

SUPREME COURT OF INDIA

Gaya Sugar Mills Ltd.

Vs.

Nand Kishore Bajoria

C.A.No.162 of 1953

(Mehr Chand Mahajan, C.J.I., N. H. Bhagwati, B. Jagannadhadas and T. L. Venkatarama Ayyar, JJ.)

24.11.1954

JUDGEMENT

MAHAJAN, C. J. :-

1. This appeal arises out of an application made by the official liquidator of the Gaya Sugar Mills Ltd., under S. 185, Indian Companies Act praying that Nand Kishore Bajorh and Mahadeolal Jhunjunwala be required to pay a sum of as. 14,77,000 to the official liquidater. The facts giving rise to the application shortly stated, are these :

2. Gaya Sugar Mills, Ltd., was incorporated in 1934 with an authorised capital of Rs. 7 lakhs divided into 7,000 shares of Rs. 100 each. The capital was raised to Rs. one crore in 1946. Out of this, approximately, Rs. 65 lakhs was subscribed, and in order to obtain the balance, the directors issued debentures of Rs. 1,000 each of the value of Rs. 25 lakhs. The authorised capital of the company consisted of, amongst other shares, 2,000 seven per cent preference shares of Rs. 100 each fully Paid up, 28,000 five per cent. A class preference shares of Rs. 100 each fully paid up. The total amount of the capital raised by these A class preference sharer was in the neighbourhood of Rs. 27 lakhs. The company had raised its capital in view of an ambitious scheme for the expansion of its business. The scheme, however, owing to circumstances unforeseen, could not be carried through and the company found itself in serious financial difficulty which eventually resulted in its winding up.

3. On 24-10-1949, one Sohan Lal Jajodia, a director and debenture trustee of the company filed a suit in the High Court of Calcutta against Gursharan Lal, the then managing director of the company and others for several reliefs in respect of the management of the company. On 1-1-1950, an agreement was arrived at between the parties to the said suit. Under this agreement, the parties to it framed a scheme regarding future working of the business of the company for the sanction of the court and pending the sanction and subject to it agreed to take certain steps for paying off the debenture holders and the preference share-holders. The scheme was framed under the provisions of S. 153, Indian Companies Act. The agreement incorporating the scheme was in these terms.

"Each one of the signatories to this Memorandum covenants with each one of the other or others of them jointly and severally that they 'will take such steps as is necessary to give effect to the following scheme.

A Board of Directors comprising of the following persons will be constituted in substitution of the

present board of directors of Gaya Sugar Mills Ltd.

The parties consider it in the interest of the company and of the share-holders that the existing debenture holders should be paid off and the capital of the company should be reduced by canceling and paying off the preference share-holders.

The debentures will be redeemed by payment in cash and the preference shareholders will be redeemed by payment of partly in cash and by partly issuing in them 5 per cent. taxable debentures of Rs. 10 lakhs on the security of Guraru works and 5 per cent. tax free cumulative redeemable preference shares of Rs. 5 lakhs, while redeeming the existing debentures, debentures of Rs. 10 lakhs will, if necessary, be kept alive for the purpose of reissuing to the preference share-holder 'under this scheme'

..

Possession of assets appertaining to the Warsaliganj scheme will be forthwith given to the trustees of the debentures with full liberty to them to dispose of the same and to utilise the sale proceeds for redemption of the debentures and to make ever surplus, if any, to the preference shares trustees hereinafter named for redemption of the redeemable preference, shares.

"Messrs. Nand Kishore Bajoria and Mahadeolal are appointed trustees for the purpose hereinafter named and are in these presents referred to as Preference Trustees."

The shares in the Ryam Sugar Company Ltd., belonging to this company and Chakand land and Gaya land and the unrealised dividend due on Ryam shares and commission for sale of Ryam sugar of 1948-49 season will be vested in the preference trustees with a power to the preference trustees to get and realise the dividend and commission and to sell the shares of Ryam Sugar Mills Ltd., and the Chakand and Gaya land and to utilise the sale proceeds for redemption of the preference shares. Ryam sugar shares will be sold at Rs. 25 per share nett. As regards Chakand and Gaya lands if the proceeds be more than 1 lakh the same will be made over to the company and if the proceeds be less than Rs. 1 lakh the deficiency will be made good by the company. As regards the unrealised dividend due on Ryam shares and commission, if the amount be more than Rs. 65,000 the same will be made over to the company and if it be less than, Rs. 65,000 the deficiency will be made good by the company.

The sale proceeds of the properties mentioned in the proceeding paragraph will be paid to the preference share-holders. In addition to payment to them of cash as hereinbefore referred to the preference shareholders will get 5 per cent. taxable debentures of the face value or Rs. 10 lakhs and 5 per cent. tax free cumulative redeemable preference shares of Rs. 5 lakhs in full payment of their dues on account of capital and arrears of interest

"The General Meeting of the share-holders called by some of the share-holders as requisitionists will be abandoned and a fresh meeting of the share-holders will be called in Calcutta as it is convenient for shareholders generally that the meeting should be held in Calcutta".

"Steps will be taken for sanction of the court and of the share-holders according as necessary for implementing the above scheme."

4. In pursuance of this agreement a resolution was passed by the Board of Directors of the Gaya Sugar Mills Ltd., on 9-1-1950, and the terms of the agreement were incorporated therein. The

resolution further said as follows:

"Pending the sanction of the court and of the share-holders for reduction of capital and redemption of preference shares it was decided that the shares in the Ryam Sugar Co. Ltd., be sold and the sale proceeds, thereof and the Chakand and Gaya lands together with structures thereon be put in the possession of Messrs. Nand Kishore Bajoria and Mahadeolal Jhunjhunwala (hereinafter referred to as preference trustees) upon trust that they will sell the said lands with structure thereon and hold the sale proceeds of Ryam Sugar Co. Ltd., and Rs. 7,000, out of the sale proceeds of the lands and structure for distribution among the preference share holders 'in the event of the redemption of capital being sanctioned by the court'..... ".

5. It appears that neither the meeting of the creditors was held in pursuance of the agreement nor was sanction of the court taken for reduction of the capital, with the result that the proposed scheme was never implemented. The two persons, however, who were styled as preference trustees were handed over the shares of the Ryam Sugar Mills and these shares were sold by them for a sum of Rs. 11,30,400 and this money is admittedly in the possession of these persons.

6. On 16-1-1951, a winding-up application regarding this company was made by some debenture holders and creditors and a winding up order was made on 14-11-1951, and an official liquidator was appointed to take charge of the affairs of the company on 1-2-1952. Immediately after his appointment the official liquidator made the application out of which this appeal arose for an order to recover an amount of Rs. 14,77,000 from the respondents on the allegation that the said amount was held by them on behalf of the company.

7. The respondents admitted that they had with them a sum of Rs. 11,39,400 and not Rs. 14,77,000 as claimed by the official liquidator, but contended that the said amount was lying with them at a trust to redeem the preference shares and that the company was not entitled to it. It was also contended that the said sum was not recoverable in a summary proceeding under S. 185 of the Indian Companies Act on the ground that the word "trustee" occurring in the said section did not include a "constructive trustee". The respondents claimed to be trustees on behalf of the preference share-holders under the terms of the agreement above cited.

8. Imam J., who heard the application held that Gaya Sugar Mills Ltd., were entitled to the sum of Rs. 11,39,400 and that the preference trustees held the trust money for the benefit of the company. The respondents preferred an appeal under the Letters Patent against this decision while the official liquidator filed cross-objections regarding dividends and commission. The appeal Bench of the High Court held that the purpose of the agreement of 1-1-1950, was illegal because the company had no power to purchase its own shares by diverting its capital nor reduce the share capital in the way sought to be done.

It further held that the expression "trustee" in S. 185 meant an "express trustee" and did not include within its ambit the case of a "constructive trustee", and therefore the official liquidator could not recover this amount under the provisions of S.185. In the result the High Court set aside the order directing the respondents to pay to the appellant a sum of Rs. 11,39,400 and the cross-objections were dismissed.

9. The principal question that falls for decision in this appeal is whether the High Court had jurisdiction, in the circumstances of this case, to require the two respondents to pay the sum of Rs. 11,39,400 to the official liquidator under the provisions of S. 185. Indian Companies Act. The

determination of this question depends on the construction of the agreement above cited and the relationship created by that agreement between the company and these two respondents taken with the resolution of the directors till the stage that the scheme was sanctioned by the court and the proposal to reduce the capital was accepted after the formalities provided for in the Indian Companies Act had been gone through.

10. Section 185, Indian Companies Act provides:

"The Court may at any time after making a winding up order, require any contributory for the time being settled on the list of contributors and any trustee, receiver, banker, agent or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the court directs, to the official liquidator any money, property or documents in his hands to which the company is 'prima facie' entitled".

11. This is a summary remedy provided by the Indian Companies Act for speedy winding up of the affairs of the company. The requirements of the section are that the person in possession and the person against whom an order can be made under this section should be a contributory, trustee, receiver, banker, agent or officer of the company and he should have in his possession or custody any money or property or documents to which the company is 'prima facie' entitled. The company Judge took the view that the two respondents were in the status of trustees and were in possession of the sum of money to which 'prima facie' the company was entitled. He held that they held the money for benefit of the author of the trust, i. e., the Gaya Sugar Mills Ltd.

The Appeal Bench took the view that the official liquidator may be entitled to the money but that he was not entitled to the return of this money by the summary procedure provided by S. 185 and the court had no jurisdiction to pass an order under this section inasmuch as the expression "trustee" in S. 185 does not include within its ambit the case of a "constructive trustee". A contention was raised before the Appeal Bench that the two respondents could be treated as agents of the company till the scheme went through. The learned Judges negatived this contention on the ground that the two respondents were acting in 'their own right', and not as agents of the company in respect of this property. It was further held that the purpose for which the money was held was unlawful and therefore no relationship of principal and agent could be created in respect of an unlawful purpose.

12. In our judgment the view taken by the Appeal Bench cannot be sustained and the decision has to be reversed on the short ground that till the scheme was formally approved by the share-holders and creditors and was sanctioned by the court and the share capital was thus reduced, the preference share-holders could not acquire any rights under the scheme and become beneficiaries regarding the amount realized by sale of the shares of the Ryam Sugar Company Ltd. Till that event happened, it is obvious that the ownership of the shares remained in the Gaya Sugar Mills Ltd., and the amount realized by the sale of those shares remained the property of the Mills.

It is clearly provided in the agreement that a fresh meeting of the share-holders will be called in Calcutta for considering the scheme and that steps will be taken for sanction of the Court and of the share-holders according as necessary for implementing the scheme. In this situation the covenants and directions contained in the agreement were mere proposals, and till implemented, neither the preference share-holders acquired any right under these proposals, nor did the so-called preference trustees become vested with the ownership of Ryam Sugar Company Ltd.'s shares or the immoveable properties that were proposed to be transferred to them and which they were authorised to sell.

In other words, the agreement of 1-1-1950 remained in an inchoate shape and never became operative. The two respondents Messrs. Nand Kishore Bajoria and Mahadeolal thus never became trustees for the preference shareholders as contemplated in the proposed scheme. The Gaya Sugar Mills Ltd., thus remained, as it was, the legal owner of the shares and of the sale-proceeds as well as of the immovable properties.

13. The next question that arises for consideration is what was the true relationship between the company and these two respondents before the proposed scheme was sanctioned. The company, pending the sanction of the court, passed a Resolution that the shares be sold, and the sale-proceeds be put in the possession of the, two respondents, for distribution amongst preference share-holders 'in the event of reduction of capital being sanctioned by the court'. In our judgment there can be no manner of doubt that in the situation that arose these two persons were the agents of the company for selling the shares and keeping the sale-proceeds with them till the scheme was sanctioned, and if the scheme was not sanctioned, they remained agents of the company in custody of the sale-proceeds. They could not be trustees under an inchoate document, and therefore the only possible relationship that could be constituted between them and the company would be that of principal and agent appointed for a particular purpose and to meet a particular eventuality. The relationship of principal and agent need not be expressly constituted and can be brought about by implication of law on a particular situation arising or from the necessity of a case. In the present case this relationship was clearly brought about by the situation that arose by the scheme not being implemented. By the exigencies of this particular case that relationship has to be necessarily implied. It is also clear that the shares were sold under the Resolution passed by the Board of Directors of the Company and it is the Board that fixed the price for which the shares were to be sold. The transfer deeds were also got executed by the company from the persons in whose names the shares were nominally standing. The two respondents were merely in custody of the amount till the expected event happened. As that event did not happen, the property never became vested in them as trustees for distribution amongst the preference shareholders. On the other hand, they remained as mere agents of the company and held this money for the company pending the sanction of the scheme. The money belonged to the company and was thus in the hands of the agents of the company, and the official liquidator was entitled to its return under the provisions of S. 185, Indian Companies Act. As no obligation was annexed to the ownership of this money till the scheme was sanctioned, no trust was created and the courts were, therefore, in error in deciding this case on the basis either of an express trust or on the basis of a constructive trust. The Appeal Bench of the High Court thought that no relationship of principal and agent was constituted between the company and the two respondents by the agreement of 1-1-1950, because the two respondents in effecting the sale of the shares were acting 'in their own right'. This construction of the agreement, in our opinion, is clearly erroneous. The two respondents had no right of their own in the shares or in the money and whatever right they had they acquired as would-be trustees under the agreement which never matured. That being so, they could not act in their own right in selling the shares of the Ryam Sugar Coy. Ltd. and in keeping the sale proceeds in their custody. We have also not been able to follow how the Appeal Bench of the High Court arrived at the conclusion that the scheme propounded in the agreement was unlawful. We are constrained to observe that both the learned Single Judge and the Appeal Bench of the High Court completely lost sight of the fact that no right could be vested either in the preference shareholder or the so-called trustees on the basis of a document which merely contained proposals and which was of an inchoate character and which was never completed or became operative and it is this opinion which led to an error in the decision of the case.

14. For the reasons given above, we allow this appeal, set aside the decision of the Appeal Bench and restore the decision of the single Judge ordering the return of the sum of Rs. 11,39,400/- by the

two respondents to the Official Liquidator of the Gaya Sugar Mills Ltd. in liquidation. The appellant did not press in these summary proceedings the question of dividend and the commission that had been raised in the cross-objections in the court below. The Official Liquidator will have his costs against these two respondents.

Appeal allowed.

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