

**Stp Ltd. Vs. Sujit Sen**

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**Court :** Kolkata

**Decided On :** May-05-2006

**Reported in :** (2006)5CompLJ329(Cal),[2006]72SCL399(Cal)

**Judge :** Bhaskar Bhattacharya and; Pravendu Narayan Sinha, JJ.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 38

**Appeal No. :** APO/T. No. 710 of 2003, ACO No. 126 OF 2003 and C.P. No. 96 of 2003

**Appellant :** Stp Ltd.

**Respondent :** Sujit Sen

**Advocate for Def. :** U.S. Menon, Adv.

**Advocate for Pet/Ap. :** S.N. Mukherjee,; D. Basak,; Niloy Sengupta and; Saroj Tulsian, advs.

**Judgement :**

**Bhaskar Bhattacharya, J.**

1. This appeal is at the instance of the company in a proceeding for winding up and is directed against the order dated 27-3-2003, passed by a learned Single Judge thereby admitting a winding up petition to the tune of Rs. 3,20,000, with

further direction upon the company to give a bank guarantee to the tune of Rs. 2,50,000 for the purpose of protecting the interest of the applicant for winding up in respect of the balance amount of Rs. 2,75,978 for which the applicant was directed to seek its remedy before the civil court.

2. The respondent herein filed an application for winding up on the allegation that the dues of the respondent were to the extent of Rs. 5,96,000. The company admitted the claim of the creditor to the tune of Rs. 3,20,000 and the learned trial Judge after considering the materials on record came to the conclusion that it should be proper for him to direct the respondent to seek its remedy by filing a suit for recovery of that amount as the said amount is disputed.

3. Ultimately, the learned trial Judge directed the company to pay the admitted amount of Rs. 3,20,000 by six equal monthly instalments. However, the learned Judge further directed the company to give a bank-guarantee to the extent of Rs. 2,50,000 for protecting the claim of the creditor for the balance amount for which the respondent was asked to seek remedy before the civil court with a further direction that if the creditor did not file the suit within four weeks from that date for the balance amount, the company would be at liberty to withdraw the bank guarantee furnished pursuant to that order.

4. Being dissatisfied, the company has come up with the present appeal.

5. Mr. Mukherjee, the learned senior advocate appearing on behalf of the appellant has raised a pure question of law in support of this appeal.

6. According to Mr. Mukherjee, the learned trial Judge himself having directed the creditor to approach the civil court for the purpose of deciding his disputed claim of Rs. 2,75,978, acted without jurisdiction in directing his client to give security to the extent of Rs. 2,50,000 for securing the part of the claim of the creditor for that disputed amount. Mr. Mukherjee contends that by the aforesaid direction, the learned Company Court has virtually passed an order of attachment before judgment in the suit that would be filed by the creditor.

7. The learned advocate appearing on behalf of the respondent, however, supported the order passed by the learned trial Judge and contended that there was no bar in passing such order even though his client has been asked to approach the civil court for the remedy.

8. After hearing learned Counsel for the parties and after going through the materials on record we find substance in the contention of Mr. Mukherjee that the Company Court itself having turned down the claim of Rs. 2,75,978 as the said amount is a disputed one by directing the creditor to approach the civil court, acted without jurisdiction in passing a direction for production of bank guarantee to secure substantial portion of the disputed claim.

9. In our view, it is for the creditor to first file a suit and thereafter to approach the said court with application under Order 38 of the Code of Civil Procedure in order to get the benefit of attachment before judgment; but a Company Court by directing a party to seek remedy before the civil court for the disputed claim cannot at the same time direct the company to give a bank guarantee for the purpose of securing the disputed claim of the creditor.

10. We thus find that the portion of the order impugned by which the learned trial Judge directed the company to give a bank guarantee to the extent of Rs. 2,50,000 for the purpose of securing the disputed claim of the creditor cannot be supported and is liable to be set aside because such order was passed without having any jurisdiction to decide the fate of the disputed claim.

11. We thus modify the order impugned to the extent indicated above. We have been given to understand that a Division Bench of this Court after entertaining this appeal directed the company to deposit the entire amount of the admitted claim and according to such direction, the company has already paid that amount which is kept in the custody of the learned advocate for the respondent as a receiver.

12. Since we do not interfere with the admitted claim of the respondent, the money already deposited by the appellant may be adjusted towards the claim of the respondent and the learned advocate for the respondent is free to utilise that amount for the purpose of satisfaction of the dues of his client.

13. The appeal is thus allowed to the extent indicated above.

14. In the facts and circumstances, there will be, however, no order as to costs.

**Pravendu Narayan Sinha, J.**

15. I agree.

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