

(1976) 03 KL CK 0002

In the High Court Of Kerala

Case No : Application No. 415 of 1975 in C.P. No. 7 of 1973

South Indian Bank Ltd.

APPELLANT

Vs

Imperial Chit Funds (P.) Ltd. (In Liquidation)

RESPONDENT

Date of Decision : 18-03-1976

Acts Referred:

Companies Act, 1956 — Section 446

Citation : (1976) 46 CompCas 665

Hon'ble Judges : V. Khalid, J

Bench : Single Bench

Advocate : S. Narayanan Poti, for the Appellant; T.V. Ramakrishnan and P.R. Nambiar, for the Respondent

Judgement

Khalid, J.—This is an application filed by the South Indian Bank Ltd., Trichur, seeking leave of this court to institute a suit against the respondent, viz., the Imperial Chit Funds (P.) Ltd., Ernakulam (in liquidation), and three others, for the recovery of the amount due to the applicant-bank as per the overdraft account of the Imperial Chit Funds (P.) Ltd., Ernakulam.

2. The facts of the case are, in short, as follows : The applicant-bank is a company registered under the Indian Companies Act, having its registered office at Trichur. The Imperial Chit Funds (P.) Ltd., 1st respondent in the application, is also a company registered under the Indian Companies Act. This company is now under liquidation. This company was carrying on business of conducting kuries with head office at Ernakulam. This company had fixed deposits in certain branches of the applicant-bank. The details of the deposits are given in paragraph 4 of the application. The total amount of the deposits comes to Rs. 1,40,000. There are in all five such deposits. Each of these fixed deposits was offered as security in favour of the ex-officio Chitty Registrar, Edappally, Ernakulam, by the 1st respondent-company, for the due conduct of some of their kuries. The 1st respondent-company desired that the applicant-bank allow them an overdraft facility on the basis of the second charge on the above said fixed

deposits and personal guarantee of respondents Nos. 2 to 4. The applicant-bank sanctioned the said request, and allowed an overdraft facility to the extent of Rs. 20,000 on the second charge of the aforesaid fixed deposits and the personal guarantee of respondents Nos. 2 to 4 from the Cochin branch of the applicant-bank. As per the books of accounts of the bank, a sum of Rs. 15,016.88 is due as on 30th June, 1975, from the 1st respondent-company and respondents Nos. 2 to 4. The respondents failed to discharge their liability. The applicant bank issued notices on April 10, 1973, to the respondents. No amount was paid. As no payment was made, a suit for recovery of the amount has become necessary. Hence, this application.

3. The 1st respondent-company was ordered to be wound up by this court on June 1, 1973, and the official liquidator took charge of the affairs of the company. Since the company is under liquidation, permission is necessary and hence this application u/s 446 of the Companies Act, 1956.

4. In the counter-affidavit filed by the official liquidator, it is stated that no permission need be given and that the applicant-bank has to prove its claim u/s 528 or Section 530 of the Companies Act along with the other creditors of the company. It is stated that by filing a suit and obtaining a decree against the said company, the applicant-bank cannot claim preference over the other creditors.

5. The official liquidator has taken a further contention that the second charge created in favour of the applicant-company has not been registered as required under the provisions of Section 125 of the Companies Act, 1956, and, therefore the charge is not enforceable. The charge in favour of the respective kuri creditors have been registered.

6. The 4th respondent, one of the directors, has filed a counter-affidavit resisting the application for leave. According to him, leave has to be refused since a suit is redundant. It is stated that proceedings u/s 454 of the Companies Act, 1956, are already pending against respondents Nos. 2 to 4 and if leave is granted u/s 446, the respondents will have to answer in two courts relating to identical matters.

7. The counsel for the official liquidator stated that the directors did not file the necessary details as contemplated u/s 454. This has disabled the official liquidator from quantifying the liabilities. If the details were made available, the official liquidator would have been in a position to ascertain whether the applicant-bank could be paid the amount due to it on the second charge available to it. The statement of affairs not having been filed as contemplated u/s 454 no preliminary report could be submitted u/s 455. In any case, the official liquidator would contend that the company has to be reimbursed for the amounts that will have to be expended for the conduct of the suit, and the applicant-bank must be directed to pay the requisite amount for meeting the expenses, should leave be granted as prayed for.

8. The learned counsel for the applicant-bank dealt with the scope of an application u/s 446 and the jurisdiction of this court to grant or refuse leave for

the institution of a suit. That the leave of this court is necessary is a matter beyond dispute. Section 446 of the Act makes it mandatory. Where what the plaintiff claims is in reality no more than his own property, the company should not be permitted to withhold the plaintiff's property simply because it is in liquidation. Differently stated, when property not available for division among the general creditors is the subject-matter of the suit, the persons entitled to it stand outside the winding up proceedings and possess rights which they can enforce independently of the liquidation proceedings. However, where the claim is in respect of what is no more than a simple contract which can be submitted to proof in the ordinary way, leave is almost invariably refused.

9. In *G.S. Setty & Sons v. Y.C.W. & S. Mills Co. Ltd.* 1970 1 Comp LJ 184 (Mys) the Mysore High Court had to consider the jurisdiction of the company court u/s 446. In that case an application was filed in the company petition praying for leave to proceed with a suit already pending on the ground that the company was a necessary party and that the claim against the second defendant on the guarantee given by him cannot be proceeded with in the absence of the 1st respondent company in liquidation. The company judge refused the leave prayed for. The Division Bench in appeal held that the question in issue could not be gone into and decided in the winding up proceedings and, therefore, refusal was not proper. The principle laid down is that where the suit is necessarily for a relief, which cannot normally be granted in the winding up proceedings, leave should in equity be granted.

10. In *In re Subhodhaya Publications Ltd.*, 1955 25 Comp Cas 49 (Mad). Ramaswamy J. observed that leave in such cases cannot be obtained merely for the asking and will not be granted automatically or as a matter of course. The general principle governing granting or refusing leave is to prevent a litigation against the company which has been wound up except with the consent of the court and where the matter cannot be effectively adjudicated in the winding up proceedings itself.

11. In *Balkrishna Mahadeo Vartak Vs. Indian Association Chemical Industries Ltd.*, Chainani J. has observed as follows :

" Section 446 provides that when a winding up order has been made, no suit shall be commenced except by leave of the court and subject to such terms as the court may impose. The object of the section is to save the company which is being wound up from unnecessary litigation and to protect its assets for equitable distribution amongst its creditors and its shareholders. The consequence of the winding up order, therefore, is that no suit can be filed against the company without obtaining the leave of the court. An application for such leave is, therefore, made necessary by the order for winding up. In dealing with such an application, the court has necessarily to consider the interest of the company and to see that its assets are not wasted in frivolous and unnecessary litigation. An order or decision on such an application is, therefore, clearly an order or decision in the matter of winding up. It is not a mere procedural order,

for it affects the valuable right to obtain relief by filing a suit. An appeal, therefore, lies against such an order or decision u/s 483 of the Act."

12. In *Hansraj v. Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co. Ltd.*, it is observed that the discretion to refuse leave must be exercised with due regard to the rights of third persons who are not members of the company and who had not to come in and claim the share. It is also observed that the unlimited power to refuse leave will be exercised by a court of law in furtherance of the ends of justice and not capriciously.

13. The principle in short is that if the applicant who seeks leave of a court, can be given what is due to him, without having recourse to proceedings in the winding up court to prove his claim, then he can be given what is due to him and need not be ordered to file a fresh suit. If he can say "there is some property upon which I have a certain specific charge, I want to realise that charge. I have nothing to do with the distribution of your property among your creditors. This is my property." ; then leave need not be given but he can be given what is due to him without waiting for the winding up proceedings to be completed. The point to be emphasised is that if the applicant is a person outside the winding up proceedings, then he should not be forced to file a suit. His claim can be considered without giving leave to file a suit.

14. In this case the applicant made a demand on April 10, 1973, for payment of the amount. Time runs against the applicant and the suit for the enforcement of the personal liability, at any rate, will have to be filed before April 10, 1976. If the official liquidator was in a position to tell the applicant that "I have the statements of affairs. The directors have made available to me the details, I want only this much amount in the fixed deposit. You are entitled to Rs. 15,000. Here it is. Take it." Then leave can be refused. But here the official liquidator is not in a position to tell the applicant precisely as to the state of the company's affairs. The balance of convenience is, therefore, in favour of the applicant, since if the suit is not filed within time, the applicant will lose the personal charge against the directors. It is not fair to tell the applicant that he can wait. It will act to his detriment. Respondents Nos. 2 to 4 have no justification to say so, since they have not made available the details to the official liquidator as contemplated u/s 454 of the Companies Act. Therefore, I hold that the applicant is entitled to the leave asked for.

15. The counsel for the official liquidator invited my attention to Section 125(4) (e) and rested his argument on the ground that the charge which the applicant now seeks to enforce has not been registered and that the charge in this case is not a pledge on an immovable property. I do not think it necessary to resolve this dispute, although arguments were addressed before me by the counsel for the applicant that the charge in this case is in fact a pledge and a registration is not necessary. It is a matter which can effectively be urged and adjudicated upon in the suit to be filed. I, therefore, refrain from adjudicating upon this question at this stage.

16. The counsel for the 4th respondent contended that the directors will have to answer two proceedings and, therefore, leave should not be granted. I am not satisfied that this plea has any basis since they have to blame themselves for this state of affairs, necessitating the filing of a suit by the applicant-bank to enforce the personal charge against respondents Nos. 2 to 4.

17. On a consideration of the entire facts and circumstances of the case, I am satisfied that this is a fit case to grant leave to the applicant-bank to institute a suit against the respondents before the Sub-Court, Cochin, for the recovery of the amount due to the said bank. The application is thus allowed. Parties are directed to bear their costs. It is made clear that no steps will be taken in execution of any decree that the bank may obtain in the suit without obtaining previous leave of this court.