

raised on behalf of the auction purchaser that the points on which appeal was allowed by the lower appellate Court could not be raised by the judgment debtor.

(8) In view of the statement of law, which came into being after the amendment Act No. 104 of 1976, the decisions in regard to law prevailing before that date would be wholly irrelevant. The decision of R. N. Mittal, J. in *Mal Singh's case* (supra), and other cases relied therein relate to proceedings before the amendment Act No. 104 of 1976 and, therefore, need no further discussion. As already stated above, the proviso added by Punjab amendment to rule 90 of Order 21, of the Code, stands repealed with effect from 1st February, 1977. Rule 90 as it stands now with effect from 1st February, 1977 would be applicable.

(9) For the reasons recorded above, we do not find any merit in this revision and the same is dismissed leaving the parties to bear their own costs. The Executing Court would now proceed to sell the attached property afresh in accordance with law.

N.K.S.

*Before S. P. Goyal and G. C. Mital, JJ.*

UNITED COMMERCIAL BANK,—*Petitioner*

*versus*

STATE OF JAMMU AND KASHMIR AND OTHERS,—*Respondents.*

*Company Petition No. 48 of 1981*

September 18, 1985.

*Companies Act (I of 1956)—Section 446—Companies Act (VII of 1913)—Section 171—Company in liquidation—Suit or other legal proceedings commenced against the company after the winding up order—Requirement of leave under section 446—Post facto leave—Whether could be granted.*

*Held.* that the change made in the phraseology of section 446 of the Companies Act, 1956 is of no consequence so far as the competency of the Court to grant post facto sanction to continue with the suit instituted after the winding up order is concerned and the

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suit or other legal proceedings shall be deemed to have been validly instituted from the date the requisite sanction is granted. Consequently, obtaining leave of the Court to proceed with a suit against a company in liquidation is not a condition precedent for instituting the suit and even though a suit had been instituted against a company in liquidation without obtaining leave, such leave can be applied for and obtained even subsequently.

(Para 5)

Eastern Steamship Private Ltd. vs. Pucto Private Ltd. and another  
(1971)41 Comp. Cas. 43.

(Dissented from)

*Case referred by Hon'ble Mr. Justice S. P. Goyal to a larger Bench for the decision of an important question of law involved in this case on 9th November, 1984. The larger Bench consisting of Hon'ble Mr. Justice S. P. Goyal and Hon'ble Mr. Justice Gokal Chand Mital on September 18, 1985 after deciding the question of law involved referred that the case may be listed before learned Single Judge on October 25, 1985.*

*Case transferred to Punjab and Haryana High Court from the High Court of Jammu and Kashmir under the orders dated August 1, 1980 passed by Hon'ble Company Judge of Punjab and Haryana High Court and registered as Company Petition No. 48 of 1981.*

J. S. Narang Advocate, for the Petitioner.

Munishwar Puri, Advocate and R. K. Chhiber Advocate, for the Respondent.

#### JUDGMENT

S. P. Goyal, J.

(1) The Hindustan Forest Company, a private limited concern, went into voluntary liquidation on November 8, 1974. The present suit was filed by the United Commercial Bank against the said company and other persons on June 16, 1975 in the High Court of Jammu and Kashmir and was transferred to the file of this Court by the order of the Company Judge dated August 1, 1980. A preliminary objection as to the maintainability of the suit was raised in the written statement on the ground that no leave had been obtained prior to its institution. *Vide* order dated November 9, 1984, sitting singly, I held that the order passed on August 1, 1980 impliedly granted *post facto* permission to the institution of the suit. The question still remains, as to whether *post facto* permission could be

granted and be effective for the continuation of the suit instituted prior thereto. As there was a conflict on this question between the two Division Bench judgments of the Bombay and Madras High Courts, I referred the case to a larger Bench. This is how we are seized of this matter.

(2) The requirement of the leave of the Court to institute or continue any proceeding or suit against the company in liquidation and its grant is provided for in section 446 of the Companies Act 1956. A similar provision was contained in section 171 of the Companies Act 1913. Under that provision the question of the grant of *post facto* sanction came up before the Supreme Court in *Bansidhar Shankarlal v. Mohd. Ibrahim and another*, (1) and it was ruled :

“Alternatively, assuming that sanction under section 179 did not dispense with the leave under section 171, that there was nothing in the Act which made leave under section 171 a condition precedent to the institution of a proceeding in execution of a decree against the company. Failure to obtain leave before institution of the proceeding did not entail dismissal of the proceeding : the suit or proceeding instituted without leave of the Court would be ineffective until leave was obtained, but once leave was obtained the proceeding would be deemed instituted on the date of granting leave.”

(3) While reenacting the provisions of section 171 as contained in section 446 of the Companies Act, 1956 the Legislature made some changes in its phraseology and on its basis, a Division Bench of the Bombay High Court in *Eastern Steamship Private Ltd. v. Pucto Private Ltd. and another*, (2), took the view that leave to continue a suit or to proceed with it could only be granted before the suit is commenced and not thereafter, if it is commenced after the date of the winding up order. A contrary view was taken by the Gujarat High Court in *Star Engineering Works Ltd. v. Official Liquidator of the Krishnakumar Mills Company Ltd. (in liquidation) and others*, (3) and the Madras High Court in *State Bank of India v. Official Liquidator Straps (India) Private Ltd.*, (4). To correctly appreciate

(1) (1971) 41 Comp. Cases 21.

(2) (1971) 41 Comp. Cases 43.

(3) (1977) 47 Comp. Cases 30.

(4) (1979) 49 Comp. Cases 514.

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the ratio of the two conflicting views, the provisions of both sections, i.e., section 171 of 1913 Act and section 446 of the present Act, have to be noticed which read as under :

**SECTION 171 :**

“When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of this court, and subject to such terms as the court may impose.”

**SECTION 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.”

(4) From a comparison of the two provisions, it is apparent that the change made in the phraseology is that in the latter section the words, “or if pending at the date of the winding up order” have been added, between the words, “shall be proceeded with or commenced against the company”. The addition of the said words has only made the intent of the Legislature more explicit and in no way affected the basic structure of the provision. The words, “no suit or other legal proceeding shall be proceeded with” obviously refer to the proceedings which are pending on the date of the winding up order. If the proceedings are not pending on that date, no question of proceeding with them after the passing of the winding up order would arise. The above noted addition made in the phraseology of the provision is, therefore, of explanatory nature only. The Bombay High Court in *Eastern Steamship Private Limited's case* (supra) for its view relied on the wording of section 17 and section 28(2) of the Provincial Insolvency Act, 1920 and the decisions on the interpretation of that provision. The decision of the Supreme Court in *Bansidhar Shankarlal's case* (supra) had not been rendered till then.

(5) The Madras High Court in *the State Bank of India's case* (supra) while interpreting the provisions of section 446 relying on the said Supreme Court decision observed as under :—

“The difference brought about in the language of section 446 of the Companies Act, 1956 is only a drafting change and has not effected any change in the legal position gathered by the Supreme Court from the language of the corresponding section 171 of the Indian Companies Act 1913, and the change in the language of section 446 of the present Act is only by way of amplification, clarification or elaboration of the provision contained in section 171 of the former Act rather than alteration or amendment thereof or departure therefrom. Consequently, obtaining leave of the court to proceed with a suit against a company in liquidation is not a condition precedent for instituting the suit and even though a suit had been instituted against a company in liquidation without obtaining leave, such leave can be applied for and obtained even subsequently. However, the date such leave was granted.”

Similar opinion was expressed earlier by the Gujarat High Court relying on the same Supreme Court decision in the following terms :—

“Failure to obtain leave of the company court before institution of a proceeding; the suit or proceeding instituted without leave of the court would be ineffective until leave was obtained, but once leave was obtained the proceeding would be deemed instituted on the date of granting leave.

Respectfully agreeing with the same, we are of the view that the rule laid down by the Supreme Court in *Bansidhar Shankarlal's case* (supra) still holds the field and the change made in the phraseology of the present section is of no consequence so far as the competency of the court to grant *post facto* sanction to continue with the suit instituted after the winding up order is concerned and the suit shall be deemed to have been validly instituted from the date requisite sanction is granted. The case may now be listed before learned Single Judge on October 25, 1985 for further trial.

N.K.S.