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**(2005) 03 CAL CK 0046**

**Calcutta High Court**

**Case No:** E.C. No. 66 of 2004 and C.P. No. 181 of 2004

Coastal Roadways Ltd.

APPELLANT

Vs

Kanoi Plantation (P) Ltd.

RESPONDENT

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**Date of Decision:** March 2, 2005

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 10, 36, 38, 39, 40
- Companies Act, 1956 - Section 10, 2(11), 2(14), 237, 391

**Citation:** (2006) 132 CompCas 503

**Hon'ble Judges:** Kalyan Jyoti Sengupta, J

**Bench:** Single Bench

**Advocate:** A.C. Kar, for the Appellant; R. Kapoor, for the Respondent

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### **Judgement**

Kalyan Jyoti Sengupta, J.

This batch of execution applications raise legal points as to whether the orders passed by the company court are executable or not, and further whether these orders can be enforced by this Court being the principal civil court. The facts of the execution case are as follows : In each case the petitioners approached the company court initiating proceedings under Sections 433 434 and 439 of the Companies Act, 1956. The learned company judge disposed of all the proceedings by passing almost identical orders allowing the respective companies to pay the debts by instalments and in default liberty was given, inter alia, to apply for execution of these orders treating them to be decrees. I felt the aforesaid two questions are considerably important, so I took assistance of Mr. A. C. Kar, learned advocate, as amicus curiae.

2. Mr. Kar submits drawing my attention to the various provisions of the Companies Act, 1956, that the company court has jurisdiction to pass any order as it deems fit in the winding up proceedings. It is not always necessary that the company court has to pass winding up order. Wide discretion is left with the court for passing appropriate orders as it deems fit and proper. This legal position will appear from

Section 433(2) of the said Act. He submits that it will appear from judicial pronouncements that the object of initiating winding up proceedings is to enforce payment of a debt. This will appear from decision of this Court reported in [Techno Metal India \(P.\) Ltd. Vs. Prem Nath Anand](#), and a Supreme Court decision reported in [Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan](#), . According to his contention the orders under execution are lawful and valid orders and these are executable.

3. But, he contends, these orders cannot be executed by the civil court and they must be executed by the company court itself or any other court where this order could be transferred for execution, not by the civil court. He has drawn my attention to the various Sections, viz. 634 634A 635 482 and 443 of the said Act and contends that it is a self contained code and exhaustive as far as procedure is concerned. The scheme of the aforesaid section is that right from the stage of entertaining application for winding up and to bring an end to the same with logical conclusion it has to be done by the same court. He submits further that definition of the "court" is given in Section 2(11) of the said Act. From the definition it is clear that there is no meaning and contemplation of any court than the same mentioned in the said section. It will appear from the definition of the said section the same does not cover the principal civil court of original jurisdiction. Rather definition of "district court" given in Section 2(14) clearly refers to principal civil court of original jurisdiction in the district but does not include the High Court in exercise of its ordinary original civil jurisdiction. There is no express provision in the Act that orders or decrees passed by the company court shall be executed by the competent court of civil jurisdiction.

4. According to him execution proceedings must not be allowed to be proceeded in this Court and this should be returned and/or dismissed for initiating before the appropriate court.

5. He has also referred to the various provisions of the CPC wherefrom it appears that this civil court cannot entertain any decree or order for execution except as provided therein or under the expressed provision of any other the statute. He has drawn my attention to the provision of Sections 36 38 39 40 of the Code of Civil Procedure.

6. Mr. R. Kapoor, learned advocate while appearing for one of the decree holders submits that the company court is competent to pass any order apart from the order of winding up. However, he does not agree with the submission of Mr. Kar, that the orders cannot be executed by this Court as being principal court of civil jurisdiction. He submits further that it is the only court not the company court which can execute order. He submits that the language of Section 634 of the said Act is clear that this order can be enforced in the same manner as if it were a decree by the court in a suit pending therein.

7. Having heard Mr. Kar and Mr. Kapoor and also other learned lawyers supporting these execution applications, I think the first question as to whether the company court has jurisdiction to pass order for payment of money as it has been done in all these cases, has to be answered in the affirmative. Both Mr. Kar and Kapoor have drawn my attention to Section 443 of the Companies Act, 1956. On reading of this section I think that the power of the company court is quite wide to pass varieties of orders including that of winding up. Section 443 is, therefore, reproduced hereunder:

Section 443. Power of Tribunal on hearing petition.♦(1) On hearing a winding up petition, the Tribunal may♦

(a) dismiss it, with or without costs ; or

(b) adjourn the hearing conditionally or unconditionally ; or

(c) make any interim order that it thinks fit; or

(d) make an order for winding up the company with or without costs, or any other order that it thinks fit:

provided that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(3) Where the petition is presented on the ground of default in delivering the statutory report to the Registrar, or in holding the statutory meeting, the Tribunal may♦

(a) instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held ; and

(b) order the costs to be paid by any persons who, in the opinion of the Tribunal, are responsible for the default.

8. It is clear from the aforesaid section, particularly Sub-section (1), Clause (d) that without passing order of winding up any appropriate order including order of instalment can be passed. This point has been settled by various decisions of the High Court as well as the Supreme Court. In the case of [Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan](#), it was held that winding up petition is perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the court gives to creditor against a company unable to pay its debt. Similar view was taken in

decision rendered by this Court, reported in [Techno Metal India \(P.\) Ltd. Vs. Prem Nath Anand](#), . Therefore, I am of the view that this order of payment of instalment has been passed in lawful exercise of jurisdiction.

9. Although in an unreported decision rendered by this Division Bench of this Court (A.C.O. No. 79 of 2004), Loharimal Steels Pvt. Ltd. v. Bharat Industrial Corporation held that the company court has no jurisdiction to ask for furnishing security but this Division Bench has not dealt with the question whether the company court can pass any order of payment of just debt.

10. Next question comes whether this order is executable or not. Section 634 of the Companies Act has made this provision clear that this order of payment may be enforced in the same manner as a decree made by the court in a suit pending therein. This point came up before the Division Bench of the Bombay High Court in the case of Mrs. Pratibha Inderjit Kapur v. Nilesh Lalit Parekh [2002] 111 Comp Cas 177. In this case a consent order for payment of money passed by the company court was sought to be enforced by initiating insolvency proceedings. The learned trial judge in that case held that such a proceedings is incompetent and the remedy lies in suit. However, the Division Bench has overruled this decision and held amongst others that this order of payment can be enforced in various ways firstly by filing a subsequent winding up petition, secondly by way of execution treating the same being decree and then by initiating insolvency proceedings treating the same being an unsatisfied decree.

Therefore, I hold that the execution proceedings are maintainable for enforcement of this order. The language of Section 634 of the said Act is quite clear in this regard. This section is reproduced hereunder:

Section 634. Enforcement of orders of courts. ♦ Any order made by a court under this Act may be enforced in the same manner as a decree made by the court in a suit pending therein.

11. The expression of the words "any order" means and includes the Order 12 of payment of money and this can be enforced by various method as has been provided under the laws. Unsatisfied decree can be enforced by filing execution application, or initiating insolvency proceedings both in case of company judgment debtor or individual judgment debtor. The second winding up proceedings can also be initiated on the strength of this order of payment.

12. Now, the crucial question comes as to which court will enforce this order of payment. According to Mr. Kar, this execution proceedings lies in the court which has passed the order, whereas Mr. Kapoor, contends that reading language of Section 634 execution proceedings shall be levied before the principal court of civil jurisdiction within whose jurisdiction the registered office of the company situated meaning thereby before this interlocutory court.

13. It is true in the said Section 634 it does not expressly make clear where the execution proceedings are to be initiated. Upon careful reading of Section 634 and also Section 634A it appears to me the order of payment can be executed by the court which has passed the order. Similarly, Section 634A of the said Act has empowered the Company Law Board to execute it. In the decision of the Bombay High Court rendered in the case of Mrs. Pratibha Inderjit Kapur v. Nilesh Lalit Parekh [2002] 111 Comp Cas 177 this point was dwelt upon. It is observed by their lordships that Section 634 provides that the orders may be enforced by that court and Section 634A provides for enforcement by the Company Law Board which does not have any inherent power to pass a decree. It is also observed that Section 634 provides that if the Board is unable to execute order then it may send its order for execution to the court within the legal limits of whose jurisdiction the registered office of the company is situate or the person concerned voluntarily resides or carries on business, etc. It is further observed that Section 634 deals with order passed by the court, which, has jurisdiction to pass decrees, vide Section 10 of the Companies Act.

14. In this connection the definition of Section 10 in the said Act has to be noted:

(1) The court having jurisdiction under this Act shall be◆

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situated, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of Sub-section (2) ; and

(b) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district.

(2) The Central Government may, by notification in the Official Gazette and subject to such restrictions, limitations and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the Court, not being the jurisdiction conferred◆

(a) in respect of companies generally, by Sections 237 391 394 395 and 397 to 407, both inclusive ;

(b) in respect of companies with a paid-up share capital of not less than one lakh of rupees, by Part VII (sections 425 to 560) and the other provisions of this Act relating to the winding up of companies.

(3) For the purposes of jurisdiction to wind up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

15. Therefore, the court means the company court and this Court has exclusive jurisdiction to pass any order including enforcement of the order passed by it. If for any reason the order passed by one company court cannot be enforced under the situations mentioned in Section 635 then such order can be executed by another company court not by any other court. Therefore, the intention of the Legislature is clear that the order passed by the company court can only be executed by company court alone and no other court. The definition of the court (section 10) under the said Act is not intended to mean and include the civil court. In fact, it will appear u/s 446 that after winding up order is passed or official liquidator has been appointed as provisional liquidator, it is the company court which has got exclusive jurisdiction to entertain any suit or proceeding by or against the company. Therefore, in my opinion reading as a whole as regard jurisdiction of the company court the authority of any other court for any matter is excluded except in case of enforcement of order passed by the Company Law Board. In this respect special provision u/s 634A of the said Act, has been provided.

16. The civil court has got the power of execution under the provisions of the Civil Procedure Code. The civil court can execute the decrees or orders passed by it as provided u/s 38 of the Code of Civil Procedure. That apart the civil court can execute decrees provided it is conferred with power under the special statute though the decree is neither passed by the civil court nor it is received by way of transfer as contemplated in Section 38 of the Code of Civil Procedure. To give examples the awards passed under the provisions of the Arbitration and Conciliation Act, 1996, Legal Service Authorities Act, 1987, and other various statutes are enforceable as decrees in civil courts. These statutes expressly have conferred power upon the civil court to execute awards or orders as a decree of the civil court. But the Companies Act in my view has not conferred such power upon the civil court.

17. Under such circumstances I accept the argument of Mr. Kar, that the execution application cannot be levied before this Court being a court of principal civil jurisdiction and it must be executed by the court which has passed the order however, of course adhering to the same method and procedure as it is followed in case of execution of decree or orders in the civil court under the provisions of the Code of Civil procedure. Thus these execution proceedings have been presented and filed before the incompetent court, instead of dismissing all these proceedings I think following the principle of the provisions of Order 7, Rule 10 of the Code of Civil Procedure, I return all these applications for execution for presentation before the appropriate court.

18. There will be no order as to costs.