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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 705/2018 & CM APPL. 25048/2018
NARESH KUMAR GUPTA & ANR Petitioner
Through: Mr. Akshay Goel, Adv.

versus

NAVBHARAT ENTERPRISES Respondent
Through: Mr. Narender Sharma, Adv.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

18.01.2019

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Vide the present petition, the petitioner assails the impugned order dated 25.05.2018 of the Court of the ADJ-05, PHC, New Delhi in Execution Petition No. 5793/2016 filed by the respondent herein as the applicant thereof against Shri Shyam Pulp & Board Mills Ltd., copy of which has now been submitted by learned counsel for the respondent which indicates that it seeks the execution of decree dated 21.12.2015 in CS 58/2015 seeking the directions for recovery of the decretal amount of Rs.19,74,730/- along with interest @ 8% p.a. till realization and costs of Rs.1,48,560/- as stated in the decree sheet. Vide the impugned order dated 25.05.2018, it is indicated that the Directors of the judgment debtor's company i.e. the Director of Shri Shyam Pulp & Board Mills Ltd. were not present in the Court of the ADJ concerned despite orders and that an application had been filed under Section 446 of the Companies Act, 1956 along with affidavits of Mr. Amit Kumar Gupta and Mr. Naresh Kumar Gupta, the Directors of the said company with the matter having been renotified for disposal of all the

miscellaneous applications on the date 08.06.2018, on which date, all the Directors of the judgment debtor's company i.e. of Shri Shyam Pulp & Board Mills Ltd. were directed to be present in the Court on the next date of hearing.

Vide the present petition, the petitioner submits that in view of the specific embargo of Section 446 of the Companies Act, 1956, in view of an official liquidator having already been appointed vide order dated 07.08.2015 in CO Petition 81/2014 qua Shri Shyam Pulp & Board Mills Ltd. which proceedings were revived vide order dated 15.05.2018 in CO Petition 81/2014, the directions vide the impugned order to the Directors of Shri Shyam Pulp & Board Mills Ltd. to put in appearance before the Ld. Executing Court is a miscarriage of justice in as much as no liberty has been sought in terms of Section 446 (1) of the Companies Act, 1956 and no such liberty has been so granted till date.

Section 446 (1) of the Companies Act, 1956 provides to the effect:

“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 the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.”

It is apparent that in terms of Section 446 (1) of the Companies Act, 1956, the proceedings against the company cannot proceed except with leave of the Tribunal concerned and subject to such terms as the Tribunal thereunder may impose. In terms of Section 447 of the said enactment further, it is apparent that an order for winding of a company operates in

favour of all the creditors and of all the contributories of the company as if it has been made on the joint petition of a creditor and of a contributory.

It had been submitted during the course of submissions made on 11.01.2019 on behalf of the respondent by learned counsel for the respondent that the respondent was not shown in the list of the creditors of the company of which the petitioners were Directors which was refuted on behalf of the petitioner and thus the list of the creditors which showed the name of the respondent as being a creditor of the company was directed to be filed by the petitioners. On behalf of the petitioners has been filed an affidavit of the petitioner no.1, one of the Directors of the company to state that the original certificate issued by the Chartered Accountant reflecting the respondent namely M/s Nav Bharat Enterprises as a creditor of the petitioner's company was being submitted as Annexure-A through the said affidavit which Annexure-A is a certificate dated 16.01.2019 issued by the Chartered Accountant with Membership No.524444 to state that on inspection of the books of accounts of Shri Shyam Pulp & Board Mills Ltd. it had been certified that an amount of Rs.92,65,929/- was outstanding and payable as on date to M/s Nav Bharat Enterprises, Ghaziabad.

Reliance is *inter alia* placed on behalf of the petitioners on the verdict of the Hon'ble Supreme Court in ***The Official Liquidator Vs. Dharti Dhan (P) Ltd. (1977) 2 SCC 166*** with specific reference to the observations therein in para-6 which read to the effect:

The clear object of the section is that claims in suits in and proceeding pending elsewhere which have a bearing on the company's liabilities, may be stayed only until the winding up order is made, because, after the winding up order has been

passed, section 446 begins to. operate so as to. automatically transfer with certain exceptions proceedings against the company being wound up to. the Court exercising the. jurisdiction to wind it up. Section 446 reads:

"446.(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 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 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.

(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".

Taking into account the factum that the petitioner no.1, one of the Directors of Shri Shyam Pulp & Board Mills Ltd. already under liquidation and qua whom the official liquidator has already been appointed, has admitted, the factum of the respondent being a creditor of the said company in terms of Section 446 (1) of the Companies Act, 1956, the proceedings in relation to the Execution 5793/2016 pending before the ADJ-05, PHC, New Delhi are stayed till any such permission for continuance thereof is granted by the NCLT. The operation of the impugned order dated 25.05.2018 in Execution Petition No. 5793/2016 of the Court of the ADJ-05, PHC, New Delhi is thus set aside.

The petition is disposed of accordingly.

ANU MALHOTRA, J

JANUARY 18, 2019

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