

(1973) 08 DEL CK 0014
In the Delhi High Court
Case No : Suit No. 330 of 1970

V. Rajaraman Liquidator of Globe United Engineering and Foundry Co. Ltd.

APPELLANT

Vs

Hindustan Brown Boveri Ltd.

RESPONDENT

Date of Decision : 28-08-1973

Acts Referred:

Citation : AIR 1974 Delhi 200 : (1975) 45 CompCas 184

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Judgement

1. V. Rajaraman, Liquidator of Globe United Engineering & Foundry Ltd. has instituted this suit for the recovery of Rs. 5,00,000 against the defendant M/s. Hindustan Brown Boveri Ltd. The defendant filed his written statement and then subsequently amended it. The defendant has raised a number of preliminary objections.

2. Firstly, it is alleged that this Court has no jurisdiction to entertain and try this suit since no part of the cause of action has arisen within the jurisdiction of the court and the defendant's registered office is situated in Bombay. The second objection is that the suit as framed and filed in the name of V. Rajaraman is not competent. Thirdly, it is alleged that no leave of the court was obtained prior to the filing of the suit against the defendants.

3. In the replication, the plaintiff submitted that no prior sanction was required for the institution of the suit by the plaintiff and went on to say that if any sanction is required the same can be granted even after the institution of the suit.

4. On the pleadings of the parties, the following issue was framed on August 27, 1971:

1. Whether this court has territorial jurisdiction to entertain and try the suit?

5. On February 21, 1972 the following further preliminary issues were framed:

2. Whether the suit on behalf of the plaintiff as framed, is competent?
3. Whether leave of the appropriate court was necessary before the institution of the present suit. If so, what is its effect on the present suit?
4. If the plaintiffs have obtained or are granted sanction, from what date will the suit be deemed to have been instituted
5. Relief.
6. By this order I propose to dispose of all the five issues.

Issues 1, 3 and 4 :

7. These three issues can be decided together conveniently. The principal question as crystallized in these issues is: whether this Court has territorial jurisdiction to try the suit and whether any leave of the appropriate court was necessary before the institution of the suit, assuming that this court has jurisdiction to try this suit? The fourth issue will arise only if it is held that leave of the court was necessary before the institution of the present suit.

8. Mr. Anoop Singh, the learned counsel for the defendant has only argued the question of leave. By order D/12-3-1969, in C. P. No. 8 of 1969 (Delhi) (Globe Motors Ltd. v. Globe United Engineering and Foundry Co. Ltd.) Hardy, J. ordered that the voluntary winding up of Globe United Engineering and Foundry Boveri Ltd. shall continue subject to the supervision of the court with liberty to creditors, contributories and others to apply to the court in accordance, with the provisions of Section 522 of the Companies Act. In view of this order it cannot be disputed that Globe United Engineer and Foundry Co. Ltd. is under voluntary winding up subject to the supervision of the court and that the order of Hardy, J. was made in terms of Section 522 of the Companies Act, 1956.

9. The Liquidator on behalf of and in the name of the company has in the suit for the recovery of Rs. 5 lakhs against the defendant. The question is, whether this court has jurisdiction to entertain and try this suit.

10. Part VII of the Companies Act: 1956 (hereinafter referred to as the Act) deals with the subject of "winding, up". Section 425 of the Act provides for the three following modes of winding up of a company

- (1) By the court; or
- (2) Voluntary; or
- (3) Subject to the supervision of the court.

11. Chapter IV of Part VII of the Act is headed as "Winding up subject to supervision of Court". This chapter contains six sections i.e., Sections 522 to 527. The effect of a. supervision order is that the liquidation continues as a voluntary one, and the rules applicable to voluntary liquidation continue to govern it, subject to a few exceptions and the conditions imposed by the court in

the supervision order.

12. Where a company has gone into voluntary liquidation, the court may make an order for the continuance of the winding up subject to such supervision of the court and with such liberty for the creditors, contributories and others to apply to the court, and generally upon such terms and conditions as the court thinks just. Section 522 thus means that the court may leave in the hands of the liquidator whatever of his powers it thinks fit, and may exclude from his powers whatever matters it thinks ought to be reserved to the court.

13 Section 523 reads as under:

"A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the court over suits and legal proceedings, be deemed to be a petition for winding up by the Court."

14. What Section 523 says is that for the purpose of determining jurisdiction of the court over suits and legal proceedings a petition for the continuance of a voluntary winding up subject to that supervision of court shall be equated to a petition for winding up by the court. The effect of the section is that the court to which application for a supervision order is made is given the same jurisdiction as regards suits and other legal Pro- as it has u/s 446. This is the meaning of the word "deemed" as used in that section. Section 523 imports a fiction. It is a limited fiction. It is limited "for the Purpose of giving jurisdiction to the court over suit and legal proceedings". In order to find out what courts are competent to entertain suits by or against the company which is under compulsory winding up or winding up by the court, we must necessarily have recourse to Section 446 which appears in Chapter II entitled as "Winding up by the court." Section 446 reads 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 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.

(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 application made u/s 391 by or in respect of the company;

(d) any question or 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 proceeding 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) 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 proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court."

15. Section 446(1) lays down that when a winding up order has been made or the Official Liquidator has been appointed, no suit or legal proceeding shall be commenced or if pending shall be continued against the company except by the leave of the court. In effect what Section 446(1) means is that the pending suits against the company will be stayed on winding up and if any new legal Proceeding is proposed to be commenced against the company then that cannot be done except by leave of the court and subject to such terms as the court may impose. In my opinion Section 446(1) has no application to the facts of the present case, as the present suit is not a suit against the company in winding up. In fact it is a suit by the company, which is in voluntary winding up subject to the supervision of court.

16. Sub-section (2) of Section 446 clearly Provides 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. In the present case we are only concerned with sub-section. (2) (a) of Section 446. That the court which is winding up the company has jurisdiction to entertain every type of proceedings detailed in paragraphs (a) to (d), is not open to doubt, The only type of proceeding with which we are concerned is the suit by a company which is under voluntary winding up subject to supervision of the court. A suit by the company u/s 446(2) can be instituted in the court in which the winding up proceedings are pending. In other words the Legislature has prescribed the forum or what may be called "the Place of suing" to use an expression of the Code of Civil Procedure. This provision shall have effect notwithstanding anything contained in any other law for the time being in force.

17. There was some debate before me whether Section 20, CPC applies to the present case. In view of the clear provision in Section 446 that "notwithstanding anything contained any other law for the time being in force" the court which is winding up the company shall have jurisdiction to entertain the suit by or against the company, the applicability of Section 20, CPC is completely ruled out. It is not disputed that this court passed the order of continuance of the voluntary winding up subject to the supervision of the court. If this is so, there is no doubt

that Section 446 read with Section 523 is at once attracted and the inescapable conclusion is that this is the court which can entertain and try the present suit.

18. Mr. Anoop Singh, the learned counsel for the defendant, conceded that Section 446(1) did not apply to the present case. He relies mainly on Section 526(2) of the Companies Act. I may at this stage read Section 526:

526. (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the court in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1) any order made by the court for a winding up subject to the supervision of the Court, shall for all purposes include the staying of suits and other proceedings, be deemed to be an order of the court for winding up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favor of the liquidator, the expression "liquidator" shall be deemed to mean the liquidator conducting the winding up, subject to the supervision of the Court."

19. In my view Section 526(2) has no application to the present case. Subsection (1) applies. Section 526(1) provides that the Liquidator in the case of a company which is under winding up subject to the supervision of the Court may, subject to any restrictions imposed by the court, exercise all his powers, without the sanction or intervention of the court in the same manner as if the company were being wound up altogether voluntarily. This means that the Liquidator has not to obtain the sanction of the court for the institution of the suits by him or on behalf of the company. The only limitation on his powers may be such restrictions as are imposed by the court. But where restrictions are not as in this case the liquidator will exercise the same powers as in a voluntary winding up. A liquidator appointed by the court in winding up subject to the supervision of the court shall have the same powers and be subject to the same obligations and in all respects stand in the same position as if he had been duly appointed in accordance with the provisions with respect to the appointment of liquidator in a voluntary winding up: Section 525. One advantage of having a supervision order is that the liquidator is allowed to occupy the same position and exercise the same powers (subject to restrictions where necessary as a voluntary liquidator.

20. At the same time the advantages of a compulsory winding up as regards stay of suits and other proceedings and making and enforcing calls etc. are also secured and the court is empowered to exercise all the powers, which it can, exercise in a compulsory winding up. This is the true effect of Section 526(2) on which reliance has been placed. In truth a supervision order is an amalgam of

bath a voluntary winding up and a winding up by court as it is made on "such terms and conditions as the court thinks just" (S, 522).

21. The defendant's counsel then referred me to the Provisions of Section 457, which are in the following terms:

"457. (1) the liquidator in a winding up by the Court shall have power, with the sanction of the Court

(a) to institute or defend any suit, prosecution, or other legal Proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract with Power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels:

(d) to raise on the security of the assets of the company any money requisite;

(e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(2) The liquidator in a winding up by the Court shall have power

(i) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary the company's seal;

(ia) to inspect the records and returns of the company on the files of the Registrar without payment of any fee;

(ii) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(iii) to draw, accept, make and en- any bill of exchange, hundi or pro- note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(iv) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself;

Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator-General:

(iv) to appoint an agent to do any business which the liquidator is unable to do himself

(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any of the "powers conferred by this section."

22. The defendant's counsel laid great stress on the words with the sanction of the court in this section. It must be remembered that this section appears in Part VII, Chapter II that deals with the "winding up by the Court" and has no application to Chapter IV of that part, In Chapter IV there is an express provision with regard to the powers of the Liquidator and it is Section 526(1), which I have set out above.

23. Section 512 is in these terms "512, (1) the liquidator may

(a) in the case of a members' voluntary - winding up, with the sanction of a special resolution of the company, and. in the case of a creditors' voluntary winding up, with the sanction of the Court or, the committee of inspection or, if there is no such committee, of a meeting of the creditors, exercise any of the powers given by clauses (a) to (d) of sub-section (1) of Section 457 to a liquidator in a winding up by the Court;

(b) without the sanction referred to in clause (a) exercise any of the other powers given by this Act to the" liquidator in a winding up by the Court:

(c) Exercise the power of the Court under this Act of settling a list of contributories (which shall be prima facie evidence of the liability of the persons named therein to be contributories):

(d) Exercise the power of the Court of making calls;

(e) Call general meeting for the company for the purpose of obtaining the sanction of the company by ordinary or special resolution, as the case may require, or for any other purpose he may think fit.

(2) The exercise by the liquidator of the powers given by clause (a) of subsection (1) shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of the powers conferred by this section,

(3) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(4) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number of them

not being less than two."

24. This provision is applicable to every voluntary winding Up of the company. It clearly shows that in the case of, a members" voluntary winding up the liquidator may institute actions in the name and on behalf of the company with the sanction of a special resolution of the company. The defendant has not taken any objection that the special resolution of the company was not passed. In fact his objection is confined only to two points, viz., that this court has no jurisdiction and sanction has not been obtained and this is why the question of sphere solution, Therefore, was never put in issue.

25. It appears from the structure and scheme of the Companies Act that the Legislature has approximated the winding up subject to supervision of court to voluntary winding up. Of course there are important differences between the two. Sections 522 to 527 deal specifically with the cases of winding up subject to the supervision of the court though Chapter V applies to every mode of winding up including winding up subject to supervision of court.

26. The defendant's counsel contends that sanction of the court winding up the company is essential for the institution of the suit by the liquidator in the name of the company, which is being wound up subject to supervision of the court. This argument is based on a confusion of thought. In winding up by the court all proceedings are taken under the orders and directions of the court. In winding up subject to supervision of the court there is greater autonomy for the members or the creditors and the role of the court is supervisory. In my opinion complete answer to the defendant's counsel is contained in Section 526(1) of the Act. The governing words in the subsection are "without the sanction or intervention of the court". The Legislature, Therefore, has expressly laid down that the court's sanction is not necessary and its intervention is to be as little as possible. Section 526(1) provides for three things as regards the powers of the liquidator:

- 1 . the court may impose restrictions on the powers of the liquidator.
2. subject to such restrictions the liquidator exercises all powers without the sanction and intervention of the court, and
3. the liquidator exercises all his powers in the same manner as if the company were being wound up altogether voluntarily.

In voluntary winding up sanction of the court is not required by the liquidator to institute proceedings. By parity of reasoning no sanction is called for in winding up subject to the supervision of the court. The key words as if and altogether in Section 526(1) put the matter beyond the We of controversy Therefore dismiss the arguments of the defendant's counsel.

27. In my opinion, this Court has jurisdiction to try the suit. No leave of the court is required by the liquidator to institute the suit I decide issues 1 and 3 in favor of the plaintiff. As I have held I that no sanction is required, issue No. 4 does riot arise for decision. Issue No. 2:

28. The plaintiff has instituted the suit in the following form:

"Shri V. Rajaraman, Liquidator, Globe United Engineering and Foundry Co. Ltd. 1/2, Jhandewala Extension, New Delhi-55 (now in voluntary liquidation subject to the supervision of Court)."

29. The form of the suit is not correct. A company in liquidation retains its corporate powers including the power to sue, although such powers must be exercised through the liquidator. The suit on behalf of the company in liquidation ought to be instituted in the name and on behalf of the company and not in the name of the liquidator. This appears to me to be settled law: See *City Bank of Lahore Ltd. v. Shri Sharma*, Air 1951 Punj 144.

30. The plaint requires amendment so as to bring it in conformity with law. The plaintiff is allowed to amend the plaint subject to payment of Rs. 100 as costs.

31. There will otherwise be no order as to costs.

32. The amended plaint will be filed by the plaintiff within three weeks. The defendant will file the written statement within three weeks thereafter. Replication will be filed, if any, within three weeks after the written statement has been filed. The parties are directed to appear before the Deputy Registrar on November 19, 1973.

33. Order accordingly.