**(1991) 02 DEL CK 0041**

**In the Delhi High Court**

State Bank of India APPELLANT

Vs

Indian Electric and others RESPONDENT

**Date of Decision :** 22-02-1991

**Acts Referred:**

**Citation :** (1991) 02 DEL CK 0041

**Hon'ble Judges :** Y.K. Sabharwal, J

**Bench :** Single Bench

## Judgement

Y.K. Sabharwal, J.—The plaintiff state Bank of India has filed this suit for recovery of Rs. 15,09,661.71 Defendant No.1 is a partnership firm of which Deepak K. Singh defendant No. 2 and Krishna K. Rawat,. defendant No. 3 are the partners . The claim is that as on April 15, 1985, the defendant''s outstanding in the accounts with the plaintiff were as under:

MTL (Machinery ) Rs. 2,20,524.77

Cash Credit (FT) Rs. 3,52,637.49

Cash Credit (bills ) account Rs. 6,25,499.68

MTL equity fund assistance Rs. 66,000.00

2. Defendant No. 4 is a private limited company and is being sued as acceptor of the various bills drawn by defendant No. 1 on it although a decreed for the full amount in the suit was claimed by the plaintiff against al the defendants during arguments learned counsel for the plaintiff stated that defendant NO. 4 is liable only in respect of cash credits (bill) account and the plaintiff does not claim any amount from the said defendant in respect of three other credit facilities namely MYL (Machinery), cash credit (FT) and MTL (Equity fund assistance ).

3. By order made on September 22, 1987, Mr. Mohinder Goel, advocate was appointed a receiver to make an inventory and take possession of the goods of defendant NO. 1, firm. He was also directed to keep the goods at a place/ go

down to be provided by the plaintiff-bank. defendant No. 2 was directed to give all assistance to the receiver. Inventory of the goods as directed by the court was prepared and the receiver has submitted a report dated March 14, 1988, inter alia, stating that the factory is under lock and key of Mr. Deepak K. Singh and machinery/goods were not removed because it was felt that most of the machines which are embedded in the floor will get damaged because of their removal and transportation . The report also states that the factory is closed since 1985 and that no useful purpose shall be served by storing the machines for a longer period till the disposal of the suit. The receiver further states that the machines be disposed of on " as is where is basis" after giving opportunity to both the parties.

4. Turning now to the prayer of the plaintiff for sale of machinery/goods of defendant No. 1, of which an inventory has been prepared by the receiver, defendants NOs.1 and 2 neither filed any reply to the application of the plaintiff nor was was any factual submission put forth on their behalf as to why an order for sale be not made. However Mr. P.C. Khanna learned counsel for defendants Nos. 1 and 2, submitted that this court has no jurisdiction to pass any orders on this application or proceed with the suit in view of the winding up of defendant No.4 - company. Defendant No.4, Integral Marketing P. Ltd. About winding up of defendant No. 4 there is no dispute. The question is as to its effect on these proceedings.

5. Section 446(1) and (3) of the companies Act, 1956, on which reliance has been placed read as under:

"446. Suits stayed on winding up order :- (1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator no suit or other legal proceedings 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.....

(3) Any suit or proceeding by order against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force be transferred to and disposed of by that court."

6. The argument of Mr. Khanna is that in view of the order of winding up of defendant No. 4 this suit cannot proceed against any of the defendants except by leave of the company court.

7. It cannot be disputed that defendant No.4 has no concern with te machinery/ goods of defendant NO.1 of which orders for sale are sought by the plaintiff. It is not the case of any of the parties that the goods belong to defendant NO. 4 or that defendant No.4 has nay interest in the said goods. By this application no liability is being fastened on any of the assets of defendant No.4 company in liquidation. The claim against defendant of defendant No.4 company inn liquidation. The claim against defendant No.4 is only in respect of cash credit bill

facility as acceptor of various bills drawn by defendant No.1 on it. In respect of cash credit bill facility the plaintiff claims that all the defendants are jointly and severally liable. In respect of other facilities the plaintiff does not claim any decree against defendant No.4. The plaintiff has also not claimed any relief against defendant No.4 in this application.

8. Learned counsel for the parties have not cited any direct judgment taking a view one way or the other on the question of the effect of an order of winding up being made inn respect of one of the defendants. I have to decide the question on the plain language of the section and general principles . Learned counsel for the defendants has however, placed reliance on section 446(3) of the companies Act in support of the contention that the entire suit is liable to be transferred to the company court. Counsel submits that it will neither be possible nor feasible to spilt the claims in the suit and transfer part of the suit to the company court while not transferring the suit against other defendants. counsel argues that this anomaly shows that proceedings in the suit are liable to be stayed against all the defendants till the leave to proceed against the company is obtained from the company court u/s 446(1) of the Companies Act, 1956.

9. In my opinion the question of splitting the claims in a suit would arise only when leave to proceed against the company is not granted by the company court and is not relevant at this stage. The two judgments. T.V. Purushottam and Co. V. Provisional Liquidator, Subhodaya Publication Ltd. [ 1955] 25 Com Cas 49 and State Bank of India v. Depro Foods Ltd. [ 1985] 57 Com. C 562 (P & H) relied upon by Mr. Khanna are not of much assistance for deciding the point in issue in this case. These judgment lay down the general principles on which leave u/s 446(1) may be granted. Evens in these two judgments, it has been held that in cases where the company is a necessary party to the action but there are other defendants as well generally leave is to be granted.

10. The language of section 446(1) is plain, clear and unambiguous. The mandate of the section is that when a winding up order has been made, no suit or other legal proceedings shall be proceeded with "against the company" except with the leave of the company court. When the section states that the suit or other legal proceedings shall not be proceeded with "against the company" can it be said that suit or other legal proceedings shall not to be proceeded with against other defendants also ? My answer is "No". The reasons are many. Firstly, section 446 is applicable only to the companies under the Act and other defendants before me are not companies but are different and distinct legal entitles. Secondly had the Legislature intended that no suit or other legal proceedings to which the company is a party shall proceed even against others after winding up order in respect of the company is made, it would have said so expressly and would not have said that".... No suit or other legal proceedings shall ..... be proceeded with against the company, except by leave of the court......" . Thirdly, the liability of the other defendants may be independent separate and distinct from that of the company. Frothily, in the proceedings, the

 

plaintiff may be seeking no relief and /or interim relief against the company. Even in there present case, the plaintiff has not claimed any relief against defendants No. 4 in this application. In my view, there is no substance in the contention that proceedings inn the suit against defendants No.4 in this application. In my, view there is no substance in the contention that proceedings inn the suit against defendants Nos. 1 and 2 cannot continue because of the order of winding up of defendants No. 4 Mrs. Shroff, in my opinion, has rightly relied upon Order 1, rule, 4 Civil procedure Code, inter alia, providing that a judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities. The defendants have not raised any other objection to the sale of the goods.

11. Consequently, I accept the report of the receiver that the goods should be sold " as is where is basis".

12. For the reasons stated above, I direct the receive. Mr. Mohinder Goel, advocate, to sell the machinery/ goods mentioned in this report dated March, 14,1988. defendants No. 2 is directed to provide all assistance and co-operation to the receiver. The machinery/goods will be solid after due publicity and by giving advertisements at least in two leading newspapers, one of English and another of Hindi. The receiver will also give an opportunity to the parties to bring buyers with a view of fetch the maximum price for the goods. The prospective buyers with a view to fetch the maximum price for the goods. The prospective buyers will be given inspection of machinery/goods to be sold and the receiver will work out other modalities of sale including the period during which the offers could be given and goods could be inspected by the prospective buyers. The prospective buyers will be required to deposit with the receiver 10 per cent. of the amount of offer by bank draft to be drawn in the name of the Registrar of this court. Learned receiver shall file his report within two months giving details of all the offers. THe offers will be to subject to confirmation by the court. The plaintiff will bear all expenses for sale and and give its full assistance and co-operation to the receiver. The fee of the receiver is tentatively fixed at Rs. 5,000 which will be paid by the plaintiff. I.A.No. 6732 of 1988 is allowed in the above terms leaving to bear their own costs.

 