IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 429 OF 2013
IN
COMPANY PETITION NO. 353 OF 2003
ALONG WITH
OLR DT.17.08.2011

Directorate of Enforcement .. Applicant

In the matter between :

Nigg Automation AG .. Petitioner
Vs.
The O.L. of M/s. Solid
Carbide Tools Ltd. .. Respondent

Dr.G.R.Sharma a/w. Mr.D.P. Singh for applicant.

Mr.Sharan Jagtiani appointed as Amicus for O.L. a/w. Mr.Aditya Pimple.

CORAM : K.R.SHRIRAM, J.
DATE : 20TH JANUARY, 2016

P.C.

1 This application is filed to condone the delay of 208 days and to quash and set aside the order of adjudication dated 14.02.2012 passed by the Deputy Official Liquidator. Two issues that require to be decided are : (a) Whether the applicant was required to take leave of the Company Court under Section 446 of the Companies Act, 1956 or not? ; (b) Whether the Official Liquidator was required to be heard by the adjudicating authority or not before the applicant passed the order on a show cause notice that was issued to the company in liquidation under Foreign Exchange Management

Act, 1999 (FEMA, 1999), applicability of Section 457 of the Companies Act, 1956 ? (the said Act).

2 Shri Shraran Jagtiani, Advocate at the request of the Court agreed to be the amicus curiae in this matter. I have heard Shri Jagtiani and Dr.Sharma for the applicant. I have also considered the pleadings. I must note the immense support given to the Court by Shri Jagtiani.

3 Shri Jagtiani submitted and correctly so, that leave under Section 446 of the said Act was not required for going ahead with deciding a show cause notice issued under FEMA, 1999. In ***S. Kandeakar Versus V.M.Deshpande & Anr.*** [1] wherein the Court was deciding whether the Income Tax Officer performs the function of a Court under Section 446 of the said Act and whether permission of liquidation Court was necessary, the Court came to a conclusion that the Income Tax Officer does not perform a function of a Court as contemplated under Section 446(2) of the said Act. The Court further held that the Income Tax Act was a complete code and it is particularly so with respect to assessment and re-assessment of income-tax and the Liquidation Court cannot perform the functions of Income-tax Officers while assessing the amount of tax payable by the assessees even if

1 1972 (1) SCC 438

the assessee be the company which is being wound up by the Court.

The Court concluded by saying that the language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding up Court with the powers of an Income-tax Officer conferred on him by the Income Tax Act. The Court, however, clarified that the liquidation court would have full power to scrutinise the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation Court then to decide how far under the law, the amount of Income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation.

4 A Division Bench of the Delhi High Court in ***Sales Tax Officer, Central Circle, New Delhi Vs. Byford Ltd.***[2]**,** held that the Company Judge does not have the power to stay assessment proceedings for the imposition of penalty under the Sales Tax Act, Sales Tax Act is a complete code and the Company Court cannot perform the functions of the Sales Tax Officer or to transfer the assessment proceedings to itself and assess the company to sales tax or for that matter levy penalty. The Court concluded by saying that the Legislature never intended that the company court invested with the power

2 (1984) 55 CompCas204 (Delhi)

to stay suits or proceedings should order the Sales Tax Officer to stay his hands and not levy penalty where in his opinion, under law, the circumstances of the case require him to do so.

5 This Court ***In the winding up order dated 23.10.1997 of Firth (India) Steel Co. Ltd. (in liquidation)*** [3] concluded that the expression 'legal proceedings' in Section 446(1) and the expression 'suit or proceedings' in Section 442 under Chapter II of Part VII of the Companies Act does not include criminal complaints filed under Section 138 of the Negotiable Instruments Act.

6 The Foreign Exchange Management Act, 1999 is also is a complete Code in itself. The Company Court cannot perform the functions of adjudicating authority/the Enforcement Directorate and invest in itself, the power of the adjudicating authority to levy penalty where, in his opinion, under law, the circumstances of the case require him to do so. The Company Court cannot try the contravention of provisions of Section 8 of FEMA, 1999. The expression “suit” or “other legal proceedings” in Section 446(1) and the expression “suit or proceedings” in Section 442 of the Companies Act, cannot include adjudication for contravention of provision of Section 8

3 1999 (1) Mh.L.J. 274

of FEMA, 1999. The expression “legal proceedings” would mean only those proceedings which have a bearing on the assets of the company in winding up or have some relation with the 'issue in winding up. It cannot include criminal or quasi-criminal proceedings where the company was liable to be presented for, which has no bearing to the issue in winding up.

7 I, therefore, agree with the submissions of Shri Jagtiani that the expression 'legal proceedings' under Section 446(1) of the Companies Act will not include the adjudication being done by the adjudicating authority under FEMA, 1999 and leave under Section 446 was not required for the Directorate of Enforcement.

8 At the same time it is not as if there is no control over such proceeding under FEMA. Section 457(1)(a) reads as under :

> **457 Powers of liquidator :**
>
> (1) The liquidator in a winding up by the Court shall have power, with the sanction of the Court :-
>
> (a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

Let us juxtapose this provision with Section 446. Section 457(1)(a) not only includes 'suits or other legal proceedings' as mentioned in Section 446, it also includes 'prosecution' and 'other legal proceedings-civil or criminal'. The proceeding that was being conducted by the adjudicating authority under FEMA, the Directorate of Enforcement, though it might not in its strict sense be criminal proceedings, certainly it would be *quasi* criminal proceedings. Therefore, in my view, the proceedings by the Directorate of Enforcement would be covered under 'other legal proceedings'. Hence, the official liquidator had the power, with the consent of the Court, to defend the proceedings that was being adjudicated by the Directorate of Enforcement under FEMA. If one considers the submissions by the applicant, viz., Directorate of Enforcement, the stand taken is not that the official liquidator need not have been heard, but the stand is the official liquidator was served notice of hearing. According to the applicant, the notice of hearing was sent to the company but was returned 'undelivered' by the Postal authorities and hence the same was pasted on the gate of the factory premises. In view thereof, according to the applicant, since the possession of the factory premises was with the official liquidator, it should be concluded that the official liquidator was aware of the proceedings being conducted by the applicant, viz., Directorate of Enforcement.

It is also submitted that the Ex-director of the Company, by a letter dated 12.06.2006, informed the official liquidator that hearings were conducted by the Directorate of Enforcement on 24.12.2004, 6.01.2005 and 12.04.2005 and hence the liquidator is deemed to have been aware about the proceedings before the Directorate of Enforcement.

9 Going in the reverse order, the second submission of the applicant is without any substance because the order passed by the Directorate of Enforcement is dated 24.04.2006 whereas the letter from the Ex-director of the company relied upon by the applicant is dated 12.06.2006. Therefore, the Ex-directors have brought to the notice of the official liquidator about the hearing after the order was passed by the Directorate of Enforcement.

10 As regards the first defence, from the submissions made by the applicant, it is clear that the reason why they pasted the hearing notice on the factory premises was because the notices sent to the company were returned undelivered. On 15.01.2004, the petition was admitted by this Court and the official liquidator was appointed as provisional liquidator of the company. The official liquidator has convened a meeting for taking the possession of the office and factory of the company on 5.04.2004. Therefore, the advertisement regarding the admission of the petition and appointment of the official liquidator as the provisional liquidator would

have been issued much before 5.04.2004 itself. The applicant, therefore, should have been aware that the official liquidator is already appointed as provisional liquidator. The applicant should have, therefore, served the notice of hearing upon the official liquidator. The final order for winding up was passed on 4.07.2005 and the order of adjudication was passed on 27.04.2006. In my view, the second issue requires to be answered in the affirmative. The official liquidator was required to be heard by the adjudicated authority before the order dated 27.04.2006 was passed.

11 The counsel for the applicant Dr.Sharma in fairness stated that there is nothing to show that a notice of hearing was served upon the official liquidator and he further stated in fairness that possibly the authorities were not even aware, on the date of hearing, that the official liquidator has been appointed as provisional liquidator of the company.

12 Therefore, in my view, the official liquidator not having been served the notice of hearing, there was nobody to defend the company at the time of hearing before the Directorate of Enforcement.

13 The applicant, therefore, is directed to issue fresh show cause notice to the Official Liquidator. The liquidator is authorized to defend the same. It

is clarified that the show cause notice should be restricted to the official liquidator only to defend the company. The show cause notice to be issued within three weeks from today and within four weeks thereafter, the official liquidator to reply to the show cause notice. While issuing the show cause notice, the adjudicating authority will also provide copies of all the documents relied upon in the show cause notice. Within two weeks of receiving the reply, the adjudicating authority will give a personal hearing to the official liquidator and pass an order within two weeks thereafter.

14 The official liquidator not to declare dividend with regard to this company in liquidation for 12 weeks from today.

15 The application stands disposed accordingly.

Liberty to apply.

15 All parties to act on a copy of this order duly authenticated by the Associate of the Court/Company Registrar.

(K.R. SHRIRAM, J.)