

In Re: Bihar Solex Pvt. Ltd.

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Court : Patna

Decided On : May-01-1998

Judge : S.N. Jha, J.

Acts : [Companies Act, 1956](#) - Sections 446; [Recovery of Debts Due to Banks and Financial Institutions Act, 1993](#) - Sections 17, 18, 31 and 34; [Constitution of India](#) - Articles 226 and 227

Appeal No. : Company Petition No. 2 of 1992

Appellant : In Re: Bihar Solex Pvt. Ltd.

Advocate for Pet/Ap. : Kalyan Kumar, Adv.

Disposition : Application allowed

Judgement :

S.N. Jha, J.

1. The question of law raised for consideration is whether a suit or proceeding by a bank or financial institution can be transferred for trial by the company court in a winding-up proceeding in view of the provisions of the [Recovery of Debts Due to Banks and Financial Institutions Act, 1993](#) (in short 'the Debts Recovery Act'). An ancillary question also is whether a bank or financial institution can be allowed to seek its remedy as a secured creditor independent of the winding-up proceeding.

2. An application has been filed on behalf of the Industrial Investment Bank of India (IIBI) under Section 40 of the Industrial Reconstruction Bank of India Act, 1984, for the sale of the properties mentioned in the schedules and for certain interim orders. The State Bank of India also seeks recall of the order dated March 24, 1995, transferring Money Suit No. 43 of 1992 (State Bank of India v. Bihar Solex Pvt. Ltd.) from the court of the First Subordinate Judge, Aurangabad, for disposal in the present proceeding in terms of Section 446(2) of the Companies Act.

3. Section 446 of the Companies Act runs as follows :

'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 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 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 (65 of 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.'

4. It is the settled legal position following *M. K. Ranganathan v. Government of Madras* [1955] 25 Comp Cas 344 ; AIR 1955 SC 604, that a secured creditor stands outside the winding-up proceeding and, therefore, can seek his remedy against the company independent of the winding-up proceeding. Nevertheless, as Section 446 of the Companies Act does not make any distinction, in terms, between secured creditors and unsecured creditors, even a secured creditor is liable to seek leave to institute a suit or commence other legal proceedings or, if the same is pending on the date of winding-up order, to proceed with such suit or legal proceeding against the company. Controversy has arisen on several occasions as to whether such leave is to be granted to a secured creditor, as a matter of course. Reference may be made to the cases of *Sudarsan Chits (India) Ltd. v. O. Sukumaran Pillai* [1984] 4 SCC 657 ; [1985] 58 Comp Cas 633 (SC), *Central Bank of India v. Elmot Engineering Co.* [1994] 81 Comp Cas 13 ; [1994] 4 SCC 159 and *Industrial Credit and Investment Corporation of India v. Srinivas Agencies* [1996] 86 Comp Cas 255 ; [1996] 4 SCC 165. In the case of *Industrial Credit and Investment Corporation of India v. Srinivas Agencies* [1996] 86 Comp Cas 255, the Supreme Court, after noticing the rival contentions, observed that although the interest of the secured creditor, who has taken recourse to an independent proceeding to realise his debt has to be protected, it is apparent that it cannot be done at the cost of the other secured creditors as well as that of the workmen under Section 529A of the Companies Act. It further observed that in a particular case the secured creditor, who had approached the civil court may be the one who had lent huge amount or may be the only secured creditor. In such a situation, and upon approach being made by such creditor, the company court may grant leave ; and by the same token refuse to transfer the proceeding to itself. However, where the secured creditor, who had approached the civil court is one

amongst many similar creditors, the company court may take care of the interest of the other secured creditors and either refuse leave or transfer the suit to itself for disposal. However, such transfer should not be made merely for the sake of convenience ignoring the difficulties which may have to be faced by the secured creditors. Summing up, the Supreme Court observed that the approach to be adopted in this regard by the company court cannot be put in a straitjacket formula. The discretion

to exercise in this regard has to depend on the facts and circumstances of each case.

5. In the present case, however, in view of the provisions of the Debts Recovery Act, it is not necessary for me to weigh the pros and cons of the application for grant of leave. Section 17 of the said Act confers exclusive jurisdiction upon the Debts Recovery Tribunal established under the Act (or the Appellate Tribunal, as the case may be) to entertain and decide applications by banks and financial institutions for recovery of debts due to them. Section 18 excludes the jurisdiction of any other court except that of the Supreme Court and the High Court while exercising its jurisdiction under Articles 226 and 227 of the Constitution. The Section reads as follows ;

'On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution), in relation to the matters specified in Section 17.'

6. Section 34 gives overriding effect to the provisions of the said Act. It would be useful to refer to the provisions of the said Section as follows :

'34. Act to have overriding effect.--(1) Save as provided in Sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) and the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).'

7. Another provision of the Act which requires to be noticed is Sub-section (1) of Section 31, which runs as follows :

'31. Transfer of pending cases.--(I) Every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal :

Provided that nothing in this sub-section shall apply to any appeal pending as aforesaid before any court.'

8. While counsel for the SBI and IIBI highlighted the provisions of Section 34, amongst others, counsel for the official liquidator pointed out that a similar non-obstante Clause is contained in Section 446(2) of the Companies Act as well. In other words, according to counsel for the official liquidator, the company court has jurisdiction to not only grant or refuse leave to banks or financial institutions to institute a suit or proceed with the suit already pending, but also to transfer to it such a suit for disposal by itself. The submission has to be rejected in view of the decision of the Supreme Court in Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd. [1993] 78 Comp Cas 803 ; [1993] 2 SCC 144. The Supreme Court has held in no uncertain terms that where two statutes contain similar non obstante clauses, it is the latter which is to prevail over the former, for, the Legislature is supposed to be aware of the fact that the statute already in force contains a non obstante Clause but still incorporates such non obstante Clause in order to obliterate the effect of the non obstante Clause contained in the former statute.

9. In view of the clear provisions of Sections 17, 18 and 34 there cannot be any doubt that the jurisdiction of the Debt Recovery Tribunal to entertain and decide suits or other proceedings by banks or financial institutions is exclusive, to the exclusion of all other courts except the Supreme Court and the High Courts (while exercising its jurisdiction under Article 226/227 of the Constitution). As a matter of fact, in view of the provisions of Section 31, such suit, pending immediately prior to the establishment of the Debts Recovery Tribunal 'stands transferred' to the Tribunal on the date of its establishment. There is no dispute, in the present case, that the State Bank of India and the 1IB1 are covered by the provisions of the Debts Recovery Act and are secured creditors. In this view of the matter, the order dated March 24, 1995, transferring Money Suit No, 43 of 1992 (SBI v. Bihar Solex Pvt. Ltd.) has to be recalled, despite the fact that the order was passed with the consent of counsel for the bank. In fairness to him, however, it must be mentioned that as on March 24, 1995, the Debts Recovery Tribunal had not been established in the State of Bihar and, therefore, on the date the order was passed, it was perfectly a valid order. However, as the position now stands, with the coming into force of the Debts Recovery Act and establishment of the Debts Recovery Tribunal in the State of Bihar, the suit 'has to be transferred' by operation of statutes, there is hardly any discretion left in the court except to pass a formal order of transfer.

10. In the above view of the matter, it is not necessary to consider the merits of the application for leave under Section 446 of the Companies Act. It would not be out of place to mention that in the case of Industrial Credit and Investment Corporation of India v. Srinivas Agencies [1996] 86 Comp Cas 255, the Supreme Court while concluding the discussions observed that, while exercising the power under Section 446 of the Companies Act, the company court 'would also bear in mind the rationale behind the enactment of [Recovery of Debts Due to Banks and Financial Institutions Act, 1993](#)'.

11. A similar view has been taken by the Kerala High Court in Industrial Credit and Investment Corporation of India v. Vanjinad Leathers Ltd. (In Liquidation), AIR 1997 Ker 273 ; [1998] 91 Comp Cas 625 . It took the view that Section 34 of the Debts Recovery Act excludes the exercise of power by the company court under

Section 446 of the Companies Act, and, therefore, neither leave under Section 446(1) was necessary to continue the suit nor the suit could be transferred by the company court to itself under Section 446(2) of the Companies Act. The High Court noticed the observations of the Supreme Court in Industrial Credit and Investment Corporation of India v. Srinivas Agencies [1996] 86 Comp Cas 255.

12. In the above premises, the application filed by IIBI (flag '37') is allowed. Liberty is given to it to recover the dues from the company in accordance with the provisions of the Debt Recovery Act.

13. The order dated March 24, 1995, regarding transfer of Money Suit No. 43 of 1992 (SBI v. Bihar Solex (Pvt.) Ltd.) is recalled. The records of the said suit may be sent down to the court of First Subordinate Judge, Aurangabad, for passing formal order of transfer to the Debts Recovery Tribunal under Section 31 of the Debts Recovery Act in accordance with law.

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