

Bansidhar Shankarlal

Vs

Mohd. Ibrahim and Another

Civil Appeal No. 1927 of 1966

(J. C. Shah, A. N. Grover JJ)

25.09.1970

JUDGMENT

SHAH, J. -

1. Mohammed Ibrahim (hereinafter called "the plaintiff") instituted an action in the Court of the Subordinate Judge, Alipur for a decree in ejectment in respect of land occupied by the Laxmi Spinning and Weaving Mills Ltd. as his tenant. The suit was decreed on October 1, 1953. Before the decree was passed, the Company had executed on January 31, 1951, a deed in favour of Bansidhar mortgaging its fixed assets for securing repayment of Rs. 1,25,000/-. After the decree of the Trial Court, the Company executed on January 21, 1954, a second deed also in favour of Bansidhar mortgaging the fixed assets for repayment of an additional sum of Rs. 2,00,000/-. The decree of the Subordinate Judge in the plaintiff's suit was confined on August 4, 1954. Against that decree the Company and Bansidhar preferred Second Appeal No. 1380 of 1954 to the High Court of Calcutta. Bansidhar also filed a suit in the High Court of Calcutta on its original side to enforce the two mortgages in his favour and obtained preliminary mortgage decree in the suit on May 13, 1955. Another creditor of the Company applied for and obtained on August 22, 1955, an order directing that the company be wound up. The liquidators of the Company and Bansidhar prosecuted the Second Appeal No. 1380 of 1954. The decree of the District Court was confirmed by the High Court in its appellate jurisdiction on February 22, 1958. The plaintiff then instituted an application for enforcement of the decree in ejectment against the Company without obtaining leave of the High Court of Calcutta under Section 171 of the Indian Companies Act, 1913. On December 17, 1958, Bansidhar filed a petition contending that the application for enforcement of the decree was not maintainable without leave of the High Court which ordered that the Company be wound up. On the motion of the plaintiff the Company Judge granted leave to execute the decree in Second Appeal No. 1380 of 1954. The Subordinate Judge before whom the proceedings were pending dismissed the application filed by Bansidhar, and the order of dismissal was confirmed by the Additional District Judge and by the High Court in Second Appeal. Bansidhar's petition for certificate for appeal to this Court under Article 133(1)(b) and (c) of the Constitution was also rejected. Bansidhar then preferred two petitions for special leave to his Court-one against of the order in the execution proceedings and the other against the order of the High Court refusing to certify the appeal under Article 133(a)(b) and (c) of the Constitution. This Court dismissed the petition against the order of the High Court in Second Appeal and granted special leave to appeal against the order of the High Court refusing to certify the case.

2. The order passed by the High Court in Second Appeal Having affirmed the order of the District Court, unless the appeal preferred to this Court involved some substantial question of law of public or private importance the case could not be certified under Article 133(1)(b) even if the proposed

appeal involved directly or indirectly some claim or question respecting property of value not less than Rs. 20,000/-. The High Court could not also certify the case as a fit one for appeal under Article 133(1)(c) unless in the view of the Court it raised a question of some general or public importance.

3. Counsel for the appellant says that the Subordinate Judge was incompetent to entertain the application for executing the decree in Second Appeal No. 1380 of 1954, unless the High Court of Calcutta in its company jurisdiction granted leave to execute the decree under Section 171 of the Indian Companies Act, 1913. Counsel urged that leave of the High Court is by the terms of Section 171 of the Indian Companies Act made a condition precedent to the institution of a proceeding against a company ordered to be wound up by the Court and that the application for execution of the decree without, in the first instance, obtaining leave of the High Court was entertained without authority. The question sought to be raised in the proposed appeal, it was urged was of general or public importance. In any case it was contended that there is conflict of opinion among the Courts in Indian on the true interpretation of Section 171 of the Indian Companies Act, 1913, and Section 446 of the Companies Act, 1956 (which replaced Section 171 of the Act of 1913), and the High Court was bound to grant the certificate applied for either under Section 133(1)(b) or under Article 133(1)(c) or both the clauses.

4. Our attention is invited to the decision of the High Court of Calcutta in *Har Narain Misra v. Kanhaiya Lal Lohawalla* (ILR (1939) 2 Cal 425 : AIR 1940 Cal 166) and of the High Court of Andhra Pradesh in *Godavari Sugar and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy and Others.* (AIR 1960 AP 74 : (1959) 2 Andh WR 234 : 1959 Andh LT 872 : (1960) 30 Com Cas 104) In these cases it was held that leave of The High Court which has ordered winding up of a company is a condition precedent to the institution of proceedings against a company in liquidation, and that proceeding initiated without obtained leave of the Court in the first instance must be dismissed.

5. There are however, other case which take a contrary view. *Nazir Ahmad v. Peoples Bank of Northern Indian Ltd.* (ILR (1942) Lah 517 : AIR 1942 Lah 289); *Suresh Chandra Khannabish v. The Bank of Calcutta Ltd.* ((1950) 54 Cal WN 832 (FB)); *People Industrial Bank Ltd. v. Ramchandra Shukul* (ILR 52 ALL 430) *Roopnarain Ramchandra Private Ltd. v. Brahmapootra Tea Co. (India) Ltd. and Another.* (65 Cal WN 1060)

Section 171 of the Indian Companies Act, 1913 provided that -

"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 the Court and subject to such terms as the Court may impose."

This section is in terms analogous to Section 231 of the English Companies Act, 1948 (11 and 122 Geo. 6 Ch. 38). The object of Section 171 is plain. It is intended to ensure that the assets of a company ordered to be wound up by the Court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain in advantage over others by instituting or prosecuting proceedings against the company. The section is intended to maintain control of the court which has made an order for winding up on proceedings which may be pending against the company or may be initiated after the order of winding up, and the Court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion.

6. When the Second Appeal No. 1380 of 1954 was pending before the High Court of Calcutta at the

instance of the Company and Bansidhar against the decree passed by the District Court in enjoinment, the Company was ordered to be wound up by order of the High Court of Calcutta and the liquidators were appointed. The liquidators prosecuted the appeal. There is no evidence on the record whether the liquidators obtained the sanction of the Court under Section 179(1) (a) of the Companies Act 1913. But there is no reason to suppose that the liquidators did not obtain the sanction of the Court. If sanction of the Court under Section 179 to prosecute the appeal before the High Court was obtained, and it must be so assumed, the contention raised on behalf of Bansidhar loses all significance for an execution applications is only a continuation of the suite and the control of the High Court ensures during the execution proceeding also. If the sanction of the Court has been obtained for the prosecution of the suit, it would be plainly unnecessary to obtain fresh sanction to the institution of execution proceedings at the instance of the successful party. It is true that the sanction obtained by the liquidators is granted under Section 179 of the Companies Act to initiate or enforce a claim of the company or to defend an action, whereas the leave of the Court to institute or to continue a suit against the company in winding up is obtained under Section 171. It would be giving effect to a technicality divorced from the true object of the section to hold that even in a suit filed or prosecuted with the sanction of the Court, the decree may not be enforced by a successful party without leave under Section 171 of the Act.

7. Even granting that sanction under Section 179 does not dispense with the leave under Section 171 of the Act, to institute a proceedings in execution against a company ordered to be wound up, we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceedings in execution of a decree against the company and failure to obtain leave before institution of the proceeding entails dismissal of the proceedings. The suit or proceedings instituted without leave of the Court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceedings will be instituted on the date granting leave.

In Buckley on the Companies Act, 13th Edn., at p. 490 it is observed.

"Leave to continue after winding up a debenture-holder's action, whether previously or subsequently commenced, will be given unless the liquidator is able and willing to give in the winding up the relief which could be obtained in the action."

The Calcutta High Court in Suresh Chandra v. The Bank of Calcutta examined the decision of the English Courts in some details and observed that as regards Section 171 of the Indian Companies Act, 1913, the High Court has jurisdiction to grant leave to proceed with the suit or other proceedings against a company in liquidations even if such leave was not obtained for its commencement. The proceedings may at best be regarded as instituted on the date on which the leave was obtained for the High Court.

8. Considering the question both on principle and authority we are unable to agree with the view expressed by the Calcutta High Court in Har Narain Misra's case (supra) and in Godavari Sugar and Refineries Ltd. case (supra) by the Andhra Pradesh High Court.

9. Counsel for the appellant, however, urged that this Court is not concerned in this appeal with the correctness of one or the other of the two conflicting views. Counsel says the Court has only to consider the correctness of the view of the High Court refusing to grant the certificate. In our judgment, it would be a futile exercise if we come to the conclusion that the view taken by the High Court on the merits of the case is true, still to certify the case for appeal. The proposed appeal only involves the question about the maintainability of the execution proceeding commenced by the

plaintiff and against the company in liquidation without leave of the High Court which has ordered the company to be wound up. WE entertain no doubt that the High Court was right in the view it has taken on the merits and the contentions raised. We do not think that we will be justified in certifying an appeal in which the only question which may be urged is the one on which we have expressed our opinion against the appellant.

10. The appeal fails and is dismissed. The appellant will pay the costs of the plaintiff in this Court.

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