(1970) 12 MAD CK 0013

In the Madras High Court

Case No : Civil Revision Petition No. 1182 of 1970

Srinivasa Naicker and Another APPELLANT

Vs

A.N. Nagappa Chettiar RESPONDENT

Date of Decision : 21-12-1970

Acts Referred:
Companies Act, 1956 — Section 446

Citation : (1971) 41 CompCas 550

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Advocate : V. Narayanaswamy, for the Appellant; K. Sarvabhauman, for the Respondent

Final Decision : Dismissed

Judgement

Ramanujam, J.—This revision raises an interesting question of law. The respondent, Nagappa Chettiar, filed a suit, O.S. No. 27 of 1969, on

the file of the lower court for recovery of certain monies due under a promissory note executed by the petitioners, and their defence was that the

promissory note was executed in connection with the business of a company by name Chellam Transports Ltd., and that the money could,

therefore, be recovered from the assets of that company only and not personally from them. The petitioners filed an application, I.A. No. 95 of

1970, for a notice under Order 8-A, Civil Procedure Code, to bring in Chellam Transports Ltd., which was under liquidation by then, as a co-

defendant, and this application was opposed by the respondent on the ground that he had nothing to do with Chellam Transports Ltd., and that u/s

446 of the Companies Act of 1956, the petitioners have to obtain sanction of the company court for initiating proceedings against the company

under Order 8-A of the Code of Civil Procedure. The court below upheld the objection of the respondent and rejected the application on the

ground that the application for initiating proceedings under Order 8-A against the company, which is in liquidation, cannot be maintained without

the leave of the company court. It is the correctness of the said order which is canvassed in this revision.

2. The learned counsel for the petitioners contends that no leave of the company court is necessary for an application under Order 8-A, Rule 1,

that a resort to Order 8-A will not amount to initiation of any proceeding against a company as contemplated in Section 446 of the Companies Act

and that Section 446 applies only to original proceedings such as suits, etc., and not to interlocutory applications in a pending suit. The learned

counsel contends that the words ""other legal proceeding "" in Section 446(1) of the Companies Act have to be construed as to denote original

proceeding and that they cannot comprehend interlocutory applications in a pending proceeding. The learned counsel compares this provision with

Section 16(2)(b) of the Provincial Insolvency Act to substantiate his contention that the words ""other legal proceeding"" can refer only to original

proceedings initiated against the company.

3. In Periyakarupa Thevar and Others Vs. Vellai alias Ocha Thevar and Others, the scope of Section 141, Civil Procedure Code, came up for

consideration. In that case there was an ex parte order in a reference proceeding u/s 146, Criminal Procedure Code, and when the ex parte order

was sought to be set aside under Order 9, Rule 13, invoking Section 141 of the Code of Civil Procedure, a Division Bench of this court hold that

Section 141 could not be called into play, that Section 141 relates to original matters in the nature of suits, that the proceeding in a civil court u/s

146, Criminal Procedure Code, cannot with any propriety be called ""original"" in character and that, therefore, Order 9, Rule 13, cannot be

invoked in relation to reference proceedings. Kuppuswami Ayyar J, in The Calicut Bank Limited Vs. Nekkat alias Eppurath Manakkal

Parameswaran Nambudiri''s son Narayanan Nambudiri, however, construed the word ""proceeding"" in Section 171 of the Companies Act, 1913,

as applying to execution proceedings also, and held that it was not confined to original proceedings alone, and that a claim petition which was itself a proceeding in execution, fell within the mischief of the section. It has also been clearly laid down by the Federal Court in AIR 1946 16 (Federal

Court) that the expression "" other legal proceeding "" in Section 171, need not, and therefore should not be construed to mean original proceedings

in a court of first instance, analogous to a suit initiated by means of a petition similar to a plaint, that Section 171 must be construed with reference

to other Sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the ,Act, and that

leave of court is required for execution proceedings against a company in the ordinary course even though they are not original proceedings. In that

case their Lordships of the Federal Court held that, though a proceeding u/s 46 of the Income Tax Act cannot be construed as a proceeding in any

ordinary court of law which will be comprised within the words "" other legal proceeding "" occurring in Section 171, the Income Tax authorities

have to apply for leave of the winding-up court before issuing the certificate contemplated in Section 46(2) by the Collector for the collection of

arrears of Income Tax. In view of this decision it is not possible to confine the scope of Section 446 only to original proceedings as contended for

by the learned counsel for the petitioners.

4. It was then contended on behalf of the petitioners that the Order 8-A, having been invoked by them in defence of the suit filed against them,

Section 446 of the Companies Act cannot stand in their way. Reliance has been placed on the following decisions :

5. In Andhra Paper Mills Co. Ltd. v. Anand Bros., [1951] 21 Comp. Cas. 160, ; [1951] 1 M.L.J. 340 a Division Bench of this court had

occasion to consider whether leave of the company court u/s 171 has to be obtained by a defendant for setting up a cross-claim or set off in a suit

filed by a company in liquidation, and Rajamannar C.J. had expressed as follows :

On principle and in the interests of fairness and justice, we think that a party against whom the company has instituted a suit, should not be

prevented from establishing that on a proper taking of the account between the company and the party, i.e., after adjusting mutual credits and

debits, no amount is due to the company or that the extent of its liability is more or less reduced. When the company has made a claim, any plea

which has the effect of reducing the claim if successful would be a plea in defence. It may be for certain purposes, as for example, for court-fees, a

written statement containing a plea of set-off or counter-claim is treated as a cross-suit, but that is not conclusive of the matter. There can be no

doubt that the pleading by the defendant is defensive in character. If it is so, then Section 171 cannot apply.

6. Viswanatha Sastri J. also, in his concurring but separate judgment, held that the right of set-off is a ground of defence and is required by Order

8, Rule 6 of the CPC to be pleaded as part of the written statement of the defendant, that the procedural law that the written statement containing a

set-off has the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment and pass a single decree in respect of

both the original claim and the set-off, however, does not mean that a written statement containing a plea of set-off is to be treated as a plaint in all

respects and for all purposes, that the set-off allowed by Section 229 of the Companies Act is a weapon of defence and a written statement

pleading a set-off filed in answer to a suit by the official liquidator is a defensive proceeding and that the official liquidator having brought the

defendant before the court, the latter must, in common justice, have a right to contest the suit by raising all defences allowed to him by law including

a defence of set-off. Raghava Rao J. in The Palghat Wariar Bank Ltd. Vs. Mundan Kandath Purakkal Ramaswamy''s son, Padmanabhan and

Another, considered the necessity or otherwise of leave of court when a claim petition was filed by a third party when the company in winding-up

attached certain properties in execution of a decree in its favour as that of its judgment debtors and held that such claim petition can be proceeded

with against the company without the leave of the court u/s 171 of the Companies Act of 1913 which corresponds to Section 446 of the present

Act. The learned judge was of the view that the words "" legal proceeding "" in Section 171 cannot comprehend a claim petition by a third party and

that it would be most inequitable for a company in liquidation to institute execution proceedings and rely upon Section 171, to debar persons from

defending their property in those proceedings, that the object and purpose of Section 171 is not to prevent third parties from putting forward their

claim to the properties sought to be proceeded against by the company, and that the claim proceeding in the course of the execution proceeding taken by the company itself is in the nature of an independent proceeding by a stranger to the execution petition in vindication of his rights to the

property attached, which is only incidental to the main proceeding started by the company itself. Rahmat Ali Fatehullah Vs. Calcutta National Bank

Ltd., also held that the meaning of the words "" other legal proceeding "" in Section 171 must not be confined within narrow limits, that they need not

necessarily refer to proceedings analogous to a suit initiated by means of a petition similar to a plaint, and that the words "" against the company "" in

Section 171 mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a

person with the object of escaping liability arising out of a proceeding commenced by the company itself and that if a person wants to file a suit to

escape liability on the ground that the company''s claim against him is unfounded, it is a proceeding against the company, but where the company

has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the

company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company. The decision of the

Federal Court above referred to should be taken as to have set at rest the earlier view that the words ""other proceeding"" should connote only an

original proceeding initiated in a court of law. In V.K. Padmanabhan Vs. Kunjan Narayanan and Others, the court held that permission of the

company court u/s 446 is required only where proceedings are started with the object of fastening liability on the company or with the intention of

escaping liability in respect of a claim which has not been brought into court by the company itself.

7. The decisions aforesaid proceed on the principle that when once an action by the company itself has been proceeded with, there is no necessity

for the defendant in that action to obtain leave for any defensive proceeding on his part. But it is doubtful whether the principles laid down in those

decisions will apply to the facts of the present case where the company in liquidation has not initiated the proceedings. In this case before the

application under Order 8-A was filed, the company was nowhere in the picture and what the petitioners want to establish is that the company in

liquidation is liable to answer the suit claim or that it has to indemnify them in case a decree is passed against them in the suit filed by the respondent. ,

8. The learned counsel states that as the provisions of Order 8-A have been held not to apply to winding-up proceedings, it has to be held that no

sanction is required u/s 446 for taking proceedings under Order 8-A. I am not inclined to agree. It is true that the third party proceedings under

Order 8-A cannot apply to the winding-up proceedings before a court and that the court in winding-up has no jurisdiction to settle disputes

between the parties outside the winding-up. This has been so held in In re A Singer and Company (Hat Manufacturers) Ltd., [1943] Ch. 121 ; 13

Comp. Cas. 175 . by the Court of Appeal. In that case in the winding-up proceedings third parties were sought to be brought in under the third

party procedure, and the court held that the third party procedure is not applicable to proceedings in winding up of companies. But that will not

establish the contrary submission that, for a third party procedure, the leave of the company court is unnecessary. For deciding the question

whether leave of the company court is necessary or not, the substance of the claim made by the applicant invoking the third party procedure has to

be looked into in the light of the object of Section 446. In this case the petitioners not only seek to avoid a decree being passed against them but

also seek a decree against the company in liquidation in case the respondent obtains a decree against them in the suit. It is well known that the

object of the winding-up is to put all unsecured creditors upon an equality and to pay them pari passu, and to accomplish; this, it was indispensable

that proceedings against the company by way of action, execution, distress or other process should be suspended as otherwise the winding-up

would resolve itself into a scramble for the assets. With a view to carry out the objects of the winding-up, the court is empowered, after the

presentation of the petition for winding up, to restrain or stay the proceedings pending on that date and to grant leave for initiating or proceeding

with any claim against the company.

9. In this case the suit has been filed by the respondent to recover a debt due on a promissory note from the petitioners and as has been held by

Venkataraman J. in N.S.M. Adaikappa Chettiar Vs. The Official Assignee, High Court, even if the money borrowed under the promissory note

has been utilised for the purpose of the company, it would be a separate debt of the promissor and when the petitioners as promissors who are

liable to answer the suit-claim seek to implead the company in liquidation by invoking third party procedure, it clearly means that the petitioners

seek to enforce a claim against the company by establishing their case that they are entitled to indemnity or contribution from the company in

liquidation. The learned counsel, however, seeks support from a decision in Subramanyam v. Narasimham, AIR 1929 Mad. 323 where a Division

Bench of this court, while considering the scope of Section 16(2)(d) of the Provincial Insolvency Act, expressed the view that a suit by a decree-

holder under Order 21, Rule 63, against a successful objector, who is alleged to have purchased the property from the judgment-debtor

(insolvent) prior to attachment effected before the insolvency does not fall within the prohibition, that a party''s ordinary civil right should not be

taken away or reduced unless there is a clear statutory authority to do so, that the prohibition in Section 16 is directed not to the court but to the

party and, therefore, when a party is wholly ignorant of the adjudication he should not be penalised for not bringing to the court''s notice a matter of

which he was wholly ignorant, and that the prohibition is merely a matter of procedure and a restraint on the exercise of jurisdiction, and there is no

inherent want of jurisdiction. But the above decision is based on the fact that the suit is filed under Order 21, Rule 63, by a decree-holder against a

successful objector who has not interfered with the insolvency proceeding or hampered or affected prejudicially the administration of the

insolvent''s estate by the insolvency court. That decision cannot apply to the facts of this case where the company in liquidation is sought to be

subjected to a decree for the suit amount.

10. On a due consideration of the matter I am of the view that, having regard to the object underlying Section 446 of the Companies Act, which is

one to prevent all litigations against the company in liquidation except with the permission of the company court, leave of the company court is

necessary for a proceeding initiated by a defendant under Order 8-A. In that view the order of the lower court rejecting the petitioners'' application

under Order 8-A has to be upheld. The civil revision petition, is therefore, dismissed but, in the circumstances, no costs.