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**(2007) 01 CAL CK 0006**

**In the Calcutta High Court**

**Case No :** C.A. No. 540 of 2005 and BIFR Case No. 154 of 1999

State Bank of India

APPELLANT

Vs

Official Liquidator

RESPONDENT

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**Date of Decision :** 15-01-2007

**Acts Referred:**

Limitation Act, 1963 — Article 123

**Citation :** (1999) 1 CALLT 322 : (2008) 142 CompCas 521

**Hon'ble Judges :** Sanjib Banerjee, J

**Bench :** Single Bench

**Advocate :** A.K. Dhandhaniya and A. Sarkar, Rupak Ghosh, for the Appellant; S. Dutta and D. Dutta, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Sanjib Banerjee, J.—This application has been taken out in August, 2005, for recalling an order passed on February 1, 2002.

2. The order of February 1, 2002, is as follows:

The court: There shall be an order as prayed for by the official liquidator in the letter for direction dated September 13, 2000.

Parties concerned including the official liquidator are to act on a signed copy of the minutes of this order.

3. The prayers made by the official liquidator in the letter for directions of September 13, 2000 were as follows:

(a) The hon"ble court may be pleased to pass an order by staying the demand in Certificate No. 63 of 2000 (State Bank of India v. Official Liquidator, High Court, Calcutta, being the liquidator of the British India Steels Ltd. (in liquidation) and Anr.).

(b) Leave may be given to official liquidator to invite claims of creditors of the

company (in liquidation) by releasing advertisement in the newspapers made as Bartaman, Statesman and Gujarat Samachar published from Gujarat. Expenses may also be permitted of such advertisement to be paid from the sale proceeds lying with the official liquidator.

(c) Leave may be given to the official liquidator to refund the advertisement cost, security cost and insurance premium which was received from the 4 (four) secured creditors from time to time from the sale proceeds lying with the official liquidator.

(d) Leave may be given to the official liquidator to pay the security cost for the month of February, 2000 and March, 2000 to Security Agency from the sale proceeds lying with the official liquidator.

(e) Leave may be given to the official liquidator to take steps for premature withdrawal of fixed deposit for payment as mentioned in prayers (b), (c) and (d) above.

(f) Such further order or orders as this hon"ble court may deem fit and proper may be given.

4. The certificate covered by the first prayer in the letter for direction was issued at the behest of the applicant. The applicant had notice of the order of February 1, 2002 on March 7, 2002. The applicant took no immediate steps in the matter.

5. A single-prayer application was made in August, 2005, supported by an affidavit running into a bit over three pages. In such terse affidavit in support of the summons the applicant-bank has narrated the course of the proceedings instituted by it before the Debts Recovery Tribunal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the said Act of 1993").

6. The grounds in support of the orders sought are contained in the following four paragraphs:

6. The applicant states that by reason of the law laid down by the apex court it has been clearly held that the Debts Recovery Tribunal Act is a special statute. The applicant being a secured creditor is entitled to enforce its own securities for execution of the said certificate and the same could not be stayed by the hon"ble High Court at Calcutta in exercise of its jurisdiction under the provisions of the Companies Act.

7. The applicant states that the petitioner as a secured creditor has the paramount right to enforce its own securities for the purpose of realisation of its own claim. The applicant respectfully states and submits that having regard to the fact that the Debts Recovery Tribunal Act is a special statute, the recovery proceeding initiated in terms of the said certificate could not have been stayed.

8. The applicant states that since the applicant had no notice of the said proceeding, the applicant could not appear on the day when the said order was

passed. The applicant respectfully states and submits that the said order if allowed to continue would seriously affect the valuable right of the applicant to enforce its securities and to proceed with the said certificate proceeding.

9. The applicant states that the order passed by this hon"ble court is without jurisdiction inasmuch as the said order having been passed without giving any opportunity to the applicant to make its submission, the said order is required to be recalled.

7. It is apparent from the tenor of the averments that the applicant is of the view that since the court had no jurisdiction to pass the order, the order would be recalled for the asking. After all, an order without jurisdiction is a nullity and maybe set aside or ignored in collateral proceedings. It appears that on the strength of such reasoning, the applicant did not seek condonation of delay in making the application and such stand was later sought to be justified in the course of hearing.

8. A supplementary affidavit was filed in September, 2005. The reason for filing such supplementary affidavit is found in the second paragraph thereof:

2. Certain pertinent facts and/or circumstances could not be elucidated and/or pointed out in the affidavit in support of judges summons affirmed by Sri Subir Kumar Dutta on the August 9, 2005 (hereinafter referred to as "the said affidavit"). The said facts and circumstances being absolutely essential for the adjudication of the present issue the same are being brought on record by way of the instant affidavit.

9. Later in such affidavit, filed without so much as "by your leave" appearing in letter or spirit therein, the applicant seeks condonation of delay in filing the present application on the grounds contained in the following paragraphs:

5. I state that the said affidavit having been affirmed in support of the judges summons intending to set aside and/or modify the said order the limitation prescribed for filing of such application or affidavit is three years under the residuary article of the Limitation Act of 1963 and as such the said period of three years should start on and from the date of communication of the said order being March 7, 2002.

6. I say that the applicant-bank had taken all necessary steps, diligently and without negligence on its part on and from March 7, 2002, in taking out the said judges summons and filing the said affidavit dated August 7, 2005.

7. I say that the delay in filing the said affidavit was, inter alia, caused due to the delay in obtaining proper legal opinion on the issue and pray that the same be condoned in the interest of substantial justice.

10. It is irrelevant that the date "March 7, 2002" in the sixth paragraph was originally printed as "March 7, 2005" and the figure "5" at the end has been overwritten by pen to make it appear as "2" without such change being initialled

by the Commissioner of Oath.

11. The application has been opposed by the official liquidator. In the affidavit filed on behalf of the liquidator the entire history of the matter has been detailed. It appears that the Board for Industrial and Financial Reconstruction (BIFR) made an order on October 15, 1993, recommending that the company be wound up. Such recommendation was accepted by this court and the company was directed to be wound up by an order of July 16, 1997. The winding up order was advertised in August, 1997. Several charges have been made against the secured creditors of the company in liquidation, including the applicant, that despite directions of the court, moneys had not been paid for posting security guards to protect the assets of the company in liquidation and for issuing advertisement for sale of the assets of the company in liquidation.

12. The application has also been opposed by IFCI. IFCI is by far the major creditor of the company in liquidation. Despite being a secured creditor, IFCI wants the official liquidator to disburse the payments. It is submitted that IFCI has the first charge and the charge of the applicant over the company's assets are subservient to that of IFCI.

13. In the affidavit filed on behalf of the official liquidator, it has been stated that the assets of the company in liquidation have been sold and the sale fetched a sum of Rs. 1.25 crores. It has also been stated that proceedings have also been instituted by IFCI, ICICI and IDBI, the other secured creditors of the company in liquidation before the Debts Recovery Tribunal, Ahmedabad, and that Tribunal has passed an order of March 21, 2005, restraining the official liquidator from disbursing the sales proceeds until further orders. In effect, the certificate obtained by the applicant from the Debts Recovery Tribunal, Calcutta, cannot be proceeded with or implemented by virtue of the order passed by the Ahmedabad Tribunal.

14. It also appears that the claims of other creditors of the company have not been settled. Workers rank *pari passu* with the secured creditors. It is necessary for claims to be invited and priorities to be decided. Since IFCI, one of the applicants in the proceedings before the Ahmedabad Tribunal, seeks adjudication of priorities and disbursements by the official liquidator, it is no longer necessary to consider whether the court could have stayed implementation of the certificate obtained by the applicant.

15. The applicant has relied on the case reported at *Allahabad Bank v. Canara Bank* [2000] 101 Comp Cas 64 : *Allahabad Bank Vs. Canara Bank and Another*, , for the proposition that the recovery officer under the said Act of 1993 has exclusive jurisdiction in the matter of execution. Paragraphs 23, 24, 25, 30 and 31 of that judgment have been placed in furtherance of the argument that in view of the overriding provisions of the said Act of 1993, the company court presiding over the liquidation of a company was no longer the exclusive judicial forum before which any claimant against a company in liquidation had to come

even if to seek permission to proceed against the company in liquidation elsewhere.

16. But such matter need not be gone into as the necessity therefore would arise only upon the applicant establishing that it had the right to maintain this application. Such right the applicant has not been able to demonstrate. The argument on this aspect, therefore, has to be seen in the narrow sense as to whether the order dated February 1, 2002, is wholly without jurisdiction and, therefore, may be set aside or ignored. Again, such issue becomes irrelevant in the context of the decision. If, indeed, the order of February 1, 2002, can be ignored on the ground that it was passed wholly without jurisdiction, it becomes academic as to whether such order is required to be set aside.

17. But first the applicant has to demonstrate that it has a right to proceed with the application, before the grounds for setting aside can be weighed.

18. The applicant has proceeded on the basis that the limitation for applying to have the order recalled was three years from the date of knowledge of the order. Such argument is founded on the applicant's understanding that the order was passed ex parte and Article 123 of the Schedule to the Limitation Act, 1963, would not govern the application but the residuary article would. The applicant has cited Mst. Kiran Devi Vs. Abdul Wahid and Another, , to assert that the residuary article would apply to an application for setting aside an ex parte order. The applicant has also relied on Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., , to suggest that no explanation was necessary for the period prior to limitation setting in, and an application for condonation of delay was required to explain only the time elapsed beyond the period of limitation.

19. But to apply such proposition, the facts must be set in perspective. The applicant has averred that the period of limitation would be three years from the date of the applicant's knowledge of the order of February 1, 2002. The applicant has admitted being made aware of the order on March 7, 2002. The applicant claims that it could have applied for setting aside or recalling the order on or before March 7, 2005 and as such the delay was for the period between March 8, 2005 and the date of filing of the application. Such averment has been denied in the affidavit filed by the official liquidator.

20. The order of February 1, 2002, records the presence of one Mr. B. Goswami, advocate. According to the official liquidator, Mr. Goswami was an advocate in the office of the applicant's advocates-on-record. Since the then official liquidator moved the application on which the order dated February 1, 2002, was made, Mr. Goswami could not have appeared for the official liquidator. Again, since the orders sought were directed against the applicant, it is more than likely that the applicant was served or given notice thereof. The recording of Mr. Goswami's presence has not been challenged by the applicant though a copy of the order of February 1, 2002, has been annexed to the application. The applicant had notice of the order of February 1, 2002, on March 7, 2002 and did not make any

attempts to speak to the minutes or, in other words, to have the recording of Mr. Goswami deleted.

On the facts, therefore, it does not appear that the order dated February 1, 2002, was passed ex parte.

Whether the period of limitation was 30 days or three years, the explanation given in seeking condonation thereof is pitifully inadequate. The unsubstantiated and impoverished explanation proffered is that there was delay in obtaining proper legal opinion on the issue. I do not consider it to be any ground at all, whether to condone a delay of three years and four months or a delay of five months.

21. In the absence of sufficient cause being shown by the applicant, the merits of the matter cannot be gone into. The prayer for condonation of the delay is rejected. Consequently, the application stands dismissed with costs assessed at 100 GMs.

It is necessary that the claims of the creditors of the company in liquidation be settled and disbursed as expeditiously as possible and preferably within a period of two months from date.

Urgent photostat xerox copy be issued to the parties, if all formalities in that regard are complied with.