
(2000) 03 BOM CK 0094

In the Bombay High Court

Case No : Appeal No. 28 of 2001 in Company Petition No. 495 of 2000

Viral Filaments Ltd., Mumbai

APPELLANT

Vs

Indusind Bank Ltd., Mumbai

RESPONDENT

Date of Decision : 01-03-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 73
Companies Act, 1956 — Section 433, 434, 434(1), 442, 446
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19, 19(1), 19(2)

Citation : (2001) 3 ALLMR 737 : (2003) 113 CompCas 85

Hon'ble Judges : Mr S.A. Bobde, J;B.N. Srikrishna, J

Bench : Division Bench

Advocate : Mr. Shailesh Shah and Mr. Jayesh Mitra, instructed by Deshpande and Co, for the Appellant; Mr. Pravin Samdani, Mr. Prateek Seksaria, Mr. Simil Purohit and Mrs. Kiran Shah, instructed by Ashar and Co., for the Respondent

Final Decision : Dismissed

Judgement

B.N. Srikrishna, J.—Appeal admitted. Respondent waives service through their Counsel. By consent. Appeal called out and heard.

2. This Appeal under the Letters Patent impugns an order of the learned Company Judge dated November 23, 2000 by which the Respondent's petition for winding up the Company has been admitted.

3. The facts are that the Respondent is a Bank which had lent large sums of money of Rs. 5,17,46,623.96 to the Appellant Company. It issued a statutory notice for repayment of the aforesaid amount on 8th March, 2000. Since the Company did not pay or secure the large amount due and payable, a petition for winding up of the Company was presented u/s 433(e) of the Companies Act, 1956. After the Petition was accepted and notice was issued to the Company, the Company appeared and opposed the petition by an affidavit in reply. The only

point urged in the affidavit in reply dated 8th October, 2000 is that it was not commercially insolvent, that it engaged a large number of workers and that winding up of the Company would cause hardship to the workers and their families. It was further urged that the Respondent had already moved Application No. 1249 of 2000 seeking recovery of certain debts before the Debt Recovery Tribunal (hereinafter referred to as "D.R.T.") constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "R.D.B. Act"). Based on this circumstance, it was urged in opposition to the Petition for winding up that the Company Court had no jurisdiction to entertain the winding up petition. Hence, it was prayed that the Company petition be dismissed summarily. The argument did not find favour with the learned Company Judge who admitted the petition. Hence, this Appeal.

4. Mr. Shah, learned Counsel appearing for the Appellant, strenuously contended that the judgment of the Supreme Court in *Allahabad Bank v. Canara Bank* and another, supports the proposition canvassed by him. He contends that this judgment of the Supreme Court holds that once a bank or financial institution, which is entitled to move the Tribunal constituted under the R.D.B. Act for recovery of debt, has moved the D.R.T., then a winding up petition is totally barred. We shall shortly examine whether this contention has merit.

5. Section 18 of the R.D.B. Act provides that, on and from the appointed day, jurisdiction of Courts and other authorities in relation to matters specified in Section 17 is barred. Section 17 provides that on and from the appointed day, a Tribunal constituted under the R.D.B. Act shall exercise the jurisdiction, powers and authority" to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions". Thus, it is obvious that the exclusion of the jurisdiction of all other Courts and authorities is only to the extent the jurisdiction is specifically vested in the D.R.T.. That jurisdiction u/s 17 is only the jurisdiction to entertain and decide applications from banks and financial institutions for recovery of debts due to them. On first principles we are unable to agree with the learned Counsel that a petition presented u/s 433(e) of the Companies Act, 1956 for winding up of a Company is or equivalent to an application seeking recovery of a debt due to the petitioning creditor. In the first place, Section 433 of the Companies Act, 1956 is not intended to supplant the jurisdiction of a Civil Court to adjudicate a money suit. Section 433(e) vests in the Company Court the jurisdiction to wind up a Company, inter alia, under Clause (e), if the Company is unable to pay its debts. Section 434 creates a statutory fiction that if the creditor has issued a prescribed notice to the Company to pay up that debt and the Company fails to do so or fails to secure the said debt within the prescribed time, the Company shall be deemed to be unable to pay its debt. Once such a contingency has arisen, and the statutory fiction has come into play, it is perfectly open to the Company Court to entertain the petition u/s 433(e) of the Companies Act. 1956.

6. The argument of Mr. Shah that what could be done by the Company Court can

equally be done by the D.R.T. under the R.D.B. Act is erroneous. There is no provision in the R.D.B. Act empowering the Tribunal to wind up a Company which owes the debt to the applicant financial Institution. The jurisdiction of the Tribunal under the R.D.B. Act is only to adjudicate the liability of the Respondent before it, ascertain the "debt" due to the bank/financial Institution and issue a certificate for recovery thereof. Once such a certificate of recovery is issued to the Recovery Officer, the Recovery Officer is empowered to execute the same in the manner prescribed under the R.D.B. Act. We find that the jurisdiction to wind up the Company is wholly unavailable to the D.R.T.. Hence, what could be done by the Company Court u/s 433(e) could obviously not be done by D.R.T..

7. We are supported in our view by a judgment of the Supreme Court in *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd.*. In that case, a winding up petition was filed by a creditor before the High Court and the Company moved an application u/s 8 of the Arbitration and Conciliation Act, 1996, contending, inter alia, that the High Court should refer the matter to arbitration- This contention failed before the learned Single Judge of the High Court and before the Division Bench of the High Court. When the matter came up before the Supreme Court, the Supreme Court pointed out (vide paragraph 5), "The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the Company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a Company is contained under the Companies Act and is conferred on the Court." The Supreme Court held that the Arbitrator having no such power could not have entertained the petition and, therefore, the application made to the High Court for referring the matter to arbitration was misconceived. In our view, the principle laid down in this judgment applies to the situation before us. The D.R.T. not having been invested with the power to wind up a Company, it would not be possible to urge before the Company Judge that the petition should not be heard.

8. We may usefully refer to the observations of the Supreme Court in *Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induru Pattabhirami Reddi.* The Supreme Court says in unmistakable terms that, in every situation where the Legislature has excluded jurisdiction of the Civil Court, the exclusion has to be applied only to the extent the Legislature intends and not a wit beyond it. As observed by the Supreme Court (vide paragraph 13) : "Any other construction would lead to an incongruity, namely, there will be a vacuum in many areas not covered by the Act and the general remedies would be displaced without replacing them by new remedies."

9. Finally, we come to the judgment of the Supreme Court in *Allahabad Bank (supra)*, in this case, the Appellant Bank had obtained a simple money decree against the debtor Company from the Debt Recovery Tribunal u/s 19 of the R.D.B. Act. Thereafter, the Appellant filed a recovery case before the Recovery Officer. The Respondent Bank also filed an application as a secured creditor before the same Tribunal for recovery of another debt from the same debtor

Company, The Respondent's application had remained undecided when the matter came up before the Supreme Court. A third party had filed a winding up petition against the debtor Company. The learned Company Judge made an order under Sections 442 and 537 of the Companies Act staying any further sales of the debtor Company's assets and also restraining the disbursement of the moneys already realised in other sales. This order was challenged in the Appeal. The Supreme Court raised and considered the following points:

(1) Whether in respect of proceeding, under the R.D.B. Act at the stage of adjudication for the money due to the banks or financial institutions and at the stage of execution for recovery of moneys under the R.D.B. Act, the Tribunal and the Recovery Officers are conferred exclusive jurisdiction in their respective spheres ?

(2) Whether for initiating of various proceedings by the banks and financial institutions under the R.D.B. Act, leave of the Company Court is necessary u/s 537 before a winding-up order is passed against the Company or before provisional liquidator is appointed u/s 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in exercise of powers u/s 442?

(3) Whether after a winding-up order is passed u/s 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can stay proceedings under the R.D.B. Act, transfer them to itself and also decide questions of liability, execution and priority u/s 446(2) and (3) read with Sections 529, 529A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?

(4) Whether in case it is decided that the distribution of moneys is to be done only by the Tribunal, the provisions of Section 73 of the C.P.C. and sub-sections (1) and (2) of Section 529, Section 530 of the Companies Court also apply - apart from Section 529A to the proceedings before the Tribunal under the R.D.B. Act?

(5) Whether in view of provisions in Sections 19(2) and 19(19) as introduced by Ordinance 1 of 2000, the Tribunal can permit the appellant Bank alone to appropriate the entire sale proceeds realised by the Appellant except to the limited extent restricted by Section 529A? Can the secured creditors like Canara Bank claim u/s 19(19) any part of the realisations made by the Recovery Officer and is there any difference between cases where the secured creditor opts to stand outside the winding up and where he goes before the Company Court?

(6) What is the relief to be granted on the facts of the case since the Recovery Officer has now sold some properties of the Company and the moneys are lying partly in the Tribunal or partly in this Court ?

10. As to Point (1), the Supreme Court held (paragraph 23) that it is not the intendment of the R.D.B. Act that while the basic liability of the Defendant is to

be decided by the Tribunal u/s 17, the banks/ financial institutions should go to the Civil Court or the Company Court or some other authority outside the Act for the actual realisation of the amount. Placing reliance on the provisions of Section 34(1) of the R.D.B. Act, Supreme Court held that the R.D.B. Act overrides other laws to the extent of "inconsistency" and that the prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any other manner. It was held that the adjudication of the liability ,and the recovery of amount by execution of the certificate are, respectively, within the exclusive jurisdiction of the D.R.T. and the Recovery Officer and no other Court or authority, much less the Civil Court or the Company Court, can go into the said question relating to the liability and the recovery except as provided in the Act.

11. Dealing with Point 2, the Supreme Court holds in Allahabad Bank's case (supra) that as the Company Court had no jurisdiction to decide questions which were exclusively left to the jurisdiction of the D.R.T. and would have no jurisdiction to transfer the application pending before the D.R.T. to itself for trial, no purpose would be served by insisting on leave being asked from the Company Court before the application could be proceeded with before the D.R.T. For this reason, the Supreme Court was inclined to hold that there was no need for the Appellant Bank to seek : leave of the Company Court to proceed with its claim before D.R.T. or in respect of the execution proceedings before the Recovery Officer. It was also held that such proceedings could not be transferred to the Company Court.

12. Dealing with the provisions of Sections 442, 446 and 537 of the Companies Act. 1956, the Supreme Court reiterated the principle laid down in its earlier decisions in Governor General in Council v. Shiromani Sugar Mills Ltd., and Sudarsan Chits (I) Ltd. v. O. Sukumaran Pillai, to the effect that Parliament had enacted the Companies (Amendment) Act. 1960 and added sub-sections (2) and (3) into Section 446 with the purpose that instead of allowing the claims to be proceeded with against the Companies in various Courts, the Parliament had declared that wherever winding-up proceedings were pending or when an order of winding up was passed, it was necessary to save the Company from the "prolix and expensive litigation and to accelerate the disposal of winding-up proceedings" and hence "a cheap and summary remedy" was devised by conferring jurisdiction on the Company Court to entertain suits and proceedings in respect of claims for and against the Company.

13. Dealing with the superior purpose of the R.D.B. Act and the special provisions contained therein, the Supreme Court was of the opinion that it was intended therein that there should be a speedy and summary remedy for recovery of thousands of crores which were due to the tanks and financial institutions so that the delays occurring in winding up proceedings could be avoided- Hence, the same principle applied vis-a-vis the Tribunal/Recovery Officer under the R.D.B. Act.

14. After an extensive survey of several judgments on the issue of conflict between special and general law, the Supreme Court summarized the law vide paragraph 50 :

"50. For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25 etc. the provisions of the R.D.B. Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the Company Court u/s 442 read with Section 537 or u/s 446 of the Companies Act, 1956. In respect of the moneys realised under the R.D.B. Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the Tribunal under the R.D.B. Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the R.D.B. Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding-up against the debtor Company and also after a winding-up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the R.D.B. Act, 1993. Points 2 and 3 are decided accordingly in favour of the appellant and against the respondents."

15. The Supreme Court pointed out in Allahabad Bank (supra) that the Companies Act, 1956 and the R.D.B. Act can both be treated as special laws and the principle is that, where there are two special laws, the latter will normally prevail over the former, if there is a provision in the latter special Act giving it overriding effect.

16. Dealing with the argument based on Sections 529 and 529A of the Companies Act, 1956. In the light of the provisions of the R.D.B. Act, the Supreme Court held that it will be necessary for the D.R.T. to decide questions of priority bearing in mind the principles underlying Section 73 of the CPC inasmuch as Section 22 of the R.D.B. Act gives sufficiently wide power to the Tribunal/Appellate Tribunal to decide such questions of priorities, subject only to the principles of natural justice. In fact, as the Supreme Court pointed out, the powers u/s 22 of the R.D.B. Act are much wider than those of Civil Courts and the only restriction on its powers is that principles of natural justice are to be followed.

17. Upon a careful consideration of the judgment in Allahabad Bank (supra), we are unable to agree with the learned Counsel for the Appellant that this judgment in any manner supports the contention that merely because the petitioning creditor before the Company Court is a bank/ financial institution or because an application has already been filed before the D.R.T. under the provisions of the R.D.B. Act, the petition for winding up would not be maintainable.

18. Mr. Shah raised a subsidiary contention that the role placed by the Company

Court u/s 433 of the Companies Act and the D.R.T. under the R.D.B. Act is more or less equivalent since in the Company Petition also the Company Court has to adjudicate the amount due to the petitioning creditor before it can admit petition u/s 433(e) of the Companies Act, 1956. In our view, this contention is misconceived. As we have already observed the admission of petition for winding up u/s 433(e) need not be preceded by an adjudicated liability of the Company. It proceeds upon the Inability of the Company to pay its debts. Section 434(1)(a) prescribes a statutory presumption of such inability on the part of the Company if the conditions prescribed therein are fulfilled. We recount the of quoted words of Lord Asquith in *East End Dwelling Co. Ltd. v. Finsbury Borough Council*.. "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs: it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." (Followed by the Supreme Court with approval in *State of Bombay v. Pandurang Vinayak and Others*,; *CIT, Delhi v. S. Teja Singh*,³ and *Chief Inspector of Mines v. Karam Chand Thapar*,. Thus, if the statute says that the Company must be deemed to be unable to pay its debts, the logical result would be to admit the petition for winding up to investigate it. We find it difficult to accept the contention that the admission of the petition can only follow upon the adjudicated liability of the Company towards the petitioning creditor. 19. Mr. Shah then made an argument which appears to us to be one of desperation. He contends that an order of winding up is a discretionary order and where it is possible to ascertain that a large number of employees are likely to be rendered jobless as result of the order, or where there are other circumstances indicating that the financial stringency is a temporary phase and the Company is able to get out of it, there is no need for the Company Court to make an order for winding up. He relied on the judgment of the Company Court of the Gujarat High Court in *Rishi Enterprises*. In re (Vol. 73, 1992 Company Cases 271) and the judgment of the Punjab and Haryana High Court in *State Trading Corporation of India Ltd. v. Punjab Tanneries Ltd.*,. What has been held in these two judgments is unexceptionable, if there is a silver lining, then the dark clouds need not impel the Company Court into admitting the petition for winding up the Company. But is there a silver lining at all in the Appellant's case? is the crucial question. We have already referred to the gist of the affidavit in reply filed to oppose admission of the winding up petition. One would have expected the argument to be based on surer foundation. If there was any material presented before the Company Court to indicate that the Company's assets far exceeded its liabilities, or that the cash crunch was only a temporary phase, and given a little breathing time, the Company would soon come out of straits, the argument could have been considered. After anxiously scanning the affidavit in reply, we find neither any pleading, nor any material particulars which could have satisfied the learned Company Judge on this issue. Thus, the learned Company Judge had nothing but

the statutory presumption to fall upon, which he rightly followed up with an order of admission of the petition. Hence, we are unable to say that the learned Company Judge in any way erred in admitting the petition for winding up.

20. For all the aforesaid reasons, we agree with the order made by the learned Single Judge admitting the petition for winding up. We see no reason to interfere with it. In fact, much of the discussion with regard to adjustment of the priorities is really uncalled for in the facts of the present case, for the petition has just been admitted. As to how and in what manner the question of priorities has to be dealt with in a situation of conflict between R.D.B. Act and the provisions of Sections 529 and 529A of the Companies Act, 1956, we need express no opinion; nor do we do so. The Appeal is dismissed as without substance. However, there will be no order as to costs.

21. On the application of Mr. Mitra, whose client is anxious to carry the matter to the Supreme Court, we extend the stay of the advertisement by a period of six weeks from today.

22. In view of the dismissal of the Appeal, nothing survives in the Notice of Motion No. 570 of 2001 which is also hereby dismissed.

23. Parties to act on an ordinary copy of the order duly authenticated by the Associate of this Court.

24. Issuance of certified copy expedited.