

(2005) 06 BOM CK 0146

Bombay High Court

Case No: Chamber Summons No. 1269 of 2004 in Suit No. 1738 of 1979

Omprakash Madanlal Pandya

APPELLANT

Vs

Shree Vallabh Glass Works Ltd.
and Others

RESPONDENT

Date of Decision: June 7, 2005

Acts Referred:

- Companies Act, 1956 - Section 391, 434, 446, 446(2), 446(4)
- Constitution of India, 1950 - Article 14, 226, 227

Citation: (2005) 4 BomCR 516 : (2006) 131 CompCas 527

Hon'ble Judges: S.U. Kamdar, J

Bench: Single Bench

Advocate: A.K. Tripathi, instructed by S.P. Pala, for the Appellant; N. Solanki, instructed by K. Jain, for the Respondent

Judgement

S.U. Kamdar, J.

The present Chamber Summons has been taken out for the order and direction against defendant No. 4 to give inspection of the complete papers, records and proceedings in the aforesaid suit. The suit has been filed by the plaintiff against respondent No. 1 company. The said respondent No. 1 company has since gone into liquidation and Official Liquidator has been appointed in winding up proceedings u.s. 434 of the Companies Act by the High Court of Gujarat at Ahmedabad.

2. The present suit has been filed inter alia for the recovery of sum of Rs. 1,53,190/- being amount due and payable by the company to the plaintiff. Plaintiff claims that he was an employee of defendant No. 1 company from 1.10.69 at the monthly salary of Rs. 1500/-. According to the plaintiff, company is liable to make payment towards the salary from 1.10.76 to 31.9.79 and various increments, Privilege Leave, Provident Fund Contribution, Leave Travel Allowance and bonus, totalling to an amount of Rs. 1,53,190/-. After the suit is filed the said respondent

No. 1 company has gone in liquidation. In the High Court of Gujarat at Ahmedabad, Company petition was filed against respondent No. 1 company being company petition No. 157 of 2000. In the said petition Gujarat High Court has passed an order dt.10.03.03 of winding up against respondent No. 1 company and Official Liquidator is appointed to complete winding up formalities. In view of the order of winding up and the appointment of Official Liquidator the plaintiff took out chamber summons being chamber summons No. 1188 of 2003 and by an order passed by this Court (S.Radhakrishnan, J.) on 18.9.03 Official Liquidator was permitted to be impleaded as a party defendant to the present suit. Accordingly the plaintiff has impleaded Official Liquidator as a party defendant No. 4 in the present suit.

3. The present chamber summons has now been taken out by the applicant claiming various reliefs against defendant No. 4 for giving inspection of papers and records and proceedings in the present suit and certified copies of all papers, records and proceedings in the aforesaid matter. It has been contended that the Official Liquidator is in knowledge of the present suit as well as orders passed herein. It has been contended that on 29.5.04 when the plaintiff went to meet Official Liquidator High Court of Gujarat at Ahmedabad and apprised to him about advertisement dt.4.5.03 for auction sale of immovable property by the Official Liquidator and has explained to the Liquidator that the properties are attached by order dt.17.8.01, Official Liquidator High Court Gujarat at Ahmedabad paid no attention and therefore the present chamber summons has been taken out by the plaintiff.

4. U.s. 446 of the Companies Act it is provided that once the order of winding up is passed an Official Liquidator stands appointed and all proceedings in every court stands stayed unless the leave is obtained of the Company Court who has passed the order of winding up. The learned counsel appearing for defendants No. 1 to 3 has raised an objection that the present chamber summons has been sought to be initiated without obtaining leave u.s. 446 of the Companies Act. However, the learned counsel for the plaintiff contends that it is not necessary for him to obtain leave u.s. 446 and he is entitled to maintain the present Chamber Summons without obtaining any leave from the Company Court. In support of the aforesaid contention, he has relied upon the order passed by this court (S.Radhakrishnan J) dt.18.9.03 in Chamber Summons No. 1188 of 2003 and has contended that by the said order the court granted the relief to implead the Liquidator as a party to the suit without obtaining leave u.s. 446 and therefore, this court also should pass necessary order in the aforesaid matter.

5. I have perused the order of the learned single Judge. From the said order I find that neither the learned single Judge has considered or decided an issue i.e. whether once a Liquidator is appointed then to prosecute the suit against the company under liquidation a leave is necessary or not under s. 446 of the Companies Act.

446.(1) When a winding up order has been made or the Official Liquidator has been appointed a provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the 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 u/s 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.

(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.

6. In a written submission filed by the plaintiffs, it has been contended that except the Official Liquidator appointed by company court being High Court of Gujarat at Ahmedabad in the present case no other person has a locus standi to raise issue of leave u.s. 446 of the companies act. In support of the aforesaid contention, reliance is placed on the Judgment of the Kerala High Court in the case of A.M. Padmakshi v. Sudarsan Chits (India) Ltd. and Ors. reported in Company cases - Vol.62 Page 637/643.

7. The next contention has been advanced is that defendant No. 4 has not appeared before this court to contest the proceeding and therefore, the issue of s. 446 has been waived by the said Official Liquidator of High Court of Gujarat at Ahmedabad. In the alternative to the aforesaid, it has been submitted that the plaintiff is not required to take leave u.s. 446 of the companies act 1956 on the ground that the Chamber Summons No. 1188 of 2003 is already been made absolute by this court (S.Radhakrishnan, J) and Liquidator is already allowed to be impleaded as party to the present proceeding. It has been contended that in view of the said order already passed by the learned single Judge (S.Radhakrishnan, J), I am not entitled to go into the issue of s. 446 i.e. whether the leave is required to be obtained by the plaintiffs or not to prosecute the present suit further.

8. The next contention advanced by the learned counsel in his written submission is that the present suit is of year 1979 and the same is filed under the Letter Patent of the High Court and therefore proceedings pending in this court is not affected by provision of s. 446 which has been part of Companies Act 1 of 1956. It has been contended that the Letters Patent being a superior legislation the provisions of the Company's Act cannot affect the jurisdiction of the High Court which is established under the said Letters Patent Act. It has been alternatively contended that sub section 4 of s. 446 in terms provide that nothing in sub-section 1 to 3 of section 446 shall apply to any proceeding pending in appeal before the Supreme Court or High Court. It has been contended that in view of the provision of s. 446, sub section 4 read with LP 1860 this court being a superior court of superior jurisdiction under the scheme of constitution the provision of s. 446 are not applicable. In support of the aforesaid contention, the learned counsel has relied upon the Judgment of the Gujarat High Court in the case of Vania Silk Mills Ltd. and Ors. v. Silk Mill Worker's Union and Anr. reported in 92 COMP CAS 671. In my opinion, reliance placed on the aforesaid Judgement of the Gujarat High Court is without any merits. Gujarat High Court has held that the provision of s. 446 of the Companies Act cannot control the provisions of Article 226 and 227 under the Constitution of India. It is undoubtedly so because the constitutional jurisdiction of this court cannot be affected by ordinary legislation. However, reliance placed on the aforesaid judgement and contention raised based thereon that because of the similar reasons the letters patent jurisdiction of the High Court cannot be affected by virtue of s. 446 has no merits because letters patent jurisdiction is nothing but ordinary law and cannot be equated to the Constitution of India.

9. The learned counsel has thereafter relied upon the Judgement of Allahabad High Court in the case of Reliance Dyes and Chemical Co. v. Abhudaya Paper Mills Ltd. In my opinion the said judgment has also no application because the Allahabad High Court in the aforesaid case was concerned with the issue i.e. whether an application to seek a leave u.s. 446 to proceed with SLP pending in the Supreme Court was necessary or not. Obviously by virtue of sub section (4) of section 446 no such leave was necessary and therefore, Allahabad High Court has rightly held that section 446 does not apply in case where proceedings is already pending by way of appeal to the Supreme Court. In the present case, we are at the original stage where trial is in progress and not at the Appellate Stage and in view thereof sub section (4) of section 446 has no application whatsoever.

10. It has been thereafter contended that the Hon"ble High Court being a superior court it is an admitted position that the High Court appellate proceedings are exempted from the rigour of section 446 of the companies act then why the original side proceedings should not be covered by the said sub-section (4) of Section 446. Thus, it is contended that s. 446 if made applicable to only appellate proceedings and not to original proceedings then it would be obviously violative of Article 14 of the Constitution of India in as much as appellate jurisdiction and original jurisdiction

is differently treated and the appellate jurisdiction is treated as jurisdiction of superior court whereas an original jurisdiction is treated as jurisdiction of court of lower authority.

11. I have considered the written submissions made by the learned counsel for the plaintiff. To say in brief, I find the proposition of law advanced by the learned counsel as most frivolous. The provision of s. 446 which are reproduced hereinabove in my opinion are clear provisions inter alia prescribing the stay of the proceedings as soon as winding up order is passed by winding up court. Once the winding up order is passed all proceedings pending in all courts stands stayed unless expressed leave is obtained by a party who seeks to continue the proceedings outside the company jurisdiction. This is because once winding up order is passed all the claims are required to be lodged with Official Liquidator and Official Liquidator is required to adjudicate the said claim and arrive at payment due to each of the creditors by taking into account the sale proceeds of the assets of the company which are available. This is required for the purpose of equal distribution of the assets to all the claimants. However, the learned counsel contends that he is not liable to obtain leave u.s. 446 on the aforesaid grounds and still continue to prosecute the present proceedings. Each of the aforesaid contentions in my opinion have no merits. First contention that merely because by non speaking order the learned single Judge of this court, (S.Radhakrishnan, J) has permitted the plaintiff to implead the Liquidator as party I should assume that the court has permitted the plaintiff to prosecute the proceedings without obtaining leave. In my opinion the said order does not in any manner state or indicate that the court has held that the plaintiff in the present case is entitled to continue the proceedings without obtaining leave under s. 446 of the Act. In fact in my opinion it was not pointed out to the learned single Judge at all that a leave is not obtained u.s. 446 of the companies act and therefore proceedings could not have been continued and Liquidator could not have been impleaded as a party to the suit unless the leave is obtained to continue the present proceedings.

12. The second contention raised on the ground of sub section 4 of s. 446 is also equally without any merits. Sub section 4 in my opinion only applies where proceedings are at appellate stage. It is because once a proceeding is already determined by order, decree or judgement of the court then it is only appellate court in normal jurisdiction can set aside or upheld the same. Neither the Liquidator nor the Company Court which is not the Appellate Authority can interfere or alter or set aside the Judgment and order passed by lower authority. It is because hierarchy of judicial system in this country provides for an order passed by lower authority can be only set aside by higher authority exercising Appellate jurisdiction and not any other court which is exercising any other jurisdiction may be of a superior court of jurisdiction but not having appellate jurisdiction against an order and judgment passed by a lower authority. Thus, even if the high court has a original jurisdiction but still the Judge taking the Original Side matter cannot exercise the appellate jurisdiction for setting aside the order and judgment passed by lower or

subordinate courts and that jurisdiction has to be exercised by Judge of High court exercising the appellate jurisdiction. Thus, sub section 4 of section 446 clearly applies only in respect of those proceedings which are at the appellate stage and not at the stage of original trial. The present suit is still at the trial stage and not at the appellate stage and therefore, in my opinion the sub-section 4 of section 446 would not be applicable to the present proceedings. Thus, reliance placed on the aforesaid sub section 4 of section 446 is without any merits and the Judgments cited in support thereof are also not applicable because those judgments are not in respect of High Court exercising original jurisdiction at the trial stage.

13. The next contention advanced by the learned counsel by virtue of the fact that the High Court is established by virtue of Letters Patent the provision of s. 446 would not be attracted and the jurisdiction of High Court is not affected by s. 446 merely because it is created by Letters Patent in my opinion has no merits whatsoever. The establishment of High Court under Letters Patent is obviously subject to various laws enacted from time to time and obviously subject to jurisdiction vested by this court either the Original jurisdiction or Appellate jurisdiction thereof. Merely because the companies act is enacted in 1956 and Letters Patent is of 1860 does not mean that provision of s. 460 is not applicable. The last contention advanced by the learned counsel that none except Official Liquidator has locus standi to raise aforesaid issue in my opinion has no merits. I am of the opinion that if there is a statutory stay u.s. 446 irrespective of the fact that the said issue is raised by Official Liquidator or not, law courts are supposed to act in accordance with such statutory provision and are entitled to take cognizance of such embargo. Provision of s. 446 is a statutory stay of the proceedings once winding up order is passed. In the light of the clear provision of s. 446 it is not possible for me to hold that merely because Liquidator has not raised the aforesaid objection, I must proceed with the suit and accordingly grant relief which is sought in the present Chamber summons by ignoring the provision of law as provided under s. 446 of the Act.

14. In the present Chamber Summons plaintiff is seeking direction that search / inspection be given of the complete papers records and proceedings in the present suit with the party defendant No. 4 and furnish certified copies of all the papers proceedings and records in the aforesaid matters. Papers and proceedings are before the court. I do not understand on what basis the learned counsel is seeking the reliefs in terms of prayer (a) of the Chamber Summons. Prayer (b) is only interim prayers pending the hearing and final disposal of the chamber summons. It is clear that no such relief can be granted to the plaintiff herein. Relief sought is absolutely incapable of any understanding. The plaintiff in the present suit is in possession of all records and proceedings of the court being in carriage of proceedings then why he desires the certified copies of the said proceedings from Liquidator being defendant No. 4. The learned counsel has been totally unable to answer his question. I am therefore, of the opinion that Chamber Summons should be

dismissed. Present Chamber Summons is therefore accordingly, dismissed. Suit No. 1738 of 1979 is stayed in view of s. 446 of the companies act, 1956 till and until the plaintiff obtains necessary leave u.s. 446 from the company court which has passed winding up order being High Court of Gujarat at Ahmedabad. The plaintiffs to pay the costs of Chamber Summons quantified at Rs. 10,000/-.