

Andhra High Court

Nagarjuna Finance Ltd., Hyd. vs Kanosika Laboratories Ltd. And ... on 15 June, 1998

Equivalent citations: 1998 (4) ALD 229, 1998 (4) ALT 563, 1998 (2) ALT Cri 198, 1998 94 CompCas 127 AP

Bench: A Bhate

ORDER

1. These five Company Applications are being disposed of by a common order as all the applications are for the same purpose.

2. Facts in C.A.No.59I of 1997 may be stated for purpose of understanding the nature of application.

3. The petitioner-company is a Company registered under the Companies Act, 1956 (hereinafter referred to as 'the Companies Act'). In course of its business, Respondent No. 1-Company approached the petitioner and obtained a Diesel Generator on Hire Purchase Agreement on 28-2-1994. As per agreement the cheques issued by the respondent-Company towards various instalments, when presented by the petitioner-Company were returned dishonoured, because Respondent No.1-Company had issued instructions to the Banker to stop payment. The petitioner-Company then instituted a criminal complaints against the Respondent No. 1-Company. The complaints were against the Company, as well its Managing Director under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act') for dishonour of the cheque. Such five complaints were registered separately before the concerned Magistrate. In the meantime one other Company instituted Winding Up proceedings against Respondent No. 1-Company in Company Petition No.58 of 1995. The Company Court after due enquiry passed Winding up Order on 25-7-1997. The criminal cases initiated by the petitioner-Company came up before the concerned Magistrate on 17-5-1997 for further proceedings. At that point of time, the learned Magistrate stayed the proceedings on the ground that the petitioner-Company had not obtained permission from the Company Court as required by Section 446 of the Companies Act. The petitioner-Company as a result of the stay order approached this Court, by the present application, for obtaining permission/leave to continue the criminal proceedings pending against the Respondent No 1-Company.

4. Admittedly Respondent No.I-Company has been wound up under the orders of the Court. The Official Liquidator is therefore representing Respondent'No.I-Company. Sri P. V. Rama Itaju, the learned Advocate for the Official Liquidator has appeared on his behalf. I have heard the learned Counsel for the petitioner-Company and the learned Counsel for the Official Liquidator.

5. The question that arises for determination is whether Section 446 of the Companies Act requires that for prosecuting the legal proceedings under Section 138 of the Act leave of the Company Court is necessary ? Before proceeding further it would be necessary and convenient to extract the relevant portion of Section 446 of the Companies Act. Section 446(1) of the Companies Act runs as follows:

Section446(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

ending 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."

6. A careful reading of the provision will show that no suit or other legal proceedings if pending by the date of winding up order shall be proceeded against the Company except with the leave of the Court. The Section deals with the suits and other legal proceeding. The Marginal Note is regarding staying of suits on Winding Up Order. Therefore in the context of the object of framing the said Section it is clear that the word "other legal proceedings" is ejusdem generis to the term 'suit'. The words "other legal proceedings" will not embrace proceeding like those under Section 138 of the Act. It appears that the purpose of the Section was to safeguard the assets and the property of the Company which has been wound up under the Court's Order. If any thing is to be realised from the assets or the property of the Liquidated Company, the same deserve to be done under the Court's permission only. Criminal proceedings particularly like Section 138 of the Act have no bearing whatsoever to the purpose for which this Section has been enacted. The relief or provision incorporated in Section 446(1) of the Companies Act does not in my opinion cover criminal proceedings of the type under Section 138 of the Act. I think that the use of word "other legal proceedings" is not meant to embrace proceedings of every nature as such. It is true that the word "other legal proceedings" if taken literally would mean that all and every proceeding of any nature will fall under Section 446 of the Companies Act. But having regard to the Marginal Note and the purpose of the Enactment, the expression "other legal proceedings" will have to be construed. The said word cannot be and ought not to be read out of its total context or in isolation. It has to be considered, in my view, in the light of the penal provisions, otherwise the penal clauses under the various Acts would be ineffective by invoking Section 446 of the Companies Act. I think that the operation of this Section must be restricted to proceedings arising out of violations of the Companies Act and not to proceedings for violation of provisions of other Criminal Statutes. The learned Counsel on behalf of the Official Liquidator has stated that proceedings which are of criminal nature but arise out of the provisions under the Companies Act may perhaps fall under the term "other legal proceedings". I think that this contention is right and has to be accepted though it is not necessary for deciding the present application to deal with it in depth. Here I am concerned mainly with application of Section 446 of the Companies Act to prosecution under Section 138 of the Act. For the reasons given above and, if the Section 446 of the Companies Act is read in proper perspective and in the context in which it has been framed, I am of the view that it must be construed that the term "other legal proceedings" refers to civil proceedings as opposed to criminal proceedings under other Acts. Giving a wider meaning to "other legal proceedings" would make ineffective many of the benevolent and social legislations like (1) Employees State Insurance Act (Section 86-A); (2) Employees Provident Fund and Miscellaneous Provisions Act, 1952 (Section 14-A); (3) Employment of Manual Scavengers Act, 1993 (Section 15); (4) Industrial Disputes Act, 1947 (Section 32); (5) Minimum Wages Act (Section 22-C) and several such other Enactments, which are of piece of beneficial legislation to safeguard the public or the weaker sections of the Society. Under such beneficial Legislations prosecution of the Companies are permissible. If a simplistic view is to be taken of the application of Section 446(1) of the Companies Act, all such prosecutions can become a sterile. I do not think that it was the purpose of enacting Section 446 of the Companies Act.

7. The view which I am taking is considerably supported by a very speaking judgment given by the Kerala High Court in (Company Cases, Volume 90 Part, page 438) K.P. Devassy v. Official Liquidator and others, (1997) 90 Company Cases p.438. The Court held that the words "legal proceedings" in Section 446 of the Companies Act did not apply to proceedings under Section 138 of the Act. It was observed that no recovery of any amount covered by the dishonoured cheque is envisaged in a criminal case and therefore, it is purely personal act and does not fall under the provisions of Section 446 of the Companies Act.

8. The term "legal proceedings" fell for consideration in a case arising out of Vexatious Actions Act, 1896 i.e. in Boeder in Re, 1915-Vol.I, The Law Reports, King's Bench Division-1 page 21. Section 1 of the said Act require that a vexatious legal proceeding shall not be instituted by the concerned person without the leave of the High Court. While interpreting the words "legal proceedings", the Court held that the words "legal proceedings" did not include Criminal proceedings and that they refer to proceedings as opposed to Criminal proceedings. Though it is not necessary to decide as to whether all criminal proceedings are excluded from the ambit of Section 446 of the Companies Act, there is no doubt whatsoever that a prosecution under Section 138 of the Act does not fall within the term "other legal proceedings/"

9. The learned Counsel for petitioner-Company has brought to my notice a decision of this Court in J. Venkateswara Rao u Ahdul iMteef and another, 1994 (2) ALT (Crl.) 475. On application of Section 446 of the Companies Act, the Court had quashed the criminal prosecution under Section 138 of the Act because no leave was obtained from the Company Court. The learned Magistrate has stayed the proceedings on strength of the aforesaid decision. I have gone through the said judgment. It is not disputed by either side that the said judgment does not deal with the point as to whether Section 446 of the Companies Act is applicable to proceedings under Section 138 of the Act. A reading of the judgment shows that it has been presumed that Section 446 of the Companies Act applies to all legal proceedings. In the circumstances, the said judgment cannot be said to have laid down any law on the point.

10. It may be stated that the term "other legal proceedings" has not been defined in "The Companies Act". Hence the said term has to be construed properly.

11. An identical provision exists in Section 17 of "The Provincial Insolvency Act". The said Section provides that after an adjudication order is made, no creditor shall commence any suit or "other legal proceedings" against the insolvent, so adjudicated, without leave of the Court, Bombay High Court in Emperor v. Mulshanker, 35 Bombay 63 (ILR) had specifically held that no leave of Court is necessary in order to institute criminal proceedings against the insolvent and the term "other legal proceedings" does not cover criminal proceedings. The proceedings in that case were under the Contempt of Courts Act.

12. In view of the foregoing discussion, I think that the prosecutions under Section 138 of the Act are not covered by Section 446(1) of the Companies Act. In fact the Kerala High Court in K. P. Devasay '\$ case (supra) has gone a step ahead by observing that the provisions -of the Act will prevail over the provisions under the Companies Act. Looked at from any angle, I am of the view that for

prosecuting pending criminal proceedings under Section 138 of the Act against a Company, no leave is required to be obtained from the Company Court for prosecuting the said case. As far as the Directors are concerned, Section 446 of the Companies Act has no application even by stretching the provisions because the provision is only meant for prosecution against the Companies and not against the Directors. In view of this position of law, no leave as sought is necessary.

13. The Company Applications are accordingly disposed of.