

(1998) 01 RAJ CK 0050

In the Rajasthan High Court

Case No : Company Application No. 12 of 1997 in Company Petition No. 5 of 1991

Spic Electronics and Systems Ltd.

APPELLANT

Vs

Kienzle Indian Samay Ltd.

RESPONDENT

Date of Decision : 17-01-1998

Acts Referred:

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

Citation : (1999) 98 CompCas 125

Hon'ble Judges : N.L. Tibrewal, J

Bench : Single Bench

Advocate : G.K. Garg, for the Appellant; D.K. Gupta, for the Respondent

Final Decision : Allowed

Judgement

N.L. Tibrewal, J.—The State Bank of Bikaner and Jaipur, a subsidiary bank under the State Bank of India (Subsidiary Banks) Act having its head office at 12, Tilak Marg, Jaipur, has filed this petition for grant of leave u/s 446(1) of the Companies Act to file an application before the Debt Recovery Tribunal, New Delhi, for the recovery of Rs. 1,38,09,338 against the company in liquidation. The petitioner-bank is a secured creditor. A draft copy of the application to be filed before the Debt Recovery Tribunal, New Delhi, has been placed on record as annexure A-4.

2. In S.B. Company Petition No. 5 of 1991 (SPIC Electronics and Systems Ltd. v. Kienzle Indian Samay Ltd.) vide order dated April 7, 1995, the company petition seeking winding up of the respondent-company has been admitted and the official liquidator has been appointed as provisional liquidator of the company. As per the averments made in the present petition and annexure A-4, a sum of Rs. 1,38,09,338 was outstanding as on July 31, 1997, as debit balance against the respondent-company, which includes a sum of Rs. 76,46,748 as principal amount and Rs. 61,62,590 towards interest. The details of the loans, etc., have been given in the petition as well as annexure A-4.

3. In Indian Bank v. Electronics Circuits Ltd. (S.B. Company Application No. 9 of 1997 in Company Petition No. 25 of 1996) I have examined the legal aspect thoroughly as under :

"In Bank of India Vs. Saraf Synthetics (Raj) Ltd. (In Liquidation) and Others, (Company Application No. 38 of 1996), decided on August 29, 1997, this court has examined the question of granting leave u/s 446(1) of the Companies Act to the applicant-bank which is a secured creditor, After examining various decisions and relevant provisions, this court has observed and held as under (page 489) :

"Taking into consideration the entire background and the legal aspect I am of the opinion that it is difficult to lay down a strait-jacket formula to exercise discretion for granting leave u/s 446(1) of the Act. It would depend on the facts and circumstances of each case. Undoubtedly, the interest of a secured creditor and the fact of incurring a lot of expenditure by him in filing the suit/recovery proceedings for realisation of the debt against the company would be required to be taken note of while exercising discretion. The company court would also take care of the interest of other secured creditors while deciding the question as to whether leave should be granted or not."

In Central Bank of India Vs. M/s. Elmot Engineering Co. and others, leave u/s 446 of the Act was refused by the Bombay High Court on the ground that defending by the liquidator at a far off place would be a wasteful expenditure and ordered transfer of the suit to the High Court at Bombay. The Supreme Court held that the order of transfer of the suit to the High Court of Bombay cannot be supported as transfer would result in greater expenditure to the appellant-bank which certainly is avoidable than the wasteful expenditure to the official liquidator.

In Industrial Credit and Investment Corporation of India Ltd. Vs. Srinivas Agencies and Others, we find guidelines from the Supreme Court in a case where recovery proceedings initiated by the bank as secured creditor are pending before the Debt Recovery Tribunal, it was held therein as under (page 263) :

"We have duly applied our mind to the rival contentions. It is no doubt correct that the interest of the secured creditor, who has had 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 a 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 the 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 the 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 in so far as the priority of secured creditors' claims 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.

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 straight-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 the Recovery of Debts Due to 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, the 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*."

Applying the aforesaid guidelines and taking into consideration the-relevant facts and circumstances of the case, in particular that the applicant-bank is the largest secured creditor and debt recovery proceedings are pending before the Debt Recovery Tribunal, Delhi. I am of the opinion that it would be just and proper to grant leave u/s 446(1) of the Companies Act to continue/proceed with the recovery proceedings against the company and other persons before the Debt Recovery Tribunal, Delhi, with certain conditions."

4. Vide order dated August 28, 1997, permission was granted to the applicant-bank to file application before the Debt Recovery Tribunal, Delhi, for recovery of the aforesaid amount as limitation was expiring.

5. In the result, the petition is allowed. Leave is granted to the applicant-bank to continue debt recovery proceedings if the same has been filed or to file fresh recovery proceedings before the Debt Recovery Tribunal, Delhi. The leave shall be subject to the following conditions :

- (1) The applicant will undertake to discharge the liability due to the workmen, if any, u/s 529A of the Act to the extent of the amount realised from the assets of the company.
- (2) The applicant-bank will intimate the official liquidator from time to time about the progress of the recovery proceedings and the interlocutory applications, if any, seeking any order in relation to the secured properties.
- (3) The final result of the proceedings shall be intimated immediately to the official liquidator.
- (4) The execution proceeding for realisation of the amount from the properties of the company shall be taken by the bank after obtaining permission from the company court.
- (5) The expenses to be incurred by the official liquidator in defending before the Tribunal shall be recoverable from sale proceeds of the properties of the company as and when sold.