
(1989) 02 DEL CK 0023

In the Delhi High Court

Case No : Interim Application No. 6732 of 1988 and Suit No. 2387 of 1986

State Bank of India

APPELLANT

Vs

Indian Electric and Others

RESPONDENT

Date of Decision : 22-02-1989

Acts Referred:

Citation : (1991) 70 CompCas 190 : (1989) 17 DRJ 10

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

Bench : Single Bench

Advocate : Shroff, P.C. Khanna and Reva Khetrapal, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) plaintiff, State Bank of India has filed this suit for recovery of Rs. 15,09,661-71p. 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 15th April 1985 defendants' 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) A/c 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 decree for full amount in suit was claimed by plaintiff against all the defendants but during arguments, learned counsel for the plaintiff, stated that defendant No. 4 is liable only in respect of cash credit (Bill) Account and the plaintiff does not claim any amount from the said defendant in respect of three other credit facilities, namely, Mtl (Machinery), Cash Credit (FT) and Mtl (Equity Fund Assistance).

(3) By orders made on 22nd September 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 14th March 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 its removal and transportation. The report also states that 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 the machinery/goods of defendant No.1, of which inventory has been prepared by the receiver, defendants I and 2 have neither filed any reply to the application "of the plaintiff nor any factual submission was put forth on their behalf as to why order for sale be not made. However, Mr. P.C. Khanna, learned counsel for the defendants 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 the defendant No. 4 company. Defendant No. 4, Integral Marketing Pvt. Ltd. was ordered to be wound up on 16th September 1988 in Company Petition No. 58/85 entitled Sh. Deepak K. Singh v. Integral Marketing P. Ltd. and another,. About winding up of defendant No. 4 there is no dispute. The question is as to its effect on these proceedings.

(5) Sections 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 or against the company which is pending in any court other than that in which the winding up of the company is proceedings 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 the machinery/goods of defendant No. I for 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 the defendant No. 4 has any 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 No. 4 is only in

respect of cash credit bill facility as acceptor of various bills drawn by defendant No I on it. In respect of cash credit bill facility, the plaintiff claims that all defendants are jointly and severally liable. In respect of other facilities 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 view one way or the other on the question of effect of order of winding up being made in 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 split the claims in 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 claims in 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 *Tv Purshottam & Co. v. Provisional Liquidators, Subhodaya Publications Ltd.*, (1955) 25 CompCas 49 and *State Bank of India v. Depro Foods Ltd.* (1985) 57 Comp Cas 562 relied upon by Mr. Khanna are not of much assistance for deciding the point in issue in this case. These judgments lay down the general principles on which leave u/s 446(1) may be granted. Even in these two judgments it has been held that in cases where 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 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 and are different and distinct legal entities. Secondly had the Legislature intended that no suit or 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 other defendants may be independent, separate and distinct from that of the company. Fourthly, in proceedings plaintiff may be seeking no relief and/

or, interim relief against the "company. Even in the present case, the plaintiff has not claimed any relief against defendant No. 4 in this application. In my view, there is no substance in the contention that proceedings in the suit against defendants 1 and 2 cannot continue because of order of winding up of defendant No. 4. Mrs Shroff, in my opinion, has rightly relied upon Order I Rule 4, CPC . inter-alia, providing that judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities. 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 on "as is where is basis." 12. For the reasons stated above, I direct the Receiver Mr. Mohinder Goel, advocate, to sell the machinery/goods mentioned in his report dated 14th March 1988. Defendant No. 2 is directed to provide all assistance and cooperation to the receiver. The machinery/goods will be sold after due publicity and by giving advertisements a least in two leading newspapers one of English and another of Hindi. The receiver will also give opportunity to parties to bring the buyers with a view to fetch maximum price of the goods. The prospective buyers will be given inspection of machinery/goods to be sold and receiver will work out other modalities of sale including 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% 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 subject to confirmation by the court. The plaintiff will bear all expenses for sale and give its full assistance and cooperation to the receiver. The fee of the receiver is tentatively fixed at Rs. 5,000.00 which will be paid by the plaintiff. LA. 6732/88 is allowed in the above terms leaving the parties to bear their own costs.