

(2003) 05 KL CK 0031

In the High Court Of Kerala

Case No : C.P. 25 of 1994 and C.P. 4 of 2000

Lord Krishna Bank Limited

APPELLANT

Vs

The Express (Malayalam) Pvt. Ltd.

RESPONDENT

Date of Decision : 22-05-2003

Acts Referred:

Companies Act, 1956 — Section 433, 434, 443(e), 529A(1)(a)

Citation : (2003) 3 BC 221 : (2005) 125 CompCas 655 : (2003) 2 KLJ 580 :
(2003) 2 KLT 831 : (2005) 64 SCL 542

Hon'ble Judges : R. Rajendra Babu, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R. Rajendra Babu, J.—The Lord Krishna Bank Ltd., India Express Building, Kaloor. Cochin filed C.P. 25/94 for winding up of the Company. The Express (Malayalam) Pvt. Ltd., alleging that the respondent company was incapable of paying off its debt and the liabilities of the company were far in excess of the assets and it had become commercially insolvent and incapable of repaying the amount. According to the allegations in the above petition, the company had a paid up capital of Rs. 30 lakhs and as on 31.3.1994 the company had to pay nearly Rs. 49 lakhs to the petitioner bank as the bank had accorded overdraft facilities, cash credit facilities and loans to the company. It was further alleged that there were several other creditors and other liabilities for the respondent company and because of the huge liabilities the substratum of the company had completely been vanished and the company was incapable of paying off its debts. Hence the company has to be wound up under sec. 433(e) of the Companies Act. C.P. 4/2000 was filed by one K.G. Sanadhana Menon for winding up of the same respondent company "The Express (Malayalam) pvt. Ltd. alleging that the company had incurred debts and had become insolvent and hence the company had to be wound up under sec. 433(e) of the Companies Act. It was alleged that the petitioner had advanced an amount of Rs. 1 lakh to the company on 11.10.1991 and even after repeated demands, the above amount was not repaid and accordingly he filed

O.S. 246/94 before the Sub court, Thrissur and a decree was also obtained. Thereafter he filed E.P. 35/97 for execution of the decree and even then he could not realise the amount and hence he filed this C.P. 4/2000 for winding up of the company.

2. The respondent company had filed objections to both the petitions denying the allegation that the company was incapable of paying off its debts. It was further contended that amount claimed by the Lord Krishna Bank was not correct and thus they disputed the claim and that the petition for winding up was not maintainable as the bank had approached the Debt Recovery Tribunal for realisation of the debt due to the bank.

3. This court had considered the claims and contentions and passed a preliminary order on 17.08.2001 holding that the dispute raised by the company could not be said to be bona fide or genuine based on substantial grounds. Accordingly this court directed publication of notice of winding up in the details "Malayala Manorama" and "The New Indian Express". This court further found that though several opportunities were given to the company to pay off the debt due to the petitioner in C.P. 4/200, the company could not pay it. The main argument advanced by the learned counsel for the respondent company was that the petitioner bank had already approached the Debt Recovery Tribunal and as such the proceedings for winding up pending before the Company Court was not maintainable. It was argued that when the bank had opted for realisation of the amount approaching the Debt Recovery Tribunal, the proceedings before the Company Court cannot be proceeded. The learned counsel for the petitioner bank submitted that the reliefs prayed for before the Debt Recovery Tribunal were different from the reliefs prayed for before the Company Court and as the relief of winding up of the company could not be granted by the Debt Recovery Tribunal, the proceedings before the Debt Recovery Tribunal and the Company court could be proceeded simultaneously. The learned counsel for the petitioner bank placed reliance on a decision of this court in Sree Lakshmi Silks Vs. Remanika Silks Pvt. Ltd., wherein it was held that the winding up proceedings cannot be stayed or dismissed as a suit also had been filed by the same creditor for recovery of the amount. There it was held:

Winding up proceedings is not merely for the benefit of the petitioner but for all shareholders, creditors or contributors of the Company and therefore. winding up proceedings could not be stayed or dismissed merely because the creditors has filed a suit against the Company. The proceedings for winding up will not be invalidated if a suit is filed by the petitioner by way of abundant caution to save the claim getting barred by limitation. The contention that as the petitioner has already filed a suit before the Sub Court. Coimbatore for realisation of the amount alleged to have been due from the respondent the above petition to wind up the respondent-company is not sustainable, cannot be accepted.

As the Debt Recovery Tribunal cannot grant a relief of winding up of the company and the same can be granted only by the Company Court, the reliefs are

different, and the winding up proceedings also can be continued or initiated before the Company Court. A similar approach was made by a Division Bench of the Bombay High Court in *Viral Filaments Ltd., Mumbai Vs. Indusind Bank Ltd., Mumbai*, . The learned counsel for the respondent company placed reliance on a decision of the Delhi High Court in *The Bank of Nova Scotia Vs. RPG Transmission Limited*, wherein a contrary view was taken. The above judgment also does not say that once the creditor approaches the Debt Recovery Tribunal, he cannot approach the Company Court for other reliefs under the Company Law. In the above judgment it has been observed:

A possible exception would be where a judicial determination has already taken place, such as where a decree has been passed by a Court of competent jurisdiction, or where as in the *Allahabad Bank's* case (*supra*). a decree has already been passed by Debt Recovery Tribunal. In such cases the Company Judge would immediately proceed to the second limb of his duties under Sections 433 and 434 of the Companies Act, that is post admission of the petition. At this stage he would appoint a Liquidator and decide on the distribution of the proceeds of the Company. It is only in the second limb of jural activity that an actual difference between recovery proceedings and winding-up proceedings becomes manifest.

The above observation would make it clear that the pendency of a proceedings before the Debt Recovery Tribunal is not a total bar from proceeding with the petition for winding up where the reliefs are different. An order for winding up cannot be sought as a means of recovery of the debt due from the company. Winding up order can be passed on all or any of the grounds specified under sec. 433 of the Companies Act. Sec. 443(e) says that the company may be wound up if the company is unable to pay its debts. If the company is financially sound and capable of paying off its debts, the company cannot be wound up. The Company Court is not competent to pass a decree for the amount due to the bank and proceed to recover the same without passing an order for winding up. As the amount due to the bank had been disputed, the creditor bank had to approach the Debt Recovery Tribunal for a decree for the amount. That did not mean that the grounds for winding up ceased to exist. In the present case a number of claims have been put forward by the employees also claiming their wages, For the last so many years wages of the employees were not being paid. The company was under lock out. It was further submitted that some of the creditors have already removed certain properties belonging to the company. Some of the employees of the company filed applications and affidavits in support of an order winding up of the company and for impleading them as additional respondents. C.A. 292/2001 was filed by C.C. Kurain and four others, employees of the respondent company *Express (Malayalam) Pvt Ltd.* for impleading them as additional respondents. C.A. 296/01 was filed by M.S. Ibrahimkutty. another employee of the company, for impleading. C.A. 297/01 was filed by K. Mukundan, who also was an employee of the company, for impleading. C.A. 305/01 was filed by T.D. Simon and two other employees of the company for

impleading. As the claims of the employees of the company have a priority over claims of all other creditors and for the proper adjudication of their claims. I think it just and proper to implead them as additional respondents. Accordingly C.A. 292/01, 296/01, 297/01 and 305/01 in C.P. 25/1994 are to be allowed. The evidence and circumstances would establish that the company is incapable of paying off its debts and the company is liable to be wound up. In the nature and circumstances of the case it would be proper and appropriate to wind up the company and to appoint the liquidator so that the interest of the employees also can be protected. In M/s Gujarat Composite Ltd. and Another Vs. Ranip Nagarpalika and Another, the Supreme Court held that the employees had a priority over all the creditors. It was held:

The "workmen's dues" have priority over all other creditors, secured and unsecured because of Section 529A(1)(a). There is no material to hold that workmen's dues of the defendant company have all been paid. There is an obligation resting on Court to see that no secured or unsecured creditors including Banks or financial institutions, are paid before the workmen's dues are paid. Therefore, court cannot release any amounts in favour of the appellant Bank straightway.

In the above circumstances the winding up order has to be passed.

In the result C.P. 25/1994 and C.P. 4/200 are allowed. The company The Express (Malayalam) Pvt., Ltd., Sri Krishna Buildings, Palace Road, Thrissur, is ordered to be wound up. C.A. 292/01, 296/01, 297/01 and 305/01 in C.P. 25/1994 are allowed and the applicants in those C.As. are also impleaded as additional respondents. The Official Liquidator is appointed as the liquidator of the company. The Official Liquidator shall take over possession of the assets and records of the company.