidator is the only proper person having custody of what appears to be and are or appears to be the assets of the company which is sought to be wound up.

19. There is one other matter which is required to be settled in this application. The provisional liquidator both in his main report by way of objections and the supplemental report to the court has pointed out that the Light Metals admittedly is a lessee of the Steel Wires in the space occupied by the Tandem Mill which was to function as a captive mill for the Steel Wires and the space was let out on a rent of Rs. 1,500 per month with effect from January 1, 1975, and that no rent has been paid by the Light Metals to the Steel Wires and, therefore, the provisional liquidator has a right to collect all the arrears of rent due from January 1, 1975, till the removal of the Tandem Mill, its accessories and spares, if so directed by the court.

20. In the oral evidence of both P.W. 1 and the court witness, R. K. Menon, they have admitted that rents were never demanded and the rents were not therefore paid. In fact, the evidence of P.W. - 1 is very vague. He does not know whether the rents were paid by cash or any rents had been paid at all. He has not produced any receipts for payment of rents. It would not be prudent for this court to permit the applicant, the Light Metals, to remove the Tandem Mill, the accessories and spares outside the premises where it is installed and carry it away unless it away unless it pays all rents. I do not think this is a case in which the question of law of limitation should be invoked. From the oral evidence on

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record, it is clear, one being a family concern and the other being controlled by the family, the two companies have failed to take appropriate steps to ensure that the Steel Wires receives the benefit of the rent at the appropriate time and liability has been admitted. I, therefore, see no hindrance to impose a condition on the Light Metals to pay all arrears of rent up to the date of the actual removal of the Tandem Mill, the accessories and spares from the premises of the Steel Wires, in full, and only after such payment is made, it shall be permitted to remove the machinery in the presence of and under the supervision of the provisional liquidator or his authorised representative, as the case may be.

21. Shri V. Krishna Murthy''s prayer, in the course of the argument, that the Light Metals must be permitted to remove the transformer situated on the eastern side of shed No. 2 of the factory premises of the Steel Wires is liable to be rejected as it does not form part of the schedule to the Tandem Mill and no application for amendment was ever made to amend the schedule. However, notice had been issued to the Karnataka State Electricity Board to doubly ensure that the oral claim made was not till founded. In the affidavit filed by the Karnataka State Electricity Board, South Division, Bangalore, it is seen that the transformer does not belong to the Electricity Board. Form that it does not follow the transformer belongs to the light Metals. It is possible that as it was a captive mill for the Steel Wires, the Steel Wires may have installed the transformer. Therefore, the Light Metals has to separately prove its title to the transformer situated on the eastern side of shed No. 2 of the factory premises.

22. I, therefore, direct the official liquidator to permit the removal of Tandem Mill, its accessories and spares subject to the condition that all rents up to the date of the removal are paid to the official liquidator in advance and further direct that any damage done to the building is repaired by the Light Metals at its cost to the satisfaction of the provisional liquidator or the liquidator, as the case may be, and also subject further to the condition that 5 per cent. If the cost of security arrangements made from the date the provisional liquidator took charge of the assets till date of removal of the Tandem Mill should also be paid by the Light Metals.

23. While on this matter, it is useful to indicate that the prayer of the electricity board in the affidavit for leave of this court to remove metering cubicles and a portion of power line situated in the premises of the applicant may now be made to the provisional liquidator or the liquidator, as the case may be, who shall consider the claim and issue suitable directions and if he has any doubt, he may seek the orders of this court in that behalf.

24. The application of the Light Metals is allowed in terms indicated above.

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