(1992) 07 BOM CK 0024

In the Bombay High Court

Case No : Appeal No. 270 of 1990 in Company Application No. 366 of 1988 in Company Petition No. 642 of 1983

Vysya Bank Ltd. APPELLANT

Vs

Official Liquidator, Shreeniwas Cotton Mills Ltd. (In Liquidation). RESPONDENT

Date of Decision : 09-07-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Companies Act, 1956 — Section 179, 391, 442, 446, 456
Criminal Procedure Code, 1973 (CrPC) — Section 197

Citation : (1992) 94 BOMLR 303 : (1995) 84 CompCas 493 : (1992) 2 MhLj 1239

Hon'ble Judges : N.D. Vyas, J;M.L. Pendse, J

Bench : Division Bench

Advocate : M.S. Sanghavi, instructed by Ambhubhai and Diwanji, for the Appellant; Ravi Kadam, for the Respondent

Judgement

N.D. Vyas J.

1. This appeal arises out of the judgment of the learned single judge dated June 14, 1989, in Company Application No. 366 of 1988 whereby the appellants had applied for leave u/s 446 of the Companies Act, 1956 (hereinafter referred to as "the Act"), for continuing the suit filed by them, inter alia, against Shreeniwas Cotton Mills Ltd., the company in liquidation. By the judgment under appeal, the said application was dismissed and hence the present appeal.

2. Is the obtaining of leave u/s 442 of the Companies Act, a condition precedent to filing of a suit ? Can such leave be granted ex post facto ? Does failure to obtain leave entail dismissal of the suit and whether as regards limitation the suit instituted without leave is to be regarded ineffective until leave is granted ? Such are the questions we are required to answer in this appeal.

3. Briefly stated, the facts giving rise to the present appeal are as follows :

On July 25, 1984, the company was ordered to be wound up and the official liquidator was appointed. On September 18, 1984, the appellants filed a suit, being Summary Suit No. 494 of 1985, in this court for recovery of Rs. 3,30,854 with interest. It is the claim of the appellants in the said suit that defendants Nos. 2 to 5 to the said suit are partners of defendant No. 1, viz., Imported International, and that in or about June/ July, 1981, at their request, the appellants sanctioned in favour of the first defendant a bill discounting facility. Several documents were executed in respect of the said facility. Under the said facility, the first defendant discounted five bills drawn on them by Shreeniwas Cotton Mills Ltd. (hereinafter referred to as "the company") which is defendant No. 6 in the said suit, and that the said bills were accepted by the company. In the said suit, the appellants have sued the said firm and its partners and the company for the recovery of the said amount which was due and payable according to the appellants under the said bill discounting facility. On coming to know that the company was ordered to be wound up, the present application was filed on October 21, 1988, for obtaining leave to continue and proceed with the said suit u/s 446 of the said Act against the company in liquidation and for carrying out the necessary amendments in the title of the plaint and proceedings and for other consequential reliefs. On behalf of the official liquidator, it was contended in the affidavit filed in reply that the suit against the official liquidator is hopelessly barred by the law of limitation and, therefore, no leave should be granted to join the official liquidator as party defendant. It was further contended that u/s 446 of the said Act failure to obtain leave before institution of the proceedings against the official liquidator entailed dismissal of the proceedings and that the suit instituted without the leave of the court be regarded as ineffective until leave is granted. In these circumstances, it was prayed that the application taken out by the appellants be dismissed with costs.

4. At the hearing of the said application after hearing the parties, the learned single judge dismissed the application of the appellants by holding that as per the view of the Supreme Court in Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another, , the suit would be deemed to have been instituted only on the date the leave is granted and to grant such a leave would mean that the claim would be time barred and no purpose would be served.

5. Before us, Mr. Sanghavi, learned counsel for the appellants, submitted that leave contemplated by section 442 of the Act is not a condition precedent and can be granted ex post facto and when granted would relate back to the filing of the suit which is within the period of limitation. Mr. Sanghavi relied on the decision of the Supreme Court in Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another, . Mr. Kadam, on the other hand, relied on the observation of the Supreme Court in that case, viz. (at page 25) : "The suit or proceeding instituted without the leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date of granting leave" and submitted that, thus, on the date on which leave is granted, the suit would be time-barred and, therefore, the learned

single judge had rightly not granted the leave in view of the observation of the Supreme Court in the case of Banshidhar Shankarlal [1971] 41 Comp Cas 21. In other words, it was submitted that although the Supreme Court in the said decision observed that the leave contemplated was not a condition precedent, the latter observation clearly indicated that it is only on leave being granted that a suit or legal proceeding becomes effective and that too from the date of the granting of such leave.

6. In order to appreciate the rival contentions, it would be advantageous to refer to certain relevant provisions of the Act. These provisions are enacted for achieving the object of the winding up of a company, viz., in the words of Lindley L.J. in Oak Pits Colliery Co., In re [1882] 21 Ch D 322 "to put all unsecured creditors upon an equality and to pay them pari passu". Thus "when a winding up order is made, the court, acting by its officer-the official receiver-lays its hand upon the assets and says, no creditor or claimant must touch these assets or take proceedings by way of action, execution or attachment pending the distribution by the court in due course of administration. The protection is indispensable equally in winding up and in bankruptcy to prevent a scramble for the assets, but it is not always enough." (Palmer''s Company Precedents, Part II, 17th edition, page 302).

7. Section 456 of the Act provides that from the date of the winding up order of a company, all the property and effects of the company are deemed to be in the custody of the company court, and the liquidator or the provisional liquidator is directed to take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. Section 457 of the Act, inter alia, empowers the liquidator, with the sanction of the court, to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company. An even-handed justice requires that the court shall have control over the pending or intended suits or other legal proceedings against the company and this is provided u/s 446 of the Act. The said section is in terms analogous to section 171 of the Indian Companies Act, 1913, section 231 of the English Companies Act, 1918, and section 525 of the English Companies Act, 1985. Section 446 is reproduced below :

"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 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 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 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 or a High Court."

8. Thus, u/s 446, no suit or other legal proceeding against the company shall be commenced or if pending at the date of winding up order shall be proceeded with, when a winding up order has been made or the official liquidator has been appointed as provisional liquidator, except by the leave of the court. In short, the effect is that all pending suits and legal proceedings against the company are stayed and no fresh suit or legal proceeding can be commenced without the leave. Pending actions can be continued and fresh actions can be commenced only with the leave of the court. The court is given full control over pending as well as proposed suits or legal proceedings against the company and is also empowered and has jurisdiction to dispose of any suit or legal proceeding or any claim whether pending or commenced after the winding up order. Even in respect of the interregnum period between the presentation of a petition for winding up and the passing of the winding up order, the court is empowered u/s 442 of the Act to stay or restrain proceedings against the company. The object of section 446 is to safeguard the company from being subjected to the liability or being deprived of its rights and claims without the knowledge of the winding up court. While granting the leave, false, frivolous, fraudulent or time barred suits and legal proceedings can be weeded out.

9. In the light of the above statutory provisions, we shall now examine the questions posed by us at the outset.

10. The section does not expressly provide for nullification of the proceedings as a consequence of non-compliance with the requirement of the section. The intention of the Legislature can be inferred from the omission of the words to the effect "previous leave of the court". Whenever the Legislature wanted to make such leave or permission a condition precedent to the institution of proceedings, the words "previous sanction or permission or leave" have been used like in

section 92 of the Civil Procedure Code, 1908, and in section 197 of the Criminal Procedure Code, 1973, and again in clause 12 of the Letters Patent The consequence of disregarding the necessity of the leave can also help us find out the legislative intent. The section does not expressly declare what shall be the consequence of non-compliance with the statutory injunction. Whenever the Legislature intended to lay down an absolute prohibition, the Legislature has expressly declared its intention in unambiguous terms. Section 537 of the Act can be compared with section 446. Section 537 of the Act reads as follows :

"537. Avoidance of certain attachments, executions, etc., in winding up by or subject to supervision of court. - (1) Where any company is being wound up by or subject to the supervision of the court -

(a) any attachment, distress or execution put in force, without leave of the court, against the estate or effects of the company, after the commencement of the winding up; or

(b) any sale held, without leave of the court, of any of the properties or effects of the company after such commencement;

shall be void.

(2) Nothing in this section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government."

11. Section 537 contains an unequivocal declaration that any action against the company after the commencement of the winding up, without the leave of the court, "shall be void". Such an express declaration is totally absent in section 446. The legislative intent is, therefore, undoubtedly not to lay down an absolute prohibition. A decree passed in the absence of leave is not a nullity. (See State of Bihar v. Syed Anisur Rehman [1977] 47 Comp Cas 372 (Pat) and Official Liquidator of United India General Finance Pvt. Ltd. (In Liquidation) Vs. Satya Dev Awasthi and Others, .

12. Thus form the clear and unambiguous language of section 446, it can be seen that the leave required is not a condition precedent and can be granted ex post facto. In Bansidhar Shankarlal.[1971] 41 Comp Cas 21 the Supreme Court was directly concerned with the question as to whether leave was a condition precedent or not and held (at page 25) :

"Even granting that sanction u/s 179 does not dispense with the leave u/s 171 of the Act, to institute a proceeding in execution against a company ordered to be wound up, we do not thank that there is anything in the AM which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and that failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date of granting leave."

13. Prior to this pronouncement by the Supreme Court, the courts in the country had taken divergent views. One view was that it was a condition precedent and the other that it was not. A Division Bench of this court had in Eastern Steamship Pvt. Ltd. v. Pucto Pvt. Ltd. [1971] 41 Comp Cas 43 taken the view that leave was a condition precedent. However, the Supreme Court decision in Bansidhar Shankarlal [1971] 41 Comp Cas 21 was delivered after the decision in Eastern Steamship Private Ltd. Vs. Pucto Private Ltd. and Another, and has thus impliedly overruled the decision in Eastern Steamship Pvt. Ltd. Apart from the fact that we are bound by the decision of the Supreme Court in Bansidhar Shankarlal [1971] 41 Comp Cas 21 , the legislative intent manifested in the language leaves no room for doubt. We are supported in our view by the decisions in Zahama Bee Vs. Reliable Corporation (P.) Ltd. and Another, , Star Engineering Works v. Official Liquidator, Krishnakumar Mills Co. Ltd. [1977] 47 Comp Cas 30 (Guj) , State Bank of India Vs. Official Liquidator, Straps (India) Private Ltd., and United Commercial Bank Vs. State of Jammu and Kashmir and Others, . We are fully conscious of the fact that the Supreme Court decision in Bansidhar Shankarlal [1971] 41 Comp Cas 21 was u/s 171 of the Companies Act, 1913, and we are dealing with section 446 of the Indian Companies Act, 1956. The difference brought about in the language of section 446 of the Act is only a drafting change and has not effected any change in the legal position gathered by the Supreme Court from the language of the corresponding section 171 of the Indian Companies Act, 1913. The change in the language is only by way of amplification, clarification or elaboration of the provision contained in section 171 of the 1913 Act rather than alteration or amendment thereof or departure therefrom.

14. This takes us to the next question, viz., does failure to obtain leave entail dismissal of the suit and whether as regards limitation the suit instituted without leave be regarded ineffective until leave is granted ? This is Mr. Kadam''s submission which is based on the observation, viz., "the suit or proceeding ... granting the leave" in Bansidhar Shankarlal Vs. Mohd. Ibrahim and Another, . This submission found favour with the learned single judge. The Supreme Court, after unequivocally holding that leave is not a condition precedent, observed as above. This observation has to be read in harmony with what the Supreme Court held a little earlier in the same paragraph, viz., leave is not a condition precedent. Correctly interpreted it would mean that a suit or a legal proceeding pending at the time of the winding up order or commencement thereafter would be "ineffective" unless it is activated by leave. "Ineffective" would only mean ineffective qua the official liquidator only who has power, inter alia, to defend any suit or other legal proceeding in order to protect all the property, effects and actionable claims to which the company is entitled. Thus, the observation cannot be stretched to non-suit a plaintiff whose suit when filed is otherwise within limitation. To give such an interpretation to this observation can result in only setting at naught what is held by the Supreme Court. The bar of limitation is a creature of the statute and cannot be imposed or read into the otherwise

unambiguous language of section 446. The observation in question speaks of a legal fiction and cannot be interpreted to read into the said provision any legal bar. In these circumstances, we cannot accede to Mr. Kadam''s submission. The learned single judge was clearly in error in holding as he did.

15. Now, we come to the last submission of Mr. Kadam. It is submitted that in any view of the matter the application for leave was time-barred as under the residuary article 137 of the Limitation Act, 1963, it should have been made within three years from the accrual of the right to apply. Section 446 of the Companies Act does not prescribe any time. Leave can be applied for, as we have held, subsequent to the order of winding up. Article 137 of the Limitation Act, 1963, deals with applications and is a residuary article. u/s 5 of the Limitation Act, the court is empowered to extend the time in filing any appeal or application unlike in a suit. We see no substance in this submission and the same is rejected.

16. In the result, the appellants succeed. The appeal is allowed. The judgment of the learned single judge is set aside. Prayers (a) and (b) of the Company Application No. 366 of 1988 are granted. Leave granted is for continuing Summary Suit No. 494 of 1985. There will be no order as to costs.