
(1999) 08 AP CK 0114

In the Andhra Pradesh High Court

Case No : Company Petition No's. 48 of 1989 and 82 and 83 of 1999

K.L. Varadarajan

APPELLANT

Vs

Mopeds India Ltd. and Others

RESPONDENT

Date of Decision : 31-08-1999

Acts Referred:

Companies Act, 1956 — Section 446, 446(3), 529A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 34

Citation : (2000) 1 CompLJ 196

Hon'ble Judges : Krishna Saran Shrivastav, J

Bench : Single Bench

Advocate : Y. Vasudevarao, for the Appellant; Anil Kumar, for Respondent 1, Deepak Bhattacharjee, for Respondent 2, Y.N. Lohitha, for Respondent 3, V. Vishwanadhan and R. Janardhan, for Respondent 5, for the Respondent

Final Decision : Dismissed

Judgement

Krishna Saran Shrivastav, J.—This is an application u/s 446(3) of the Indian Companies Act, 1956, for transferring O.A. No. 814 of 1997 pending on the file of Debt Relief Tribunal, Bangalore, and O.S. No. 238 of 1991 pending on the file of Subordinate Judge, Tirupathi, to the file of this court to be tried along with C.A. No. 32 of 1996, while C.A. No. 83/99 has been filed for interim stay of the aforesaid proceedings.

2. Mopeds India Ltd. has been ordered to be wound up in C.P., No. 48 of 1989 on 17.10.1990. Sri Kalyana Srinivasa Textiles (P) Ltd. has also been ordered to be wound up in C.P. No. 32 of 1991 on 19.11.1993. The 2nd respondent, i.e., Canara Bank, had filed O.S. No. 139 of 1990 on the file of the Subordinate Judge, Tirupathi, against Mopeds India Ltd. on the strength of hypothecation deed. It had obtained permission to stay outside the winding up proceedings in C.A. No. 221 of 1990 on 7.12.1990 on terms.

3. Later, O.S. No. 139 of 1990 has been transferred from the court of

subordinate judge, Tirupathi, to the Debt Recovery Tribunal, Bangalore, and it has been registered as C.A. No. 814 of 1997. The third respondent, i.e., the A.P. State Finance Corporation Ltd. (for short APSFC) has obtained leave of this court on 28.12.1994 for disposing of the properties of Mopeds India Ltd. now in liquidation and in pursuance thereof the assets in question had been sold by APSFC and the proceeds are kept under suspense account of APSFC and Canara Bank. The official liquidator is yet to quantify the wages of workmen of Mopeds India (P) Ltd. It is reported that proceedings for quantifying the wages of workmen are pending before the official liquidator in pursuance of the orders passed in C.A. No. 32 of 1996 in O.A. No. 814 of 1997 pending before the Debt Recovery Tribunal, Bangalore, against Moped India (P) Ltd. now in liquidation. The official liquidator has also been impleaded as a party to the proceedings.

4. One K.V. Srinivasan and T.V. Chowdary have filed a suit in O.S. 238 of 1991 on the file of Subordinate Judge, Tirupathi, against Sree Kalyana Srinivasa Textiles (P) Ltd., now in liquidation, and K.L. Varadarajan and the 2nd respondent, i.e., Canara Bank, for declaration that the alleged guarantee deed, dated 19.1.1985 is void and therefore, it is not binding on the said company in liquidation. It is reported that the suit had been dismissed in default and application for restoration is pending. It is also alleged that the moveable properties belonging to Mopeds India Ltd. (now in liquidation) have been disposed of by the 2nd respondent, i.e., Canara Bank.

5. It is alleged in the application that the claim of the 4th respondent, i.e., workmen of Mopeds India Ltd. (now in liquidation) has to be quantified and 2nd and 3rd respondents are also agitating their claims out of the sale proceeds of the estate of Mopeds India Ltd. (now in liquidation). Under these circumstances, it would be convenient to transfer the civil suit and the proceedings pending before the Debt Recovery Tribunal, Bangalore, to this court so that those matters may be decided along with C.A. No. 32 of 1996 u/s 446(3) of the Companies Act, 1956.

6. This application has been resisted by the 2nd respondent mainly on the ground that the Debt Recovery Tribunal, Bangalore, has got the exclusive jurisdiction to try the cases and by virtue of Sections 17 and 18 read with Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short the Act of 1993) and, therefore, the provisions of Section 446 of Companies Act cannot be pressed into service to transfer the cases. Relying on decisions in the cases of Timber (P) Ltd. (in liquidation) v. Conservator of Forests, Chenab Circles, Jammu (1981) 51 Comp Cas 18 (P&H), Arrah Sasaram Light Railway Company Ltd. v. District Board, Rohtas and Ors. (1982) 52 Comp Cas 326 (Cal), UCO Bank v. Concast Products Ltd. (in liquidation) (1996) 2 Comp LJ 449 (Cal) and State Bank of India v. S.M. Oil Extraction (P) Ltd. (1999) S&CL 33, it has been urged on behalf of the applicant that the proceedings pending for recovery of loan before the Debt Recovery Tribunal should be transferred and to be tried by the Company Court because there is no impediment under the Act of

1993 for making an order for transferring the proceedings. The provisions of Section 446(3) of the Companies Act have been enacted with a view to give jurisdiction to the Company Court to deal with all matters concerning a company which has been ordered to be wound up. The cases would be tried by the Company Court for the sake of convenience as also to avoid conflicting orders.

7. On the other hand, the learned counsel of the 2nd respondent has argued that the Debt Recovery Tribunal has got exclusive jurisdiction to try the cases and the winding up proceedings which had started subsequently against the Company (now in liquidation) cannot exercise powers u/s 446 of Companies Act. Because, Section 34 of the Act, 1993 prevails over Section 446 of the Companies Act. The exercise of powers of the Company Court u/s 446 of the Companies Act is excluded by Section 34 of the Act of 1993. He has also argued that permission had been granted to stay out of the liquidation about nine years before and there would be no conflicting orders because the claim of the petitioner bank is to be considered and decreed by the Debt Recovery Tribunal while the wages of the workmen are to be quantified by the liquidator, which when quantified shall become *pari passu* u/s 529-A of the Companies Act.

8. The first question that falls for determination is whether the provisions of Section 17 read with Sections 18 and 34 of the Act 1993 prevail over those of Section 446 of the Companies Act.

9. In *State Bank of India v. S.M. Oil Extraction (P) Ltd.* (supra) it is held that:

"The principal concern of the legislators in making the Act was obviously to expedite repayment of the various loans and advances which the banks and other financial institutions extended to their constituents. The Companies Act on the other hand consisted of an uniform law throughout India relating exclusively to companies. It has been referred to as a consolidating and amending Act. It must also be remembered that a company is a legal entity just as was an individual. It was almost certainly the intention of the legislature to afford special protection to the companies, and everything and all concerned with the companies. So there was the Company Court, where all matters relating to companies only were dealt with and nothing else. The legislature clearly had, in this enactment, specially reserved to the bona fide creditors of a company, a summary procedure to realise from the company expeditiously a just debt by way of enforcing it in a Company Court. Special protection was also reserved to the workers in Section 529A to be regarded in *pari passu* with other secured creditors. If the suit was allowed to be transferred to the Tribunal, in effect, it would be allowing the bank to receive preferential payment without consideration of the other secured creditors and in particular the workers. That would surely be in derogation of the special protection sought to have been reserved to the claim of the workers in Section 529-A. In spite of the statute, courts were averse to wind up a company *ex debito justitiae*. The courts in exercise of their equitable jurisdiction would generally afford the company opportunities to avoid being wound up and repay its debt. Winding up order would of course eventually be

made, in the event the company failed to avail of the indulgence."

10. The laws in the two enactments do not operate in the same field. It would be incorrect appreciation of law as interpreted by the Supreme Court, if the laws applicable to winding up proceedings in the Companies Act and proceedings for the recovery of debt in the Debt Recovery Act, were considered to operate in the same field, or that the legislature had so intended. In any case, there could be little doubt that such an interpretation would create an undesirable state of affairs. The Company Court would be making one set of orders and the Tribunal a different one. Once the company was in liquidation u/s 446 of the Companies Act it was mandatory to obtain leave of the Company Court to institute a suit against that company, and upon obtaining such leave, the suit would have to be heard by that court unless that court allowed the filing of and proceeding with the suit in a different court or forum. A reasonable and harmonious interpretation would surely be in the present circumstances that the non obstante clause in the Companies Act would operate in its full force, and the suit would be heard by the Company Court. The provisions or the non obstante clause in the Debt Recovery Act would have no effect on the procedures as contained in the Companies Act. Consequently there would be no conflict in the operation of the two clauses. For it was on record that Section 446 of the Companies Act was not repealed and it could not be said with any certainty that there appeared any intention of the Legislature anywhere in either of the enactments, that the later enactment would in effect operate as against the earlier clause. Had the legislature so intended, indeed appropriate provisions to that extent would have been provided for in the later or in further legislation. In those circumstances, it was to be held that when rights of the creditors and workers were protected by the legislators in the Companies Act, in the absence of any specific and categorical provisions, a non obstante clause contained in a different enactment neither could nor did operate to deprive or deny such right. Any other interpretation would amount to a violation of the principles of natural justice and a wrongful denial of rights and privileges bestowed on the creditors and the workers by an existing statute. The Debt Recovery Act was concerned with the process of recovery of the debt; in other words, procedure to adjudicate the debt in perhaps every other circumstance except as against a company which was in liquidation. The Companies Act was primarily for companies which was a separate legal entity and everything that related or touched the companies.

11. On the other hand, it has been held in the case of the The Industrial Credit and Investment Corporation of India Limited and etc. Vs. Vanjinad Leathers Ltd. and etc., , [at page 97, paras 8-10 of Comp LJ] that:

"Section 18 creates a bar on jurisdiction of other authorities and courts except the Supreme Court and High Court under Articles 226 and 227. As per Section 2(h), "financial institutions" are defined, and it includes the "institution" within the meaning of Section 4A of the Companies Act, 1956. In terms of that provision both ICICI and IDBI shall be regarded as financial institutions.

Therefore, the suits filed by the said two financial institutions for recovery of loan advanced by said institution come under 1993 Act. As per Section 31 of the said Act, all the pending cases shall stand transferred to such Tribunal. So, in terms of Section 31, the suits filed by ICICI and IDBI and pending before the Bombay High Court are suits which stand transferred under the provisions of 1993 Act to the Tribunal set up under that Act.

Section 34 of the 1993 Act provides that provisions in that Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of law other than this Act." Necessarily, this shall have an overriding effect over any other law.

"1993 Act" is a special law to deal with the applications by the banks and financial institutions for recovery of debts. Companies Act, 1956, is also a special law. Section 446 of the Companies Act, 1956, which contains a non obstante clause is also a provision to exclude all other laws with regard to pending suits in which company in liquidation is a party. The 1993 Act is also a special law enacted by the Parliament itself. So, when that later special law was enacted, the Parliament would have certainly in mind the provisions in the earlier special law, namely, the Companies Act, 1956. Thus, it was notwithstanding the special provision contained in the Companies Act, 1956, that Section 31 had been enacted in "1993 Act". Therefore, the later special law will prevail over the former. Necessarily, the Company Court will not have jurisdiction with regard to suits or applications pending on or after the "appointed day" as per the 1993 Act". Thus, exercise of power by the Company Court u/s 446 of the Companies Act, 1956, is excluded by Section 34 of the 1993 Act."

12. In the case of Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others, , it has been held by the apex court that:

"... a secured creditor who has initiated a suit or proceeding in a civil court is interested in realisation of his debt only, whereas the Company Court looks after the interest of all the creditors ; so too, the workmen's dues, which rank pari passu with debts due to secured creditors. This is brought home not only by Section 529A, which was inserted by the Companies (Amendment) Act, 1985, but also by the proviso to Sub-section (1) of Section 529 inserted by the same Amendment Act. The winding up court does these acts through a liquidator, who has been given wide powers by Section 457 of the Act. As against this, a receiver appointed by a civil court on being approached by secured creditor would basically look after the interest of that creditor, whose interest may in many cases be in conflict with that of liquidator, ... In case of such conflict, the interest of liquidator has to receive precedence over that of the receiver inasmuch as the former looks after the interest of a large segment of creditors alongwith that of workmen, whereas the latter confines his concern to the interest of the secured creditor on whose approach the receiver had been appointed." (para 6, page 425 of Comp LJ)

"A secured creditor stands outside the winding up proceeding and under the law he can proceed to realise his security without the leave of the winding up court, if by the time he initiated the action the company has not been wound up." (para 2, page 422 of Comp LJ)

Thus, any sale held even without the leave of the winding up court pursuant to order of a civil court on it being approached by a secured creditor to realise its debt will not ipso facto be void. Section 537 dealing with voidness of sale, operates when the sale is pursuant to attachment of company court. This, however, would be the position where a company has not been wound up, but is in the process of being wound up. (para 4 (iii), page 425 of Comp LJ)

It is no doubt correct that the interest of the secured creditor, who has taken recourse to an independent proceeding to realise his debt has to be protected ; but it is apparent this cannot be done at the cost of other secured creditors. To preserve the integrity of one secured creditor another secured creditor cannot be discredited--his integrity has to be of equal concern. It may, however, be that in a particular case, the secured creditor who has approached the civil court happens to be one who has lent huge amount, or be one who is the main secured creditor. In such a situation, on approach being made by such creditor, we have no doubt that Company Court would duly take note of this fact and should like to grant leave required by Sub-section (1) of Section 446 ; and by the same token refuse to transfer the proceeding to his court. This is not to say that in all cases where the proceedings have been initiated by the main secured creditor, the Company Court would grant leave. Much would depend on the circumstances of each case. But, if the position be that the secured creditor who had approached the civil court is one amongst many similar creditors, it may be that the Company Court feels that to take care of the interest of other secured creditors, either the relief of leave does not deserve to be granted or that the proceeding is required to be transferred to it for disposal. It may be pointed out that Sections 529 and 529A of the Act do contain provisions insofar as the priority of secured creditor's claim is concerned. Of course, the Company Court would not transfer the proceeding to it merely because of its convenience ignoring the difficulties which may have to be faced by the secured creditor, who may be at a place far away from the seat of the Company Court. The need to protect the company from unnecessary litigation and cost have, however, to be borne in mind by the Company Court, (para 12, page 427 of Comp LJ)

We are, therefore, of the view that the approach to be adopted in this regard by the Company Court does not deserve to be put in a strait-jacket formula. The discretion to be exercised in this regard has to depend on the facts and circumstances of each case. While exercising this power, we have no doubt that the Company Court would also bear in mind the rationale behind the enactment of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, to which reference has been made above. We make the same observation regarding the terms which a Company Court should like to impose while granting leave. It

need not be stated that the terms to be imposed have to be reasonable, which would, of course, vary from case to case. According to us, such an approach would maintain the integrity of that secured creditor who had approached the civil court or desires to do so, and would take care of the interest of other secured creditors as well which the Company Court is duty bound to do. The Company Court shall also apprise itself about the fact whether dues of workmen are outstanding ; if so, extent of the same. It would be seen whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues *pari passu*." (para 13, page 427-428 of Comp LJ)

13. In the case of *The Industrial Credit and Investment Corporation of India Limited and etc. Vs. Vanjinad Leathers Ltd. and etc.*, , Sections 17 and 18 of the Act, 1993 had been brought to the notice of the apex court. The apex court observed that the Company Court should exercise the discretion for granting leave to stay out of liquidation considering the facts and circumstances of each case and while exercising its power, the Company Court should also bear in mind the rationale behind the enactment of the Act, 1993. The Company Court should impose reasonable terms while granting leave to the secured creditors to stay out of the liquidation proceedings. It should also apprise itself about the fact that the dues of workmen are outstanding and whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues *pari passu*.

14. The Act of 1993 is concerned with the process of recovery of the debts only and this has been enacted only with a view to expedite the proceedings for recovery of the loan amounts, while the Companies Act consists of uniform law throughout India relating exclusively to companies. The Company Court is competent to adjudicate all matters relating to companies including the companies in liquidation. Special protection has also been reserved to the workers u/s 529-A to be regarded in *pari passu* with other secured creditors. Thus, it cannot be said that the laws in the two enactments operate in the same field.

15. For the foregoing reasons, I am in complete agreement with the view taken by the learned Single Judge of the Calcutta High Court that the non obstante clause in the Companies Act operates in its full force and the provisions of the non obstante clause in the Act, 1993 has no effect and, therefore, there is no conflict on the operation of the two clauses, disagreeing respectfully with the view expressed by the learned Single Judge in the case of *The Industrial Credit and Investment Corporation of India Limited and etc. Vs. Vanjinad Leathers Ltd. and etc.*, .

16. The case of *Timber (P) Ltd. v. Conservator of Forests, Chenab Circle, Jammu* (1981) 51 Comp Cas 18 (P&H), *supra*, and *UCO Bank v. Concast Products Ltd.* (1996) 2 Comp LJ 449 (Cal) are distinguishable on facts. In the case of *Timber (P) Ltd. v. Conservator of Forests, Chenab Circle, Jammu*, *supra*, the proceedings

pending in the High Court of Jammu and Kashmir were at the preliminary stage. The High Court of Jammu and Kashmir was to consider whether the application u/s 20 of the Arbitration Act is to be allowed or not. While in the case on hand, the proceedings are pending from the year 1999 and the hypothecated properties have since been sold. In the case of Arrah Sasaram Light Railway Company Ltd. v. District Board, Rohtas and Ors. (supra) there was no progress in the proceedings pending before the Supreme Court because the parties to the proceedings used to file application after application and ex parte injunction had been obtained against the liquidator to proceed further in the matter. Such is not the case here. The official liquidator has not voiced any grievance regarding the proceedings before the Debt Recovery Tribunal, Bangalore. No worker has filed any grievance regarding the proceedings pending before the Debt Recovery Tribunal. In the case of UCO Bank v. Concast Products Ltd. (1996) 2 Comp LJ 449 the suit pending before the High Court was transferred to the Debt Recovery Tribunal and it had been ordered to be brought back for disposal according to law. In that case, the court observed that under Sub-section (3) of Section 446 of the Act the proceeding must be transferred to the Company Court. It appears that the plaintiff has not obtained any permission of the Company Court to remain outside the liquidation proceedings. Whereas in the case on hand, permission to stay outside the liquidation has been granted in the year 1990 only. Therefore, this case is also distinguishable on facts.

17. The applicant is the ex-managing director of Mopeds India Ltd. (now in liquidation). It appears that it has no role to play in the quantification of the wages of the workmen. The wages of the workmen have to be quantified by the official liquidator in pursuance to the orders passed in C.A. 32 of 1991, The court has to look into the matter as and when wages are quantified and if it is challenged by the aggrieved person and not otherwise. I do not see any reason to transfer the proceedings pending before the Debt Recovery Tribunal, Bangalore, as also the civil suit pending before the Subordinate Court, Tirupathi.

18. In the result, the applications fail and are hereby dismissed.