
(1966) 03 KL CK 0012
In the High Court Of Kerala
Case No : Application No. 638 of 1965

Sebastian

APPELLANT

Vs

Rubber Board and Another

RESPONDENT

Date of Decision : 14-03-1966

Acts Referred:

Companies Act, 1956 — Section 442, 446, 466(1), 518, 518(1)

Citation : (1967) 37 CompCas 117 : (1966) 10 KLJ 633

Hon'ble Judges : P.T. Raman Nair, Acting C.J.

Bench : Single Bench

Advocate : M.U. Issac and Theresa Luiz, for the Appellant; K.V. Surianarayana Iyer, George Kurien, M. Pathrose Mathai and Joy Joseph for respondent No. I, for the Respondent

Final Decision : Allowed

Judgement

P.T. Raman Nayar, Ag. C.J.

1. This is an application u/s 518(1)(b) of the Companies Act brought by the liquidator in a members voluntary winding-up. What it seeks is a stay of the proceedings taken by the 1st respondent Rubber Board (the contesting respondent and hereinafter referred to as merely the respondent) under the provisions of the Revenue Recovery Act for the realisation of Rs. 6,57,367.60 due from the company by way of cess levied u/s 12 of the Rubber Act.

2. The facts set out in paragraphs 6 to 11 of the affidavit filed in support of this application are not controverted ; nor is it the case of the respondent that the declaration of solvency made by the directors of the company (a copy of which has been marked as exhibit P-1) is in any respect false. That being so, I think I ought to grant the stay if I have the power to do so. For, from the circumstances disclosed I am satisfied that, if the respondent is to bring the properties of the company to sale at this stage for the recovery of the dues instead of waiting for payment in the winding-up, that would gravely prejudice the winding-up.

3. It is true that the respondent claims to be a preferential creditor. (Strictly speaking, according to the respondent's case, the Central Government is really the creditor, the respondent being only a collecting agent). It is not admitted that it is but I shall proceed on the assumption that it is, for, I do not propose to decide that question here. There is on that assumption no question of a part passu distribution as between the respondent and the ordinary creditors. Nor is it the case of the petitioner that there are other preferential creditors entitled to take pan passu with the respondent who will be prejudiced by the respondent being allowed to recover forthwith. Indeed, in the face of the declaration of solvency which puts the total value of the assets at nearly Rs. 53 lakhs and of the liabilities at Rs. 40.4 lakhs, nearly Rs. 8 lakhs of the liabilities being secured and the rest unsecured, it would be difficult to put forward such a case. Therefore, on the assumption that I have made that the respondent is a preferential creditor, this might not be a case where, unless there are special circumstances calling for a refusal, a stay has to be granted as a matter of course on the ground that to deny a stay would be to make the pan passu distribution enjoined by Section 511 difficult, and I am prepared to regard it as a case where special circumstances must be shown as to how it would be just and beneficial within the meaning of Section 518(4) to stop a preferential creditor from recovering otherwise than in the winding-up.

4. As I have already said, there are, in my view, such special circumstances. The entire assets of the company, including its stock-in-trade, are subject to charges in favour of the two secured creditors to whom a total sum of about Rs. 8 lakhs is due. The stock-in-trade valued at about Rs. 12 lakhs consists almost entirely of unfinished goods, foam rubber cushions, made to the special specifications of a particular customer, namely, the Hindustan Motors Ltd., and these goods are of little use to anyone else. These goods can be sold only after they are finished and after the excise duty levied on them is paid and the charge on them in favour of the secured creditors is released by the payment to these creditors of their value. There is not now enough money on hand to pay the respondent. The cash in hand and at the bank at the commencement of the winding-up was only about Rs. 1.5 lakhs, and this (with the realisations since made) is being utilised for finishing the goods, paying the excise duty, meeting other expenses of the liquidation, and paying the secured creditors to whom about Rs. 1.4 lakhs has so far been paid during the six months that have elapsed. Once the stock-in-trade is sold and its value realised there will be a substantial balance left after paying the secured creditors in full and the rest of the valuable assets of the company consisting of lands and buildings, plant and machinery, furniture, fittings and utensils can then be sold free of encumbrances, and, on the figures shown in the declaration of solvency and in the affidavits filed by the liquidator, there will be more than enough money to pay all the creditors including the respondent in full. The properties will not fetch a fair price if they are sold subject to encumbrances, and, in particular, the stock-in-trade will fetch no price at all in a compulsory sale. It is, therefore, imperative that the secured creditors should be paid off

first. That will take some time for that is to be done mainly by the sale of the stock-in-trade. Therefore, until that is done and the assets sold free of encumbrances, the liquidator will not have enough money on hand to pay unsecured creditors like the respondent, whether preferential or ordinary. If, meanwhile, the respondent is allowed to proceed under the Revenue Recovery Act for the realisation of the cess and to attach the assets of the company and bring them to sale the entire winding-up will be gravely prejudiced. The sale being a distress sale and subject to encumbrances will result in the properties being sold at only a fraction of their real value--the stock-in-trade will fetch hardly any price at all. The result might well be that, although the respondent might be able to recover the cess, the remaining unsecured creditors will have to go without anything. On the other hand, there seems to be little ground for any apprehension on the part of the respondent that, if its hands are stayed, it may not be able to recover in full. On the material placed before me it would appear that all the creditors will be paid in full in the winding-up.

5. The question then is whether I have the power to order a stay. The principal contention of the respondent is that I have not and it is said that Section 518(1) (b) of the Act has no application. That section runs as follows:

" 518. (1) The liquidator or any contributory or creditor may apply to the court--

(b) to exercise, as respects the enforcing of calls, the staying of proceedings or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court. "

6. Now, if this company were being wound up by the court, could I have stayed the hands of the respondent ? I have little doubt that I could u/s 446(1) of the Act--Governor-General in Council v. Shiromani Sugar Mills, [1946] 16 Comp. Cas. 71 (F.C.) has put it beyond doubt that the institution of proceedings under the Revenue Recovery Act is a legal proceeding coming within the ambit of that section. No doubt what that section in terms provides for is an automatic stay. The intervention of the court is not necessary. All proceedings coming within its ambit are stayed by the statute itself unless leave of the court is obtained for their commencement or continuance. But, if it is for the court to decide whether or not a proceeding is to be commenced or continued, I suppose it must have the power to restrain a proceeding commenced or continued without its leave. That seems to be implied and that is how the statute has always been applied both in England and in India--see Palmer's Company Precedents Part IT, seventeenth edition, pages 305 and 306, where it is said that where any person acts in violation of Section 231 (Section 446 of the Indian Act) application should be made to the court to stay or restrain the proceedings; see also Nazir Ahmed v. Official Liquidator, Peoples Bank of Northern India, [1943] 13 Comp. Cas. 1 (F.B.) where the following statement of the law by Solomon Judah with reference to the similar provision in Section 171 of the 1913 Act is quoted with approval:

" Whenever proceedings are commenced without leave, the proper course for the liquidator is to apply to the court for stay of the proceedings, and not to plead the omission to obtain leave as a bar to the further maintenance of the proceedings, as, in practice, the section has always been worked out by applying to stay the proceedings."

7. It follows that Section 518(1)(b) read with Section 446 gives me the power to order a stay. *Naoshir S. Shenoy v. District Collector of Hyderabad*, [1965] 35 Comp. Cas. 402, 404 on which reliance is placed on behalf of the respondent considers only the applicability of Sub-section (2) of Section 518 to proceedings taken by a Collector under the Revenue Recovery Act, and not of sub-section 1(b). In *re Margot Bywaters Ltd.*, [1942] I Ch. 121 and In *re P.P. De & Co.*, [1951] 21 Comp. Cas. 215 decided under the corresponding provisions of the English Act then in force and of the 1913 Act respectively make it clear that u/s 518(1)(b) the court has the power to stay proceedings of the kind mentioned in Section 446(1) against a company in voluntary liquidation.

8. It is argued on the strength of an observation to that effect in *Naoshir S. Shenoy v. District Collector of Hyderabad* that the object of the amendment effected to Sub-section (2) of Section 537 of the Companies Act by Act 65 of 1960 was " to nullify the effect of the judgment of the Federal Court in *Governor-General in Council v. Shiromani Sugar Mills*, [1946] 16 Comp. Cas. 71 (F.C.) " and that, therefore, that decision can no longer be regarded as good law. I do not understand the observations as meaning that the effect of the amendment was to nullify the decision of the Federal Court in so far as it held that Section 446 was applicable to proceedings initiating action under the Revenue Recovery Act--express reference is made only to the Federal Court having " laid down that Section 537 does not enlarge the scope of Section 530 in so far as it relates to the dues payable to the Government and that it applied only to such debts as were covered only by Section 530"--and if the observation does mean that, I must express my respectful dissent. In the first place, the 1913 Act under which the Federal Court gave its decision had a provision, Section 232(2), similar to and in some respects wider than Section 537(2) of the present Act and that that provision has nothing to do with the scope of Section 446 is clear from the decision of the Allahabad High Court in *Shiromani Sugar Mills v. Governor-General in Council*, [1945] 15 Comp. Cas. 153 which the Federal Court confirmed in appeal. Secondly, if the legislature were setting about nullifying the effect of the decision of the Federal Court with regard to the scope of Section 446, one would expect it to do so by an amendment to that section and not by an amendment to Section 537.

9. Were sections 446 and 537 designed to operate in the same field, the latter setting out the consequences of a disregard of the former--even so it will be noticed that Section 537 concerns itself only with a particular class of proceedings falling within Section 446, namely, attachment, distress or execution--then there might have been some substance in the contention that if,

by reason of Sub-section (2) of the latter section, proceedings in attachment, distress or execution taken without leave of the court for the recovery of any tax or impost or any dues payable to the Government are not on that account void, the former cannot be regarded as requiring leave of the court for the commencement or the continuance of such proceedings. But then the two provisions are really designed to operate in different fields ; Section 537 is an entirely independent section, not merely a section setting out the consequences of a disregard of Section 446, and Sub-section (2) of Section 537 only saves the proceedings mentioned therein from Sub-section (1) thereof, not from the operation of Section 446, Section 537 is really complementary to Section 442 and not to Section 446. u/s 442 the appropriate court may, at any time after the presentation of the winding-up petition and before the winding-up order has been made, stay or restrain proceedings against the company. But, in the absence of such stay or restraint, the court seized of the proceeding would have jurisdiction to proceed with it and to decide it. Where, however, a winding-up order follows, any attachment, distress or execution (but not other legal proceedings) put in force, without leave of the court, against the assets of the company, after the commencement of the winding-up, in other words, after the presentation of the winding-up petition, is rendered void by Section 537 notwithstanding that there was no stay or restraint ordered u/s 442. But, once a winding-up order has been made, the commencement or the continuance thereafter of any legal proceeding (including proceedings in attachment, distress or execution) can be only by leave of the court, and any proceeding without such leave would be without jurisdiction and therefore altogether void. That is the result of Section 446 itself, and it is not Section 537, which, as we have noticed, applies only to a particular class and not to all proceedings falling within Section 446, that renders it void. And hence there can be no question of Sub-section (2) of Section 537, which only excludes the application of Sub-section (1) thereof, excluding the application of Section 446 in respect of any proceeding whatsoever. Section 537, it seems to me, is really designed to cover proceedings of the kind described therein taken during the interval between the presentation of the winding-up petition and the winding-up order in cases where a winding-up is ordered, although its language is wide enough to cover proceedings taken even after the winding-up order. But, with regard to proceedings taken after the winding-up order, these would be void u/s 446 itself, unless taken with the leave of the court, and the assistance of Section 537 would not be necessary.

10. I allow this application and stay the proceedings by the respondents for the recovery of the cess due from the company. I make no order as to costs.

11. I must add that in paragraph 5 of the reply affidavit filed by the petitioner, there appears the following statement ;

" The first respondent has not so far made any claim before me for preferential payment; and the claim, if any, can be duly examined when made. I undertake that I will not disburse any debts, except the secured debts and the excise duty

payable for getting the manufactured goods released for sale before the first respondent's claim is determined. I am also prepared to reserve the full amount claimed by the first respondent before any payment is made to unsecured creditors."

12. This assurance, on which I have acted in granting the stay, should be a sufficient safeguard for the respondent; and if, at any time, the respondent apprehends a breach of this assurance or has otherwise reason to believe that the winding-up is being conducted in a manner prejudicial to its interests it will be open to it to apply for the stay being vacated. And, of course, there is always the remedy u/s 440 of the Act.