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CENTRAL BANK OF INDIA

v.

ELMOT ENGINEERING COMPANY AND ORS.

APRIL 27, 1994

B

[M.N. VENKATACHALIAH, CJ. AND S. MOHAN, J.]

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The Companies Act, 1956 : s.446—Company—Suits against-by mortgagor for recovery of money under equitable mortgage by deposit of title deeds—Company ordered to be wound up—Application by mortgagor for leave to prosecute suits against Company in civil court—Leave granted by Company Court transferring suits to itself—Held, transfer of suits to Company Court will result in greater expenditure to plaintiff—The part of order directing transfer set aside.

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The appellant Bank filed two suits against respondent no.1, a limited Company, and its advisors and Directors, respondents no. 3 and 4 respectively, — one for enforcement of equitable mortgage seeking recovery of certain amount with interest thereon and, in default of payment, a final decree directing the sale of mortgaged properties and for ancillary reliefs was sought; and the other, for recovery of expenses incurred from time to time in respect of those properties — in the court of Subordinate Judge, Saroor Nagar, District Rangareddy in Andhra Pradesh, within whose jurisdiction the property was situated.

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During the pendency of the suits, a winding up petition against respondent no. 1 was filed before the Bombay High Court. The Company was ordered to be wound up and respondent no. 2 was appointed as the Official Liquidator.

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The appellant filed a Company Application, under s.446 of the Companies Act, 1956, in the Company Petition, for leave to prosecute the two suits before the civil court concerned. The Company Court granted leave but directed transfer of the suits to itself holding that for the Official Liquidator it would be more expensive to defend the suits at a far distance in Hyderabad and the wasteful expenditure could be avoided by transfer. The appeal filed by the appellant was dismissed summarily by the Division

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Bench of the High Court.

In appeal to this Court, it was contended on behalf of the appellant that the High Court erred in not correctly appreciating s.446 of the Companies Act, inasmuch as a secured creditor claiming under an equitable mortgage stood outside the winding up proceedings; the properties being situated in Andhra Pradesh, it would be not only just and convenient but also proper for the suits to be conducted there and convenience of the Official Liquidator alone should not be the concern.

On behalf of the respondents, it was contended that in view of sub-sections (2) and (3) of s. 446 of the Act, the Company Court was entitled to grant leave on such terms and conditions as it would impose and was empowered to transfer before it all proceedings pending against the Company at different places as it would be convenient for the winding up of the Company's affairs expeditiously.

Allowing the appeal in part, this Court

HELD : In the facts of the instant case, the order of transfer of the suits to the High Court of Bombay cannot be supported. 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. The transfer will result in greater expenditure to the appellant Bank which certainly is avoidable "than the wasteful expenditure" to the Official Liquidator. Accordingly, the part of the High Court's order directing the transfer is set aside. [772-D-H; 773-B-C]

M.K. Ranganathan v. Govt. of Madras, AIR (1955) SC 604, relied on.

Sudarsan Chits (I) Ltd. v. G.Sukumaran Pillai, AIR (1984) SC 1579, referred to.

Palmer's Company Precedents, Part II, 17th Edn., p.302, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3911 of 1994.

From the Judgment and Order dated 15.9.92 of the Bombay High Court in A. No. 428 of 1992.

Anil B. Diwan, P.H. Parekh and Ms. Smriti Mishra for the Appellants.

A Arvind Kumar, K.R. Venkataraman and Ms. Laxmi Arvind for the Respondents.

The Judgment of the Court was delivered by

MOHAN, J. Leave granted.

B The appellant filed a suit bearing O.S. No.7 of 1986 against Respondent Nos. 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
C ancillary reliefs. The averments in the plaint are briefly as follows :

D The first respondent is a limited company, 3rd and 4th 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 lended property at Industrial Developmmnt 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.

E On 6.10.76, the third and fourth respondents executed separate guarantee in respect of the facilities granted to the first respondent guaranteeing repayment of amounts. On 20.1.84, one of the Directors declared that equitable mortgage by deposit of title deeds dated 6.10.75 could 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.
F The necessary forms in this regard were filed before the Registrar of Companies, Maharashtra at Bombay for registering the charges.

G In order to secure the amount under the various heads/credit facilities the first respondent deposited on 17.8.79 with the appellant's Sundernagar 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.

H 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.

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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 23.6.90 the first respondent was ordered to be wound up. An Official Liquidator (Respondent No.2) was appointed as Liquidator of the Company. On 23.7.90 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.

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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.

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On 26.3.92, the learned Single Judge passed an order directing 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.

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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 in so far 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* AIR (1955) SC 604. 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.

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- A 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) the Act. The law laid down in *M.K. Ranganathan* (supra) 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 (I) Ltd. v. G. Sukumarann Pillai*, AIR (1984) SC 1579, the interest of the Official Liquidator is of paramount p.162 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 sub-section (3) of Section 446 of the Act
- C 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.

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

Palmer's *Company Precedents*, Part II, 17th Edn. Page 302 states:

- E "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
- F 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."

- G 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. 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* (supra). At pages 607 and 608, in paragraphs 15 and 16
- H 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. Cock*, 1923 AC 647 (A):

"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. If so, he comes into the winding up".

It is also summarised in Palmer's *Company Precedents*, Vol. II, 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 S.231 (corresponding with S.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.

Section 231 has been read together with S-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 S. 317 are also supplementary to the

A provisions of S.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.

B 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 valid and could not be challenged as void under S. 232(1), Indian Companies Act."

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

D 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 *Sudarsan Chits (I) Ltd.* (supra), at page 1582, in paragraph 10:

E "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 entertain and dispose of proceedings set out in sub-cl. (a) to (d) of sub-sec. (2) can be invoked in the Court which is winding up the company."

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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:

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"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, Ranga Reddy 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 No.1 should be asked to defend the said suits in that Court since the wasteful expenditure is to be avoided."

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.

R.P.

Appeal allowed.