

Gian Devi and another v. Bachan Motor Financers (P) Ltd.
(S. P. Goyal, J.)

her house job, the period of leave will be treated without honorarium and in lieu of this period, she will have to complete the term of House Job after 31st December, 1986 without honorarium". Terminating her services on the above-noted score appears to be utterly unsustainable.

(7) For the reasons recorded above, I allow this petition with costs and while setting aside, Annexure P.4, direct that the petitioner should be allowed to continue her job as a House Surgeon in Gynaecology Department to which she had been admitted, with effect from July 1, 1986. She would have her costs from respondent No. 2 alone which I determine at Rs. 500.

H. S. B.

Before : S. P. Goyal, J.

GIAN DEVI and another,—*Petitioners.*

versus

BACHAN MOTOR FINANCIERS (P) LTD.—*Respondents.*

Company Petition No. 59 of 1986

September 5, 1986

Companies Act (1 of 1956)—Sections 446(1)(b) and 528—Company (Court) Rules, 1959—Rules 147, 164 and 167—Unsecured creditor petitioning for recovery of debt under Section 446(1)(b) of the Act against a Company in liquidation—Such petition—Whether maintainable—Such debt—Whether required to be proved before the Official Liquidator under Section 528 of the Act and the Rules.

Held, that (a reading of) Section 528 of the Companies Act, 1956, provides that in every winding up, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the Company. A detailed procedure as to how the debts are to be proved is provided in Rule 147 onwards of the Company (Court) Rules, 1959. Against the decision of the Liquidator an appeal is competent to the Court under

Rule 164. After the dismissal of the claims, Official Liquidator is required to settle a list of the creditors under Rule 167 which is submitted to the Court for approval. The list of the creditors once settled cannot be varied except under the order of the Court. It is, therefore, evident that a special procedure has been provided in the Act and the Rules for the proof of the debt against the Company by the creditors. The general provision under Section 446 of the Act, obviously, would be excluded and available only in cases where the remedy of a proof of a debt before the Liquidator is not available. As such the petition by an un-secured creditor against the Company would not be competent under Section 446(1)(b) of the Act and the remedy of such creditor would be to prove the debt before the Official Liquidator in accordance with the provisions of Section 528 of the Act.

(Paras 2 and 3).

Petition under Section 446 of the Companies Act, 1956 praying that this Hon'ble Court may be pleased to grant an order in favour of the petitioners and against the respondent for payment of Rs. 8,000 plus future interest at the rate of 12 per cent per annum from 2nd February, 1980 till the date of realisation.

Cost of the petition may kindly be awarded. Such other orders as may be deemed necessary and fit may also be passed.

H. S. Sangha, Advocate, for the Petitioner.

A. C. Jain, Advocate, for the Respondent.

JUDGMENT

S. P. Goyal, J.—

(1) This order will dispose of three petitions (Company Petitions Nos. 59, 60 and 61 of the 1986) which involve a common question of law.

(2) The petitioners have filed these petitions under section 446 of the Companies Act, 1956 (hereinafter called 'the Act') for the recovery of the amounts of debts together with interest alleged to be due to them from the Company which is in liquidation. A preliminary objection has been raised by the Official Liquidator that no petition under Section 446(1)(b) is competent and the only remedy available to the petitioners was to prove their debts before the Official Liquidator under Section 528 of the Act in accordance with the procedure provided

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in the Companies (Court) Rules, 1959 (hereinafter called 'the Rules'). Section 528 of the Act provides that in every winding up, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company. A detailed procedure as to how the debts are to be proved is provided in the Rules from Rule 147 onwards. Against the decision of the Liquidator an appeal is competent to the Court under Rule 164. After the dismissal of the claims, Official Liquidator is required to settle a list of the creditors under Rule 167 which is submitted to the Court for approval. The list of the creditors once settled cannot be varied except under the order of the Court. It is, therefore, evident that a special procedure has been provided in the Act and the Rules for the proof of the debt against the company by the creditors. The general provision under Section 446 of the Act, obviously, would be excluded and available only in cases where the remedy of a proof of a debt before the Liquidator is not available, such as in the case of a secured creditor.

(3) A Full Bench decision in *Jaimal Singh Makin v. The Official Liquidator of Majestic Financiers (P) Ltd. and others*, (1) and a Single Bench decision of this Court in *Punjab Finance Private Ltd. v. Malhara Singh and others*, (2) were relied upon by the learned counsel for the petitioners in support of his contention that a petition under Section 446(1)(b) of the Act would be competent against the company by a creditor. In none of these decisions, this point was specifically debated or dealt with. The question before the Court in both these cases was as to whether an application was competent by the Official Liquidator under the said provision and what would be the Court fee payable thereon. If the Official Liquidator is to file a claim against a third party on behalf of the Company, obviously the only remedy available is under Section 446 of the Act. These decisions, therefore, lend no support to the contention of the petitioners that both the remedies are open to them to enforce their claim and they can choose any one of them. I am, therefore, of the considered view that a petition by an unsecured creditor against the company would not be competent under Section 446(1)(b) of the Act and his remedy is only to prove his debt before

(1) A.I.R. 1978 Delhi 169.

(2) 1975 Tax L.R. 1670.

the Official Liquidator in accordance with the provisions of Section 528 of the Act and the Rules referred to above. These petitions are, consequently, dismissed but without any order as to costs.

R.N.R.

Before D. S. Tewatia and J. V. Gupta, JJ.

LACHHMAN DASS and others,— *Petitioners.*

versus

RANJIT SINGH and others,— *Respondents.*

Civil Revision No. 1297 of 1985

September 9, 1986

Code of Civil Procedure (V of 1908)—Section 92—Civil Court conferred with jurisdiction to grant or to refuse leave to institute suits under Section 92—Notice to defendants prior to grant of leave—Whether necessary—Order passed under Section 92—Whether administrative in nature.

Held, that Section 92 of the Code of Civil Procedure, 1908, does not provide that notice must be issued before leave is granted. Issuing notice to the defendants prior to the grant of leave under Section 92 would amount to trying the suit twice, firstly at the time of granting the leave and secondly after the leave is granted. As a matter of fact, it is the satisfaction of the Court as to whether the leave should be granted or not keeping in view the provisions of Section 92 of the Code. If leave is granted, the defendants can take all available pleas in the written statement and the matter would be decided at the trial of the suit without any prejudice to them, if no notice is issued to them prior to the grant of leave. Leave is to be granted on the allegations made in the plaint and not on the averments made in the written statement. Therefore, the Court does not need the presence of the defendants at the time of granting of the leave and, therefore, no notice to the defendants prior to the grant of leave is necessary.

(Paras 8 and 9).

Held, that when the leave is refused the Court must give reasons for which the leave has been refused, but if leave is granted then in that situation when the defendant is called upon to defend