

(1974) 07 GUJ CK 0010

In the Gujarat High Court

Case No : Company Application No. 18 of 1973 in Company Petition No. 19 of 1972

Star Engineering Works Ltd.

APPELLANT

Vs

Official Liquidator of The Krishnakumar Mills Company Ltd.
(In Liquidation) and Others

RESPONDENT

Date of Decision : 09-07-1974

Acts Referred:

Companies Act, 1956 — Section 231, 446, 446(2)
Sales of Goods Act, 1930 — Section 27

Citation : (1975) 16 GLR 371

Hon'ble Judges : B.J. Divan, C.J;M.P. Thakkar, J

Bench : Division Bench

Advocate : C.C. Gandhi, for the Appellant; G.N. Shah, for the Respondent

Judgement

Divan, C.J.—In this application in the form of a judge's summons it is prayed that the applicant may be permitted to proceed with Long

Cause Suit No. 254 of 1972 filed by the applicant against the company in liquidation in the High Court of Judicature at Bombay or in the

alternative that the suit may be ordered to be transferred to this court and the applicant may be permitted to proceed with the same. The applicant

has further prayed that the respondents be ordered to give an inspection of the properties of the said company in their custody to the applicant.

This judge's summons came up for hearing before our learned brother, J. B. Mehta, J., and by order dated April 15, 1974, our learned brother

referred it to a Division Bench because he felt that the point involved was an important point and of wide public importance and required full

consideration of the various decision hereinafter referred to.

2. The applicant is a limited company and carries on business, inter alia, of manufacturing and supplying machinery, spare parts, etc., and these goods were supplied to the company under liquidation, namely, the Krishnakumar Mills Company Ltd., which had its factory at Mahuva in Bhavnagar District of Gujarat State. The winding-up order against the company in liquidation was passed by this court on February 7, 1972, and the suit which is referred to in the prayer clause of the judge's summons was filed on March 13, 1972, by the applicant-company on the original side of the High Court of Bombay. In the suit the applicant before us prayed for a decree in the sum of Rs. 3,56,458.13, together with interest and costs and in the alternative they prayed that some goods mentioned in annexure ""C"" to that plaint should be returned to the plaintiff in specie and they also prayed for a decree in the sum of Rs. 96,196.76, together with interest and costs and in the further alternative they have prayed that the defendants be ordered to return to the plaintiffs the goods mentioned in annexure ""C"" and to pay to the plaintiffs the sum of Rs. 2,69,036.47 and the interest and costs.

3. In the plaint which has been filed in Suit No. 254 of 1972, it is the case of the plaintiffs that between March, 1965, and January, 1970, at the request of the defendants, the plaintiffs manufactured and supplied to the defendants various goods at the rates agreed upon between the parties from time to time and in respect thereof made out bills in favour of the defendants at agreed rates. It is the case of the plaintiffs that they have received payment for part of the goods and some of the goods which were rejected by the defendants were returned back to the plaintiffs and in respect of those goods thus received back, credit notes aggregating to Rs. 2,11,445.45 were issued by the plaintiffs in favour of the defendants. In paragraph 4 of the plaint it is the contention of the plaintiffs that the defendants have out of the goods supplied to them rejected some of the goods, the value whereof aggregates to Rs. 87,402.71 as per particulars annexed as annexure ""C"" to the plaint. According to the plaint the defendants had rejected the said goods, and hence the property therein never passed to the defendants and the plaintiffs are entitled to receive the said goods back from the defendants.

4. It may be pointed out that when one turns to exhibit ""C"" annexed to the

plaint one finds that the goods mentioned in the said exhibit were supplied between April 30, 1969, and January 3, 1970, and the different bills and challans mentioned in exhibit ""C"" to the plaint cover a period from April 30, 1969, to January 3, 1970. Thereafter, the goods seem to have remained with the defendants. On June 29, 1971, the legal adviser of the plaintiff-company wrote a registered letter demanding the entire amount remaining unpaid of all the bills and that amount came to Rs. 4,53,747.13. It may be pointed out at this stage that the demand in this letter of June 29, 1971, was inclusive of the value of the goods included in annexure ""C"" to the plaint. By their reply dated July 6, 1971, the defendants, that is, the company under liquidation, wrote back stating that in many of the invoices full consignments of all the parts had not been received by the defendants from the plaintiff though the invoices showed the full value of the material. Further, some material had been rejected and had given a lot of trouble and put the company to a great loss. No credit note had been received by the defendant-company from the plaintiffs in respect of the these goods. The defendants for the first time purported to reject the goods by this letter of July 6, 1971, that is, nearly 1 1/2 years after the last batch of goods mentioned in annexure ""C"" to the plaint was supplied to the defendant-company. It is in respect of these goods mentioned in exhibit ""C"" that the plaintiffs have specifically prayed for returned in specie. It may also be pointed out that in the month of September, 1971, by their attorney's letter dated September 27, 1971, the plaintiffs again called upon the defendants to pay to them an aggregate sum of Rs. 4,18,747.13, which would include the price of a number of goods included in exhibit ""C and the plaintiffs' case as set out in paragraph 7 of the plaint was that the defendants in their letter dated July 6, 1971, were raising false objections to the claim of the plaintiffs.

5. At the hearing of this judge's summons before us, Mr. Gandhi on behalf of the applicant-company has stated that if the leave which he has sought for is granted to him, he will confine his claim only to the goods mentioned in exhibit ""C"" to be plaint and he will give up the rest of the claim though the suit was filed for much large amount which we have mentioned earlier.

6. u/s 446 of the Companies Act, 1956, when a winding-up order has been made or the official liquidator has been appointed as provisional

liquidator, no suit or other legal proceeding shall be commenced, except by leave of the court and subject to such terms as the court may impose.

Similarly, if at the time when the winding-up order has been made or the official liquidator has been appointed as provisional liquidator, any suit or

legal proceeding is pending, it can be proceeded with, against the company, only with the leave of the court and subject to such terms as the court

may impose. It is obvious that this suit filed by the present applicant on March 13, 1972, was in violation of the provisions of section 446 because

the winding-up order was passed on February 7, 1972, and the suit was not filed with the leave of the court which passed the winding-up order.

However, Mr. Gandhi urges that, even though the initial institution of the suit might be bad as the suit was instituted without the leave of the court,

with the leave granted subject to such terms as this court may impose, the suit can be proceeded with even today. In this connection he relies upon

the provisions of sub-section (2) of section 446 which contemplates that the court which is winding up the company shall, notwithstanding anything

contained in any other law for the time being in force, have jurisdiction to entertain or dispose of any suit or proceeding by or against the company,

whether such suit or proceeding has been instituted before or after the order for the winding up of the company, or before or after the

commencement of the Companies (Amendment) Act, 1960.

7. The English Companies Act has a provision similar to our section 446 and that section is section 231. It has been pointed out that the power of

the court to allow actions and other proceedings to be brought, taken, or proceeded with, notwithstanding a winding-up order, is often exercised.

(See Palmer's Company Law, twenty-first edition, page 271). Thus, secured creditors are, as a matter of course, given liberty to proceed with any

action for enforcing their securities. So, too, liberty to proceed is often given where outsiders are involved in some dispute with the company, and it

is desirable that the dispute should be decided in an action by the ordinary tribunals : for instance, in the case of an action against the company for

damages under Lord Campbell's Act (Fatal Accidents Act) or for specific performance, or for trespass, or to proceed with an execution, where

execution was delayed by a trick, or to bring a new action for the purpose of obtaining the fruits of an earlier action, leave must not be given on ex

parte application.

8. The Indian Companies Act, 1913, has also a similar provision, namely, section 171. The provisions of section 171 have come up for

consideration before the Supreme Court in *Bansidhar Shankerlal v. Mohd. Ibrahim* [1971] 41 Comp Cas 21 (SC) and it has been held that failure

to obtain leave before institution of the proceeding did not entail dismissal of the proceeding : the suit or proceeding instituted without leave of the

court would be ineffective until leave was obtained, but once leave was obtained the proceeding would be deemed instituted on the date of

granting leave.

9. Mr. Shah for the liquidator has relied upon a decision of the Bombay High Court in *Eastern Steamship Private Ltd. v. Pucto Private Ltd.* [1971]

41 Comp Cas 43 (Bom), where it has been held by the Division Bench of the Bombay High Court consisting of K. K. Desai, J., as he then was,

and Nain J. that u/s 446 of the Companies Act, 1956, with regard to suits against a company in liquidation leave to continue a suit or to proceed

with it could only be granted before the suit is commenced and no leave can be granted to continue it or to proceed with it if it is commenced after

the date of the winding-up order; and the Division Bench held that in this respect section 446 of the Companies Act, 1956, made a departure from

section 171 of the Indian Companies Act, 1913. Section 171 of the Indian Companies Act, 1913, was in the following terms :

When a winding-up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with

or commenced against the company except by leave of the court and subject to such terms as the court may impose.

10. The relevant part of section 446 of the 1956 Act read thus :

When a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding

shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, against the company, except by leave of the court

and subject to such terms as the court may impose.

11. With respect to the learned judges of the Bombay High Court, we are unable to agree with the conclusion reached by them regarding the

difference between the provisions of section 446 of the Companies Act, 1956,

and section 171 of the Indian Companies Act, 1913. What was in a condensed form in section 171 of the 1913 Act has been expanded in more elaborate language in section 446 of the 1956 Act, but the

substance of both the provisions remains the same and the legal position is not at all changed by the change in the terminology of the new section.

We may point out that in the Supreme Court decision in *Bansidhar Shankarlal v. Mohd. Ibrahim* [1971] 41 Comp Cas 21 (SC) Shah, J., as he

then was, delivering the judgment of the court, has observed at page 23 :

The question sought to be raised in the proposed appeal, it was urged, was of general or public importance. In any case it was contended that

there is conflict of opinion among the courts in India on the true interpretation of section 171 of the Indian Companies Act, 1913, and section 446

of the Companies Act, 1956, (which replaced section 171 of the Act of 1913)

12. Therefore, this passage of the Supreme Court indicates that, according to the Supreme Court, section 446 of the 1956 Act replaced section

171 of the 1913 Act, and the two sections, according to the Supreme Court, were in *pari materia*. Even apart from these observations from the

judgment of the Supreme Court which was primarily dealing with the provisions of section 171 of the 1913 Act, as we have pointed out above,

there is no difference in substance between section 446 of the 1956 Act and section 171 of the 1913 Act. There is difference only in framing the

language of the section and in putting in more elaborate terms what was in a condensed form in the 1913 Act. Under these circumstances this

contention urged on behalf of the liquidator must be rejected.

13. Coming now to the merits of the application before us, it must be pointed out that the general principles as to when leave u/s 171 of the Indian

Companies Act, 1913, and section 446 of the Companies Act, 1956, could be granted have been well discussed in *Balkrishna Mahadeo Vartak*

v. Indian Association Chemical Industries Ltd. [1958] 28 Comp Cas 179 (Bom). There a Division Bench consisting of Chainani and Tambe JJ., as

they then were, held that the object of section 446 is to save the company, which is being wound up, from unnecessary litigation and to protect its

assets for equitable distribution among its creditors and its shareholders. The consequence of the winding-up order, therefore, it that no suit can be

filed against the company without obtaining 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. It was also held by the Division Bench that leave to file a suit should ordinarily be granted where the question at issue is one which cannot be gone into and decided in the winding-up proceedings. In the case before the Division Bench of the Bombay High Court in Balkrishna Mahadeo Vartak's case [1958] 28 Comp Cas 179 (Bom), the lessee-company, in contravention of the terms of the lease, sub-leased the property to another and the lessor sought leave to file a suit for possession of the property in which he wanted to implead both the company and its liquidator and it was held that as the land was in the possession of the sub-lessee and the right of obtaining possession could not be adjudicated by the liquidator in the winding-up proceedings, it was a case in which leave should be granted. Thus, whether leave should or should not be granted would depend upon the merits of each particular case or each particular litigation but the principle that leave should be granted ordinarily where the claim is of such a nature which cannot be investigated into by the company court or the judge dealing with company matters, has been recognised. It may also be pointed out that the instances quoted at page 771 of Palmer's Company Law are all instances where the winding-up court would not ordinarily decide the questions at issue between the company in liquidation and the claimant. In the instances which are given which we have pointed out above are of a secured creditor filing a suit to realise the security or where outsiders are involved in some dispute with the company, and it is desirable that the dispute should be decided in an action by the ordinary tribunals.

14. In the instant case before us, from the plaint, a copy of which has been produced in the proceedings before us, it is obvious that the plaintiff was supplying goods to the defendant-company on approval or return basis because the applicant-company itself has said in the plaint that some of the goods which had been supplied by the applicant to the company in liquidation had been returned in specie and in respect of those goods returned or rejected in that fashion, credit notes aggregating to Rs. 2,00,000 and odd had been issued by the applicant-company to the company

in liquidation. It is, therefore, not unreasonable to proceed on the footing that the course of dealing between the parties was on the footing of

approval or return or sale or return. To such a course of dealings the provisions of section 24 of the Sale of Goods Act in terms apply and under

clause (b) if the purchaser does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, on

the expiration of the stipulated time, and, if no time has been fixed, on the expiration of reasonable time, the property in the goods passes to the

buyer. In the instant case, the entire claim of the plaintiff which is now restricted to goods mentioned in exhibit ""C"" to the plaint can succeed only if

the property in the goods has not passed to the buyer but has remained outstanding in the seller, namely, the applicant-company. We have pointed

out above that the applicant-company itself has treated as late as September, 1971, these goods as having been sold and the property in the said

goods as having passed to the company under liquidation. It was only in July, 1971, that the company under liquidation intimated that it had

rejected some of the goods. There is nothing to show from the annexures to the plaint that the goods mentioned in exhibit ""C"" were included in the

goods rejected by the company under liquidation. In any event, the goods which were supplied between April, 1969, and January 3, 1970, were

not returned till July 6, 1971, or even till September, 1971, not did the company under liquidation signify its approval or acceptance but it retained

the goods without giving notice of rejection. Prima facie, it seems to us that within reasonable time the rejection had not been intimated and,

therefore, the property in the goods had passed to the company under liquidation. We must make it clear at this stage that this is only a prima facie

view which we are taking on the materials which have been brought before us and we are not expressing any final opinion on the merits of the case.

It may be further emphasised that even on September 27, 1971, in the attorney's letter the applicant-company itself proceeded on the footing that

the property in these goods mentioned in exhibit ""C"" to the plaint had passed to the company under liquidation and it claimed an amount of Rs. 4

lakhs and odd which included the value of goods mentioned in exhibit ""C"" to the plaint. The reason why we have emphasised a little earlier that this

is a prima facie view and not on the merits of the case is that if the applicant-company is so advised, it can prefer its claim in respect of these goods

in the liquidation proceedings. It is open to the court taking up the winding-up proceedings to consider the claim made by the applicant-company in the course of winding up and decide as to whether the claim of the applicant-company regarding the goods mentioned in exhibit "C" to the plaint is correct or not. u/s 446(2)(b), the court which is winding up the company has the jurisdiction to entertain and dispose of any claim made by or against the company and the words "any claim" are wide enough to cover even this claim for the goods mentioned in exhibit "C" to the plaint. We do not see any reason why the leave which has been sought for in the present judge's summons should be granted to the applicant-company when there is no prima facie case made out by the applicant. As pointed out by the Division Bench consisting of Chainani and Tambe JJ., in *Balkrishna Mahadeo Vartak's Case* [1958] 28 Comp Cas 179 (Bom.), the company in winding up should not be exposed to unnecessary litigation and unnecessary costs. There is not even a prima facie case made out by the applicant which wants to proceed against the company under liquidation and has applied for leave. We may point out that the same contentions can be dealt with by the court taking up company matters in dealing with the winding up but without any further costs being incurred by the company under liquidation in respect of this claim.

15. The decision which have been relied upon in the course of the arguments before us and which were also relied upon in the course of the hearing before J. B. Mehta, J. have clearly no bearing on this case in the view that we are taking. Mr. Gandhi for the applicant-company relied upon *Barclays bank Ltd. v. Quistclose Investments Ltd.* [1969] 39 Comp Cas 105 (HL) and the observations of the House of Lords in that particular case. There is also the decision of the Supreme Court in *J. K. (Bombay) P. Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co.* [1970] 40 Comp Cas 689 (SC). In both these cases principles which we have discussed above were not involved nor did the question directly arise in this form before the House of Lords or the Supreme Court and, therefore, we have not gone closely into either of those cases.

16. Under these circumstances this judge's summons is dismissed with costs and the leave sought for is refused. Oral application for leave to appeal to the Supreme Court under article 133(1) of the Constitution is rejected as the question as to when leave u/s 446 of the Companies Act,

1956, should be granted is not a substantial question of law of general importance which is needed to be decided by the Supreme Court.

Moreover, the application of the principles (which are well known) as to when the leave should be granted on the facts of the case cannot be said

to be a substantial question of law of general importance.