(1993) 08 P&H CK 0108

In the Punjab And Haryana At Chandigarh

Case No : Company Application No. 104 of 1993 in Company Petition 51 of 1993

UCO Bank, Chandigarh APPELLANT

Vs

Sumac Engineering Private Ltd. and others RESPONDENT

Date of Decision : 24-08-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 6, Order 34 Rule 4
Companies Act, 1956 — Section 391, 446, 446(1), 446(2), 466(2)
Court Fees Act, 1870 — Article 1, 7

Citation : AIR 1994 P&H 26 : (1997) 89 CompCas 220 : (1994) 106 PLR 516

Hon'ble Judges : N.K. Sodhi, J

Bench : Single Bench

Advocate : A.K. Jaiswal, for the Appellant; Vikas Guccria, H.S. Bawa, Anand Chhibbar and O.L. for R.I., for the Respondent

Judgement

1. Sumac Engineering Private Ltd. (hereinafter called ''the Company'') was ordered to be wound up on May 29, 1992 and the official Liquidator attached to this Court was appointed its liquidator. The Company in the pre-liquidation period had been granted loan facilities by the United Commercial Bank through its branch situate in Sector 22-D, Chandigarh (referred to hereinafter as ''the Bank''). Respondents 2 & 3 who are the ex directors of the Company along with respondent No. 4 had stood guarantee for the loan advanced to the company and respondent No. 3 mortgaged her Immovable property as collateral security by creating an equitable mortgage in favour of the Bank. A sum of Rs. 46,95,555.33Ps. together with future interest at the rate of 25.25% per annum till the date of payment is said to be due from the Company.

2. The Bank has filed the present suit in this Court for the recovery of the aforesaid amount from the Company. Respondents 2 to 4 have also been impleaded therein. A prayer has also been made for the passing of a preliminary final decree under Order 34 Rule 4 of the CPC in respect of the Immovable property mortgaged by respondent No. 3. The suit which is described as a claim petition under S. 446 of the Companies Act, 1956 (for short, ''the Act'') bears a

court-fee stamp of Rs. 13/- only. Along with the suit an application has been filed under sub-sec. (1) of S. 446 of the Act with a prayer that necessary permission be granted for the institution of the suit in this Court. On notice issued to the respondent, they have put in appearance except respondent No. 4 through their counsel and without filing any written statement, an objection has been raised to the maintainability of the suit against respondents 2 to 4. Mr. Anand Chhibbar, Advocate appearing on behalf of respondents 2 & 3, the guarantors, has submitted that the suit against his clients is not maintainable in this Court and that no leave is necessary to be obtained against them under S. 446 of the Act. Learned counsel appearing on be half of the Official Liquidator has also objected to the maintainability of the suit against the Company on the ground that the petitioner has not paid ad valorem court fee. Mr. A. K. Jaiswal counsel for the petitioner has, on the other hand, contended that the Bank is filing a claim petition under sub-sec. (2) of S. 446 of the Act seeking to recover a sum of Rs. 46,95,555.33 Ps. and this being an application under the Companies Act, a fixed court-fee of Rs. 13/- only is payable as provided in Art. 1(d)(ii) of Schedule II of the Court-fees Act, 1870. As regards the institution of the suit in this Court against the guarantors, counsel for the petitioner submits that under Order 1 Rule 6 of the Code of Civil Procedure, the petitioner can at his option join as parties to the same suit all or any of the persons jointly and severally liable on any one contract and therefore, the guarantors have rightly been impleaded and this Court would have the jurisdiction to entertain the suit against them as well.

3. From the riva! contentions of the parties, the following two questions arise for consideration:--

(i) Whether a suit would lie in this Court against persons other than the Company in liquidation particularly when this Court has no original jurisdiction to entertain suits, and

(ii) Whether the petitioner is liable to pay ad valorem court-fee in accordance with the provisions of Art. 1 of Schedule-I of the Court-fees Act,

4. Having heard counsel for the parties at length and after giving my thoughtful consideration to their respective contentions, I am of the opinion that there is no merit in the objections raised on behalf of the guarantors whereas the objection raised by counsel for the Company must be upheld.

5. Let me first deal with the objection raised by the Official Liquidator in regard to the payment of ad valorem court-fee. The objection raised is that no leave should be granted even against the Company since ad valorem court-fee has not been paid in terms of S. 7 read with Schedule-I of the Court-fees Act. There is merit in this contention. Under S. 446(2) of the Act, the Company Court is given special jurisdiction to entertain or dispose of any suit or proceedings by or against the Company, any claim made by or against the Company, any application made under S. 391 of the Act and any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in

the course of winding up of the Company. The purpose and object of giving this jurisdiction under this Section is to decide matters mentioned in sub-sec. (2) of S. 446 of the Act in a speedy and cheap way against the Company in liquidation which generally cannot meet heavy expenditure of litigation. When a winding up order has been made, all properties and effects of the Company are deemed to be in the custody of the Court as from the date of the winding up order and the Official Liquidator has the statutory duty to conduct the proceedings in the winding up of the Company to reanse its assets and to distribute the same to the creditors. It is for this reason that with the sanction of the Court he has power to institute or defend any suit, prosecution or other legal proceedings in the name and on behalf of the Company. He may also apply to the Court for any direction in relation to any particular matter arising out of the winding up. If in the course of winding up he finds that a debtor who owes money to the company has not paid the same, he may file a claim petition under sub-sec. (2)(b) of S. 446 of the Act and need not file a suit. On the other hand, when a creditor comes to this Court seeking to recover money due to him from the Company after it has been ordered to be wound up, he (creditor) is just instituting a regular suit which according to the provisions of sub-sec. (2) of S. 446 of the Act can instead of being filed in the ordinary Civil Court be entertained by this Court against the Company. The grant of leave, however, does not do away with the payment of ad valorem court-fee in accordance with the provisions of S. 7 read with Schedule-1 of the Court-fees Act. If the creditor had filed a regular suit in a Civil Court seeking recovery of money from the Company including the guarantors, if any, he would have paid full court fee on ad volorem basis and merely because the suit has been instituted in this Court does not confer on him any extra privileges or rights so as entitle him not to pay such court fee. In other words, the institution of the suit in this Court only changes the forum but does not in any way abrogate the requirements of law in the matter of court fee limitation etc. Merely by describing the suit as a claim petition against the Company the creditor cannot avoid paying the court fee. The position of the Liquidator when filling a claim petition is, of course, different. He, as already observed earlier, acts in the discharge of his statutory duty when he filed a claim petition to recover money from the debtor but a creditor''s suit to recover money from the company cannot be equated with that of the Liquidator''s claim against a debtor. Thus, a creditor has to institute a regular suit and unless ad valorem court fee is paid thereon, the same cannot be entertained. The plaint even though described as a petition under S. 446 of the Act cannot be held to be a petition under the Act ''for taking some other judicial action within the meaning of Art. 1(d)(ii) of Schedule II of the Court-fees Act, 1870 so as to permit the petitioner to pay a fixed court fee of Rs. 13/- as has been done in the instant case.

6. The other objection raised is that the suit against the guarantors is not maintainable in this Court as this Court has no original jurisdiction to entertain suits against persons other than the company in liquidation since no leave was necessary to be obtained from this Court for filing a suit against them.

7. Sub-sections (1) & (2) of S. 446 of the Act read as under:--

"446.(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, expect by leave of the Court and subject to such terms as the Court may impose.

(2) 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:--

(a) any suit or proceeding by or against the company; (b) any claim made by or against the company including claims by or against any of its branches in India;

(c) any applicaton made under S. 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever whether of law or fact which may relate to or arise in course of the winding up of the company; whether such suit or proceedings has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) to (4) xx xx xx xx xx xx xx xx xx

A plain reading of the aforesaid provisions makes it clear that when a winding up order has been made no suit can be instituted or if pending at the date of winding up order can proceed against the Company except by leave of the Court and subject to such terms as the Court may impose. Leave, according to sub-sec. (I) has to be obtained for instituting or proceedings with a suit against the company but no leave is necessary if a suit is to be instituted against persons other than the company in liquidation. Under sub-sec. (2) of S. 446, the Court which is winding up the Company has, notwithstanding anything to the contrary contained in any other law for the time being in force, jurisdiction to entertain and dispose of any suit or proceeding by or against the company. It could not be disputed that the present suit against the company can be entertained by this Court. Once it is conceded that the suit could be filed in this Court against the company, the plaintiff-petitioner herein could at his option join parties to the same suit persons who are severally or jointly and severally liable on any one contract. This option can be exercised by the plaintiff in terms of Rule 6 of Order 1 of the Code of Civil Procedure. Merely because the suit could not be filed in this Court against the guarantors alone, does not, in my opinion deprive the plaintiff of his right to exercise the option under Order 1, Rule 6 of the Code. The plaintiff having exercised that option and having impleaded respondents Nos. 2 to 4 who are stated to be the guarantors under the same contract by which loan facilities were granted to the Company, the suit is maintainable against them as well. Any other view of the matter would result in multiplicity of suits which law does not encourage. For instance, if it were to be held that the suit in this Court could be filed only against the Company in liquidation then the plaintiff would have to institute a separate suit against the guarantors in a Civil Court having jurisdiction to entertain the same. This could never have been the intention of law as it could result not only in multiplicity of suits but could even lead to contradictory decisions. In the result, I hold that the present suit is maintainable against the guarantors as well who, according to the averments in the plaint, are jointly and severally liable under the same contract.

8. While upholding the objection raised on behalf of the Official Liquidator and rejecting the one raised on behalf of the guarantors, I grant leave to the Bank to institute and proceed with the present suit in this Court against the company as well as respondents 2 to 4 who are allegedly the guarantors, provided that the Bank makes up the deficiency in Court-fee within a period of four weeks from today failing which the application for leave will be deemed to have been dismissed. The suit will then proceed on merits in accordance with law and it will be open to the respondents to take up all such pleas as may be available to them and nothing said herein should be taken as an expression of opinion on any of the matters arising in the suit. The application is accordingly disposed of with no order as to costs.

9. Order accordingly.