

(1997) 06 KL CK 0019

In the High Court Of Kerala

Case No : M.C.A. No's. 106 and 109 of 1990 and 155 of 1994 in C.P. No's. 54 and 57 of 1989

K.P. Devassy

APPELLANT

Vs

Official Liquidator and Others

RESPONDENT

Date of Decision : 12-06-1997

Acts Referred:

Companies Act, 1956 — Section 446

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (1998) 2 CompLJ 315 : (1997) 3 ILR (Ker) 743

Hon'ble Judges : C.S. Rajan, J

Bench : Single Bench

Advocate : K.P. Dandapani, in MCA Nos. 106 and 109 of 1990, V.B. Unniraj, in MCA No. 155 of 1994, N. Madhavan, in C.P. No. 54 of 1989, for the Appellant; K. Moni, P. Santhalingam, in MCA No. 106 of 1990 and P. Ramakrishnan, in MCA No. 106 of 1990, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Rajan, J.—The petitioner in these applications was the managing director of Chandhini Chits (Pvt.) Ltd. The above company was ordered to be wound up by this court as per order dated November 17, 1989. According to the petitioner, as managing director he had issued cheques to various persons and those cheques were returned by the bankers for insufficiency of funds. The payees of the cheques, therefore, filed complaints before the magistrate's courts u/s 138 of the Negotiable Instruments Act. Thereafter, these petitions have been filed by the petitioner to stay the trial of those complaints and also to transfer those cases for trial to this court.

2. Sri Anil Narendran, who appeared for the petitioner, strongly urged that u/s 446 of the Companies Act this court has got jurisdiction to stay the trial of the criminal complaints and also to transfer the same to this court. In order to understand the scope and ambit of Section 446 of the Companies Act it is advantageous to reproduce the same.

"446. Suits stayed on winding up order.--(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceedings shall be commenced, or if pending at the date of 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.

(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) ;

(c) any application made u/s 391 by or in respect of the company ;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of the company ;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or 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.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or High Court."

3. Learned counsel has cited the following decisions in order to impress upon this court that these criminal complaints are liable to be stayed by this court and if necessary to be tried by this court. Official Liquidator, Khosla Fans (India) P. Ltd. (In Liquidation) Vs. Ramesh Khosla and Others, Official Liquidator, R.C. Abrol and Co. P. Ltd. v. R.C. Abrol [1977] 47 Comp Cas 537 (Delhi) and Harish C. Rashapoor v. Jaferbhai Mohmedbhai Chhatpar [1989] 65 Comp Cas 163 (Guj). In the Punjab and Haryana High Court case Khosla Fans (India) P. Ltd. (In Liquidation), In re [1983] 53 Comp Cas 858, the question was whether the complaints filed by the official liquidator against the company for not handing over the records and books of the company and thus violating the provisions of Section 538 of the Act are maintainable before the company court. An objection was taken by the company that the company court had no jurisdiction to try the complaint and the complaint should have been filed before the Judicial First Class Magistrate's court. Dealing with the above matter the Division Bench of the Punjab and Haryana High Court held that the High Court can exercise jurisdiction

in suits and proceedings including criminal proceedings in appropriate cases by or against the company filed by the official liquidator. Therefore, the question now raised in this case as to whether a complaint like the present one is to be exclusively tried by this court has never come up for decision in the above case.

4. In the Delhi High Court case *Official Liquidator, R.C. Abrol and Co. P. Ltd. v. R.C. Abrol* [1977] 47 Comp Cas 537, the official liquidator filed a criminal complaint in the High Court against its directors and officials under Sections 538 and 541 of the Companies Act on account of failure to hand over the books of account and records of the company. The High Court of Delhi was of the opinion that the High Court's jurisdiction to take cognizance of offences was restricted to that contained in Section 454(5A) of the Companies Act and the High Court had no jurisdiction to take cognizance of any other offences such as the offences u/s 538 or Section 541. The High Court also observed that it had power u/s 446(3) to transfer a pending complaint before the Magistrate for trial to itself. Thus the Delhi High Court was mainly considering whether the High Court has got any original jurisdiction to take cognizance of any offence and to try the same. Therefore, I do not think the above ruling is also helpful to the petitioner.

5. In the case before the Gujarat High Court, *Harish C. Raskapoor v. Jaferbhai Mohmedbhai Chhatpar* [1989] 65 Comp Cas 163, the High Court was considering the power of the court to order stay of proceedings against a company and its directors pending sanction of a scheme and even after sanction before finalisation of the scheme. While considering the above question the High Court held that the directors are sought to be criminally proceeded against by the creditors for their acts as directors pending consideration of a scheme of arrangement between the creditors and the directors and the proceeding can be stayed by the court in suitable cases so that the directors may not be pressurised by the creditors and the proposed scheme u/s 391 can be effectively considered and implemented. At the same time, the Gujarat High Court hastened to add that the directors of a company are accused of offences committed by them in their individual capacity and the court may not grant stay of criminal proceedings against them u/s 391(6) of the Companies Act. Therefore, I do not think the above ruling also will help the petitioner to avoid the criminal prosecution.

6. In this connection, it must be remembered that the whole object of Section 446 is to avoid multiplicity of proceedings against a company. The object of the above section is also to preserve the assets of the company which are now in the hands of the official liquidator. One or two creditors may not be allowed to take advantage by filing suits before various courts and enforce them against the company. Unless one single individual is charged with the duty of distribution of the assets of the company in an equitable manner, the creditors will not be benefited by the liquidation proceedings before the High Court. That is why the courts have emphasised that the nature of the action must be against the property of the company. The proceeding must be for the enforcement of something in the nature of a personal right against the assets of the company

and not one in vindication of public interest. Unless all the properties and the claims of the creditors of the company are pooled together and brought under the control of the company court the assets cannot be conserved and applied in full satisfaction of the creditors equitably. It is the benefit to the creditors that must be the guiding factor in dealing with these cases. Though the words "legal proceedings" in Section 446 of the Companies Act are wide enough to embrace criminal prosecution also, that criminal proceedings must be in relation to the assets of the company. The proceedings u/s 138 of the Negotiable Instruments Act can end only in the conviction or acquittal of the accused in the case. No recovery of any amount covered by the dishonoured cheques can be made in the criminal case. Therefore, it is purely a personal act by the creditors against the person who issued the cheques. The mere fact that the petitioner in these cases signed the cheque as managing director of the chit fund in liquidation cannot alter the character of the criminal proceedings pending before the criminal court.

7. I draw sustenance for taking the above view from a ruling of this court in *B.V. John v. Coir Yarn and Textiles Ltd.* [1960] 30 Comp Cas 162. In the above ruling Justice Raman Nair (as he then was) analysed the provision contained in Section 446 of the Companies Act with reference to the scope of staying the other legal proceedings mentioned in subsection (1) of Section 446 and came to the conclusion in the following words (page 168) :

"In my opinion, Section 446 of the Companies Act can have no application to proceedings pursuant to a reference u/s 10 of the Industrial Disputes Act. Giving the term, "other legal proceedings" appearing in Sub-section (1) of the section, the wide meaning given to the same term in the corresponding Section 171 of the 1913 Act in *Governor- General in Council v. Shiromani Sugar Mills Ltd. (In Liquidation)* [1946] 16 Comp Cas 71 (FC) and not confining it by an *ejusdem generis* construction to proceedings analogous to a suit, I still think that to come within the scope of this section, the proceedings must be in the nature of an action against the property of the company. To put it somewhat differently, the proceedings must be for the enforcement of something in the nature of a personal right against the assets of the company and not one in vindication of public interest. As pointed out in the Federal Court decision just referred to, the purpose of Section 446 of the Companies Act is to subject all creditors to the control of the court in respect of their actions against the property of the company so that the property may be conserved and applied in the *pari passu* satisfaction of its liabilities. The winding up court has to see that the administration is carried on to the best advantage of the creditors and the members of the company as a whole, and, for that purpose, Section 446 and other sections of the Companies Act give it wide powers so far as the rights of the creditors and the members of the company are concerned. But, if there are interests that transcend the interests of the creditors and members of the company, it is not reasonable that these interests should be subjected to the control of the winding up court, a control which it is to exercise for the benefit of the creditors and the members. A criminal prosecution against the company

would doubtless be a legal proceeding against it. But I do not suppose that it has ever been said that a criminal prosecution falls within the scope of Section 446(1) of the Companies Act. And it seems to me that Sub-sections (2) and (3) of Section 446(1), give some indication of the kind of legal proceedings that comes within the mischief of Sub-section (1). For Sub-section (2) gives the winding up court jurisdiction to entertain or dispose of any suit or proceeding by or against the company, while Sub-section (3) gives it the power to withdraw and dispose of any such suit or proceeding pending in any other court. I am inclined to think that a suit or proceeding for which leave is necessary under Sub-section (1) must be a suit or proceeding capable of being withdrawn and disposed of by the winding up court. In *S.N. Mukherjee v. Krishna Dassi* [1933] 3 Comp Cas 269 (Cal), it was observed that Section 171 of the 1913 Act was a provision intended to safeguard the company's assets against wasteful or expensive litigation in regard to matters which are capable of determination more expeditiously and cheaply in the winding up. With due respect I agree."

8. Sri Ramakrishnan, learned counsel for some of the respondents, cited the ruling of the Supreme Court in *Damji v. LIC of India* [1965] 35 Comp Cas 755 wherein the scope of Section 446 of the Companies Act, vis-a-vis Section 41 of the Life Insurance Corporation Act was discussed. The Supreme Court was of the opinion that the provisions of the Special Act, i.e., the Life Insurance Corporation Act will override the provisions of the general Act, namely, the Companies Act, which is an Act relating to companies in general. If the above view is accepted the special provisions contained in the Negotiable Instruments Act regarding the cheques, will definitely prevail over the provisions contained in the Companies Act.

9. Under these circumstances, I am unable to accept the contentions put forward by the petitioner. Therefore, these petitions are dismissed. The magistrates' courts are directed to proceed with the complaints as expeditiously as possible .