

Sudarsan Chits (I) Ltd.

Vs

O. Sukumaran Pillai and Others

Civil Appeal No. 2528 of 1984

(D. A. Desai, V. B. Eradi, V. Khalid JJ)

16.08.1984

JUDGMENT

DESAI, J. –

1. Sudarsan Chits (India) Ltd., appellant herein, ('Company' for short) is governed by the Companies Act, 1956. Three petitions being Company Petitions 9/81, 8/81 and 49/81 were moved by the creditors of the Company under Section 439 of the Companies Act praying for winding up of the Company on the ground that it was unable to pay its debts. The learned Company Judge passed an order winding up the Company and appointed Official Liquidator to be the Liquidator of the Company. This order was challenged in MFA Nos. 578, 579 and 520 of 1981 which came up for hearing before a Division Bench of the Kerala High Court. The judgment of the Division Bench is reported in Sudarsan Chits (India) Ltd. v. G. Sukumaran Pillai (ILR (1983) 1 Ker 700). The appeals were disposed of after approving the scheme of compromise and arrangement under Section 391 of the Companies Act directing that the winding-up order shall be held in abeyance on certain undertakings to be filed by the Company before the Court within the prescribed time to abide by the conditions imposed in the judgment and if there by any default in the matter of performing of the conditions so imposed, and/or undertaking is not filed as directed therein, the winding-up order made by the learned Judge will stand confirmed. A further direction in this behalf given by the Court is material and may be extracted :

On the first payment of Rs. 25,00,000 being made within four weeks from this date the winding-up order will be held in abeyance and thereupon the Official Liquidator will be considered as appointed to function as the Provisional Liquidator subject to such restrictions on his powers and privileges as may indicate here.

Since then the scheme of compromise and arrangement as set out in the judgment of the Division Bench is being implemented and we were informed that an amount of Rs. 2.40 crores has already been disbursed amongst the claimants/creditors of the Company. We were also informed that the scheme of compromise and arrangement is being meticulously under the supervision of the Court as directed by the Appellate Bench.

2. In the course of implementation of the scheme, it became necessary to recover certain debts and claims due in favour of the Company. For this purpose Civil Miscellaneous Application 14913 of 1983 was moved before the Appellate Bench praying for a direction that the Provisional Liquidator be directed to file claim petitions under Section 446(2) of the Companies Act in the Company Court for realising the claims of the Company, which would further assist and facilitate the implementation of the scheme of compromise and arrangement as supervised by the Court. One G.

Sukumaran Pillai was impleaded as the first respondent and the Provisional Liquidator was impleaded as the second respondent.

3. It appears to have been contended before the Court that as there was no winding-up proceeding pending before the Company Judge or the Appellate Bench and as the Company is being managed under the Scheme of compromise and arrangement, the Company Court will have no jurisdiction to entertain the claim petition under Section 446(2) of the Companies Act. This contention found favour with the Appellate Bench and the civil miscellaneous petition was rejected. Relying upon the decisions in *Official Liquidator v. Kadir* (1977 Ker LT 30) and *Faridabad Cold Storage and Allied Industry v. Official Liquidator, Ammonia Supplies Corporation P. Ltd.* ((1978) 48 Com Cas 432 : ILR (1978) 1 Del 279 : AIR 1978 Del 158 : 1978 Tax LR 1893 (FB)) the Court concluded that the right to avail of the remedy by filing a claim petition conferred by clause (b) of Section 446(2) can be availed of only in a court which is winding up the company. Hence this appeal by special leave.

4. After the special leave was granted, a notice was served upon the Provisional Liquidator informing him that the appeal will be listed for final hearing on August 1, 1984. Even after the intimation the Provisional Liquidator did not choose to appear at the hearing.

5. CMP 6062 of 1984 was moved on behalf of All-India Subscribers' Association of Chits through its Secretary Mr. S. K. Jain seeking intervention in the matter. Intervention was permitted.

6. Upon its true construction, what is the scope and ambit of the jurisdiction conferred on the court winding up a company by Section 446(2)(b) is the only question of law that arises in this appeal and may be answered in the facts and circumstances of the case.

7. Section 446(2) reads as under :

446(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 under Section 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.

8. Before we advert to the question of construction of Section 446(2)(b) it, would be advantageous to notice the historical evolution of the provision as well as its present setting. Section 171 of the Indian Companies Act, 1913, the predecessor of Section 446(1) did not contain any provision similar or identical to that of Section 446(2). Section 171 only provided for stay of suits and

proceeding pending at the commencement of winding-up proceeding, and embargo against the commencement of any suit or other legal proceedings against the company except by the leave of the court. This provision with little modification is re-enacted in Section 446(1). There was no specific provision conferring jurisdiction on the court winding up the company analogous to the one conferred by Section 446(2). Sub-section (2) was introduced to enlarge the jurisdiction of the court winding up the company so as to facilitate the disposal of winding-up proceedings. The provision so enacted probably did not meet with the requirement with the result the Committee appointed for examining comprehensive amendment to the Companies Act in its report recommended that "a suit by or against a company in winding up should notwithstanding any provision in law for the time being be instituted in the court in which the winding-up proceedings are pending (See para 207 of the Company Law Committee Report)". To give effect to these recommendations, sub-section (2) was suitably amended to bring it to its present form by Companies (Amendment) Act, 1960. The Committee noticed the on winding-up order being made and the Official Liquidator being appointed a Liquidator of the company, he has to take into his custody company property as required by Section 456. Section 457 confers power on him to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company. Power is conferred upon him to sell the properties both movable and immovable of the company and to realise the assets of the company and this was to be done for the purpose of distributing the assets of the company amongst the claimants. Now at a stage when a winding-up order is made the company may as well have subsisting claims and to realise these claims the Liquidator will have to file suits. To avoid this eventuality and to keep all incidental proceedings in winding-up before the court which is winding up the company, its jurisdiction was enlarged to entertain petition amongst others for recovering the claims of the company. In the absence of a provision like Section 446(2) under the repealed Indian Companies Act, 1913, the Official Liquidator in order to realise and recover the claims and subsisting debts owed to the company had the unenviable fate of filing suits. These suits as is not unknown, dragged on through the trial court and courts of appeal resulting not only in multiplicity of proceedings but would hold up the progress of the winding up proceedings. To save the Company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding up proceedings, the Parliament devised a cheap and summary remedy by conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446(2) and therefore, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it.

9. The fasciculus of sections included in Part VII of the Companies Act bears the heading 'Winding up'. Section 443 sets out the circumstances in which a company maybe wound up by the court. Section 444 provides the where the court makes an order for the winding up of a company, the court shall forthwith cause intimation thereof to be sent to the Official Liquidator and the Registrar. Section 446(1) provides that 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. Then comes sub-section (2) of Section 446. It specifies the contours of the jurisdiction of the court which is winding up the company. It confers special jurisdiction on the court which is winding up the company to do things that are set out in the various sub-clauses notwithstanding anything contained in any other law for the time being in force. Section 446(2) thus conferred special jurisdiction on the court winding up the company which otherwise it may not have enjoyed. The court in the Companies Act is defined in Section 2(11) to mean with respect to any matter relating to a company (other than any offence

against this Act), the court having jurisdiction under the Act with respect to that matter relating to that company, as provided in Section 10. Section 10 provides that the Court having jurisdiction under the Act shall be the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2). The winding-up petition has thus to be presented in the High Court before the Judge who is assigned the work under Companies Act. Therefore, the court which is winding up the company will be the court to whom the petition for winding up was presented and which passed the order for winding up the company. In this case, the order was made by the learned Company Judge in the Kerala High Court directing winding-up of the Company. An appeal lies against the order for winding up the Company under Section 483 to the same Court to which and in the same manner in which and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. In exercise of this appellate jurisdiction, the Appellate Bench entertained the appeals and directed that the winding-up order shall be held in abeyance till the scheme is implemented and if any default is committed the winding-up order made by the learned Company Judge would be revived.

10. The Appellate Bench declined to direct the Provisional Liquidator to file claim petition at the instance of the Company under Section 446(2)(b) on the sole ground that such a petition at the instance of the Liquidator would be maintainable in the course of winding up of proceedings which means that the winding-up proceedings are pending. Undoubtedly, Section 446(1) manifests the legislative intention that the procedure thereunder prescribed could be availed of when the winding-up order has been made or where the Official Liquidator is appointed as the Provisional Liquidator. Section 446(1) envisages two situations in which the court will have jurisdiction to make the order thereunder contemplated. These two situations are : where a winding-up order has been made or where the Official Liquidator has been appointed as Provisional Liquidator. The first of the two situations envisages an order for winding-up of the company having been made and which is subsisting. The second situation is where without making a winding-up order, the court has appointed Official Liquidator to be the Provisional Liquidator. Section 450(1) of the Companies act confers power on the Company Court to appoint Official Liquidator to be Provisional Liquidator at any time after the presentation of the winding-up petition and before making of the winding-up order. The court before which a winding up petition is presented has power to appoint Official Liquidator as Provisional Liquidator of the company even before making the winding-up order. If ultimate winding-up order is made, the Official Liquidator acts as such. And let it be remembered that where a winding-up order is made, it relates back to the date when petition for winding-up is presented. Referring to Section 446(1) it becomes clear that the court will have jurisdiction to make the order therein contemplated, where a winding-up order has been made or prior to the making up of the winding-up order, Official Liquidator has been appointed as Provisional Liquidator as contemplated by Section 450(1).

11. Sub-section (2) of Section 446 confers jurisdiction on the court which is winding up the company to entertain and disposed of proceedings set out in clauses (a) to (d). The expression "court which is winding up the company" will comprehend the court before which a winding-up petition is pending or which has made an order for winding up of the company and further winding-up proceedings are continued under its directions. Undoubtedly, looking to the language of Section 446(1) and (2) and its setting in Part VII which deals with winding-up proceedings would clearly show that the jurisdiction of the court to entertain and dispose of proceedings set out in sub-clauses (a) to (d) of sub-section (2) can be invoked in the court which is winding up the company.

12. Reverting to the facts of this case, the Appellate Bench held that as the winding-up proceeding in respect of the appellant Company is no more pending, and there is no court which could be said to be the court winding up the Company and therefore, the claim petition on behalf of the Company which is not being wound up could not be instituted as contemplated by Section 446(2). In reaching this conclusion, the Appellate Bench gave a restricted meaning to the expression "court which is winding up the company" in sub-section (2) by restricting it to the first situation in Section 446(1) namely, when an order of winding up has been made. The Appellate Bench appeared to be of the view that where the Official Liquidator has been appointed as the Provisional Liquidator which implies that non winding-up order has been made, jurisdiction under Section 446(2) cannot be invoked. The Court felt that an anomalous situation would arise if claim petitions are moved under Section 446(2)(b) at a stage when no winding-up order has been made because if ultimately the winding-up order is not made, the proceedings initiated under Section 446(2)(b) by the Provisional Liquidator would be wholly without jurisdiction.

13. The approach of the High Court, with respect, overlooks the object and purpose sought to be achieved by introducing sub-section (2) in Section 446 by Amending Act 65 of 1960. As noted earlier, winding-up proceedings dragged on for decades with no end in sight and with no benefit to the creditors and contributories of the Company. To accelerate the process of winding up so as to bring them to an end, this sub-section was amended in its present form in 1960 conferring jurisdiction on the court winding up the company to entertain amongst others any suit or proceeding by or against the company or any claim made by or against the company. If therefore, a winding-up petition is pending meaning thereby that an Official Liquidator is appointed as Provisional Liquidator which is a stage in the process of winding up, the court before which such proceeding is pending can be styled as a court winding up of the company and ipso facto it would have jurisdiction to entertain the proceeding enumerated in clauses (a) to (d) of sub-section (2) of Section 446. The apprehension of the High Court that if such jurisdiction is conferred on the court at a stage anterior to the winding-up order being made but subsequently to the appointment of Official Liquidator as Provisional Liquidator an anomalous situation would arise has left us unimpressed. If the winding-up petition fails the proceedings pending in the court may have to be transferred to the court which can entertain the proceeding. But if the petition praying for winding up the company ends in winding-up order the proceedings initiated under sub-section (2) will have to be proceeded with till they are finally disposed of because winding-up order will relate back to the date of the presentation of the winding-up petition. In this view of the matter no anomalous situation can ever arise.

14. However, the narrow question which is required to be considered in this appeal is : whether the winding-up proceedings were pending or had come to an end when the Appellate Bench froze the winding-up order by keeping it in abeyance ? Let it be made at once clear that the winding-up order made by the learned Company Judge in respect of the appellant-Company has neither been quashed, set aside, canceled, revoked nor recalled. On the contrary after directing that the winding-up order shall be held in abeyance, the Appellate Bench directed that Official Liquidator shall continue to act as Provisional Liquidator as provided by Section 450 and that itself is a stage in the winding-up proceedings. When winding-up order is kept in abeyance it is in a state of suspended animation. The fact that the Appellate Bench directed that pending the implementation of the scheme as sanctioned by the High Court, the winding-up order will be kept in abeyance itself without anything more shows that the order was neither canceled nor recalled nor revoked nor set aside. It continued to exist but was inoperative. Any default on the part of the Company in carrying out its obligation under the scheme by itself without anything more would revive the winding-up order. Therefore, the winding-up order was effectively subsisting but inoperative for the time being. Having all the

potentiality of being rejuvenated or being brought back to life.

15. Now if the winding-up order was merely held in abeyance i.e. it was not operative for the time being, but it had not ceased to exist, the winding-up proceedings are in fact pending and the court which made the winding-up order would be the court which is winding up the Company. It is now well-settled that a winding-up order once made can be revoked or recalled but till it is revoked or recalled it continues to subsist. That is the situation in this case. If the winding-up order is subsisting the court which made that order or the court which kept it in abeyance will have jurisdiction to give necessary directions to the Provisional Liquidator to take recourse to Section 446(2).

16. In passing it was stated that the Company sought the direction from the Appellate Bench and not from the court which was winding up the Company i.e. The Court of the Learned Company Judge which made the winding-up order. That of course is true but even taking a very technical view of the matter, the appellant was perfectly justified in moving the petition before the Division Bench because it was the Division Bench which was supervising the implementation of the scheme of compromise and arrangement and it was the Division Bench in the appeal before it against the order of winding up that had kept the winding-up order in abeyance. The direction was rightly therefore, sought from the Appellate Bench.

17. Having thus examined the matter from all angles, we are of the view that the High Court was in error in rejecting the application made on behalf of the appellant-Company for directing the Provisional Liquidator to prefer claims petitions on the materials and expenses to be furnished by the Company. The amounts realised by the Provisional Liquidator on filing claim petitions shall be handed over to the Company and the appellant-Company is under an obligation to use, spend, and appropriate them in the implementation of the scheme under the supervision of the Court.

18. This appeal accordingly succeeds and is allowed and the order of the High Court under appeal is set aside. The application for the directions to the Provisional Liquidator made by the appellant-Company is granted and directions in terms of the prayer are hereby made. The appellant shall bear its own costs.

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