

Supreme Court of India

Central Bank Of India vs Elmot Engineering Co on 27 April, 1994

Equivalent citations: 1994 AIR 2358, 1994 SCC (4) 159

Author: S Mohan

Bench: Mohan, S. (J)

PETITIONER:

CENTRAL BANK OF INDIA

Vs.

RESPONDENT:

ELMOT ENGINEERING CO.

DATE OF JUDGMENT 27/04/1994

BENCH:

MOHAN, S. (J)

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MOHAN, S. (J)

VENKATACHALLIAH, M.N. (CJ)

CITATION:

1994 AIR 2358

1994 SCC (4) 159

JT 1994 (7) 54

1994 SCALE (2) 739

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by MOHAN, J.- Leave granted.

2. The appellant filed a suit bearing O.S. No. 7 of 1986 against Respondents 1, 3 and 4 in the Court of Subordinate Judge, Rangareddy District at Saroor Nagar, Andhra Pradesh for recovery of Rs 97,21,274.11 with interest thereon. The further prayer was, in default of payment a final decree might be passed directing the sale of mortgaged properties and for ancillary reliefs. The averments in the plaint are briefly as follows.

3. The first respondent is a limited company. Third and fourth respondents are the Advisors and Directors respectively of the first respondent Company. The first respondent deposited with the appellant the documents of title relating to its landed property at Industrial Development Area, Nacharam Tehsil, District Hyderabad (presently Rangareddy District) with an intention to create an equitable mortgage of immoveable property covered by those documents together with all structures

and buildings thereon.

4. On 6-10-1976, the third and fourth respondents executed separate guarantees in respect of the facilities granted to the first respondent guaranteeing repayment of amounts. On 20-1-1984, one of the Directors declared that equitable mortgage by deposit of title deeds dated 6-10-1975 would also form security for the letters of credit, fresh-funded term loan, guarantee limited and other facilities allowed to the first respondent, by the appellant. The necessary forms in this regard were filed before the Registrar of Companies, Maharashtra at Bombay for registering the charges.

5. In order to secure the amount under the various heads/credit facilities the first respondent deposited on 17-8-1979 with the appellant's Sundemagar Branch, Bombay, an agreement for sale in respect of the first floor of the building belonging to the first respondent. The first respondent requested that its account be transferred from Sundernagar Branch, Bombay to Hyderabad Main Branch of the appellant.

6. O.S. No. 507 of 1989 came to be filed by the appellant for recovery of a sum of Rs 58,783.25 being expenses incurred from time to time in respect of these properties. Both the suits are pending adjudication.

7. Premium Automobiles Limited filed a winding-up petition against the first respondent in Company Petition No. 645 of 1988 before the High Court of Bombay. By an order dated 23- 6-1990 the first respondent was ordered to be wound up. An Official Liquidator (Respondent 2) was appointed as Liquidator of the Company. On 23-7-1990 a meeting was held in the presence of the Official Liquidator. The appellant brought to the notice of the Official Liquidator the pendency of these two suits.

8. The appellant filed Company Application No. 229 of 1991 in the aforesaid company petition under Section 446 of the Companies Act (hereinafter referred to as 'the Act'). The prayer in the application was for leave to prosecute the two original suits bearing Nos. 7 of 1986 and 507 of 1989 pending on the file of the Additional Subordinate Judge, Rangareddy District at Saroor Nagar. According to the appellant since the properties were situate in Rangareddy District it would be just and convenient to continue to prosecute the suits in Hyderabad.

9. On 26-3-1992, the learned Single Judge passed an order directing that the two suits be transferred to the Bombay High Court. Aggrieved by that order Appeal No. 428 of 1992 was preferred by the appellant. That was dismissed summarily by the impugned order dated 15-12-1992. Hence, the special leave petition.

10. Mr Anil B. Divan, learned counsel for the appellant submits that the courts below have not correctly appreciated Section 446 of the Act. The appellant is aggrieved insofar as the order of transfer of the suits from Hyderabad to Bombay was made. The finding that for the Official Liquidator to defend at a far distance in the Court of Additional Subordinate Judge, Rangareddy District at Saroor Nagar in Andhra Pradesh is going to be more expensive is not correct. Equally, the finding that the wasteful expenditure could be avoided by transfer. A secured creditor like the

appellant stands outside the winding-up proceedings as laid down in *M.K. Ranganathan v. Govt. of Madras*'. After all this is a suit for the enforcement of an equitable mortgage. The properties are situate in Rangareddy District. It will be not only just and convenient but also proper for the suit to be conducted there. The convenience of the Official Liquidator alone should not be the concern. Therefore, it is prayed that part of the order may be set aside.

11. In opposition to this, Mr Arvind Kumar, learned counsel would urge that it is true that the secured creditor stands outside the winding-up proceedings. That does not mean the company court loses its jurisdiction under Section 446(2) and (3) of the Act. The law laid down in *M.K. Ranganathan*' needs to be reviewed. As on today, the law is, the company court is entitled to grant leave on such terms and conditions as it may impose, as laid down in *Sudarsan Chits (1) Ltd. v. O. Sukumaran Pillai*<sup>2</sup> the interest of the Official Liquidator is of paramount consideration. Where, therefore, the transfer of suits is necessary in the interest of justice and equity the orders of the courts below cannot be found fault with. Under subsection (3) of Section 446 of the Act the winding-up court has the power to transfer before it all proceedings pending against the company at different places, because it is convenient for the winding-up of the company's affairs expeditiously that all the suits are transferred to the winding-up court.

12. In order to appreciate these rival contentions we will briefly set out the scope of Section 446.

1 AIR 1955 SC 604: (1955) 2 SCR 374 2 (1984) 4 SCC 657 : AIR 1984 SC 1579

13. *Palmer's Company Precedents*, Part 11, 17th Edn., page 302 states:

"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. This protection is indispensable equally in winding-up and in bankruptcy to prevent a scramble for the assets, but it is not always enough. An even-handed justice requires that the Court should have power to intervene at an early stage for the protection of the assets, and this power is given by this section."

14. This section aims at safeguarding the assets of a company in winding-up against wasteful or expensive litigation as far as matters which could be expeditiously and cheaply decided by the company court are concerned. In granting leave under this section, the court always takes into consideration whether the company is likely to be exposed to unnecessary litigation and cost. The position of secured creditor came to be decided by this Court in *M.K. Ranganathan*'. At AIR pp. 607 and 608, in paragraphs 15 and 16 it was held:

"The position of a secured creditor in the winding up of a company has been thus stated by Lord Wrenbury in '*Food Controller v. Cork*<sup>3</sup>':

"The phrase "outside the winding up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is in winding up or not. I remain outside the 'winding up' and shall enforce my rights as mortgagee". This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up.' It is also summarised in Palmer's Company Precedents, Vol. 11, p. 415:

'Sometimes the mortgagee sells, with or without the concurrence of the liquidator, in exercise of a power of sale vested in him by the mortgage. It is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made.' The secured creditor is thus outside the winding up and can realise his security without the leave of the winding-up Court, though if he files a suit or takes other legal proceedings for the realisation of his security he is bound under Section 231 (corresponding with Section 171, Indian Companies Act) to obtain the leave of the winding-up Court before he can do so although such leave would almost automatically be granted.

3 1923 AC 647 (A) : 39 TLR 699 Section 231 has been read together with Section 228(1) and the attachment, sequestration, distress or execution referred to in the latter have reference to proceedings taken through the Court and if the creditor has resort to those proceedings he cannot put them in force against the estate or effects of the Company after the commencement of the winding-up without the leave of the winding-up Court.

The provisions in Section 317 are also supplementary to the provisions of Section 231 and emphasise the position of the secured creditor as one outside the winding up, the second creditor being, in regard to the exercise of those rights and privileges, in the same position as he would be under the Bankruptcy Act.

The corresponding provisions of the Indian Companies Act have been almost bodily incorporated from those of the English Companies Act and if there was nothing more, the position of the secured creditor here also would be the same as that obtaining in England and he would also be outside the winding up and a sale by him without the intervention of the Court would be valid and could not be challenged as void under Section 232(1), Indian Companies Act."

That case no doubt dealt with the forerunner to, Section 446, namely, Section 171 of the Indian Companies Act, 1913. But that does matter.

15. In this case the appellant is admittedly a secured creditor. It sues on a mortgage by deposit of title deeds. Such a suit is not likely to involve a long drawn out trial. On the scope of Section 446(2) of the Act, this Court had occasion to observe in *Sudasan Chits (1) Ltd.*<sup>2</sup> at page 1582, in paragraph 10: "Sub-

section (2) of Section 446 confers jurisdiction on the Court which is winding up the company to entertain and dispose 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."

16. Without intending to lay down the law broadly but confining only to the facts of this case, we feel that the order of transfer of the suits to the High Court of Bombay cannot be supported. We are unable to uphold the finding of the High Court when it observed:

"On examination of facts and circumstances of the case, I am of the opinion that defending at a far distance in the Court of Additional Subordinate Judge, Rangareddy District at Saroor Nagar in Andhra Pradesh is going to be more expensive than if the said suits are continued and tried in this Court on the same being transferred to this Court. It is neither convenient nor proper that the Official Liquidator appointed Liquidator of the Respondent I should be asked to defend the said suits in that Court since the wasteful expenditure is to be avoided."

17. This transfer will result in greater expenditure to the appellant Bank which certainly is avoidable "than the wasteful expenditure" to the Official Liquidator. Accordingly that part of the order directing the transfer is set aside. We make it clear we are not interfering with the grant of leave in favour of the appellant. Civil appeal is allowed in the above terms. No costs.