Kalyan Mills Ltd.

Vs

Union of India and Others

Civil Appeal No. 447(N) of 1973

(O. Chinnppa Reddy, G. L. Oza JJ)

21.11.1986

JUDGMENT

OZA J. -

1. This appeal arises out of a certificate granted by this Court. The facts necessary for the disposal of this appeal are that respondent 1 Union of India filed a suit against the petitioner. The petitioner is a public limited company. Respondent No. 2 which is also a public limited company was the assessee-company and the Union of India, respondent 1 had to recover a sum of Rs. 1,32,400.87 from the said assessee company on account of arrears of income-tax, excess profits tax, business profit tax. To recover this amount a suit was filed on February 15, 1958 impleading therein besides the present appellant, the said assessee company and others as defendants. It was alleged that the assessee company by its letter dated October 4. 1948, informed the plaintiff Union of India that the arrears due from it be recovered from the petitioner on account of its commission. It was alleged that for recovery of the said amount notice under section 46(2) of the Indian Income Tax Act was issued on two occasions, November 9, 1948 and March 30, 1951 and thereafter a notice under section 46(5-A) of the Act was issued against the appellant-defendant 1, Kalyan Mills Ltd., on July 22, 1949. It is alleged that defendant 1 assessee company had informed the plaintiff Union of India by a letter dated October 11, 1948 that the tax dues recoverable from the assessee company be recovered from the amount which was owed by the appellant company to the assessee company. It was inter alia asserted in the plaint that the debt due by the appellant company to the assessee-company was shown to the credit of the assessee company in the accounts of the appellant company. It is said that by two letters addressed by the appellant company on November 18, 1948 and December 3, 1948, it acknowledged and admitted its liability to the assessee company and had furthermore promised the plaintiff to pay the amount of tax dues against the debt due by the appellant company, to the assessee company. The plaintiff proceeded to assert in view of the admissions made by the appellant company and the promise made by it to pay the tax dues from the debt due by it to the assessee company and having regard to the recovery proceedings undertaken by the competent authority under sections 46(2) and 46(5-A) of the Act, the plaintiff had priority over all other unsecured dues and that the appellant company was under an obligation to pay the amount of Rs. 1,32,400.87 under these circumstances. It was also alleged by the plaintiff-respondent (Union of India) that not-withstanding the fact that the debt due by the appellant company to the assessee company was shown to the credit of the assessee company in the books of accounts of the appellant company, the appellant company had subsequently set up a false theory that the assessee company itself was liable to the appellant company and that the appellant company was not liable to pay dues of the assessee. It was in terms asserted that the version set up by the appellant company that it had a claim against the assessee company was a got up version and that it had been created merely with a view to defeat or delay the dues of the plaintiff. It was contended that the appellant company had

made a false counter-claim against the assessee company with this end in view viz., to defeat and delay the claim of the plaintiff though it had taken no action in regard to the alleged counter-claim. A reference was made to a resolution passed by the appellant company on December 9, 1949 to transfer the debt due to the assessee company to the Managing Agents' commission and suspense account. No action was ever taken by the appellant company against the assessee company for the alleged claim arising in the context of damages in connection with the alleged malfeasance and misfeasance of the assessee company in the course of discharge of their functions as the Managing Agents of the appellant company. As admittedly the assessee company was functioning as the Managing Agents of the appellant company, it was contended that no action was taken for more than three years and that no steps have been taken in this connection because the counter-claim was a sham one.

It was further contended by the plaintiff-respondent (Union of India) that the appellant company and the assessee company were colluding with each other with the object of defeating or delaying the payment to the plaintiff and that the adjustment entries made by the appellant company in its books of accounts were steps in this direction. Such entries or adjustments were illegal and they were not binding on the plaintiff inasmuch as the recovery proceedings had already been initiated against the assessee company and that the adjustments and entries were false as was evident from the admissions made by the appellant company in its letter to the plaintiff. A charge of fraud and collusion has been levelled against the appellant company, the assessee company and the other defendants. With these facts the respondent Union of India instituted the present suit seeking a decree against defendants 1 to 5 i.e., the present appellant and other defendants for an amount of Rs. 1,32,400.87 with interest and a prayer also was made for appointment of receiver for recovery of the amount due from defendant 5 and its nominees other defendants. Various defences were raised. The suit was decreed by the trial court and the trial court held that the plaintiff respondent was not entitled to a money decree against the appellant company. It also recorded a finding that the contention of the appellant company that it had a genuine and valid counter-claim against the assessee company and that it had been adjusted was unfounded. In the opinion of the learned trial court it was a unilateral act of the appellant company of adjusting the sum due to the assessee company against the alleged claim in respect of damages for malfeasance and misfeasance against the assessee company and it was invalid and was not binding on the plaintiff-respondent. It also held that the sum in excess of the tax claimed by the plaintiff from the assessee company was due to the assessee company against the appellant and it held that the plaintiff was entitled to a decree for appointment of receiver to realise the dues from the plaintiff from the appellant company having regard to the fact that the appellant company was indebted to the assessee company for a sum in excess of tax dues claimed by the plaintiff, and to that extent the suit was decreed.

3. The appellant preferred an appeal and a Division Bench of the Gujarat High Court by their judgment dated April 19, 1972, dismissed the appeal and maintained the decree passed by the trial court and on certificate against that judgment the present appeal is filed in this Court. The main contention advanced on behalf of the appellant was that a suit as filed by the respondent and the decree granted by the trial court was not permissible in law as it was contended that such proceedings for appointment of receiver can only be contemplated in execution proceedings of a decree against the original debtor. Facts are not in dispute. The learned judges of the High Court maintained the decree by coming to the conclusion that the amount of commission earned by the assessee company admittedly with the appellant. It was withheld by the appellant under the pretext that it had a counter-claim against the assessee. It is also not in dispute that under section 46(2) a prohibitory order attaching the said money of the assessee company was issued. It is also not in dispute that the machinery under section 46(5-A) of the Indian Income Tax Act was no longer

effective as the appellant set up a counter-claim against the assessee company and there was no option for the Union of India but to obtain adjudication from the civil court and in this view of the matter the learned judges of the Gujarat High Court maintained the decree passed by the trial court.

An objection was also taken about the form of the decree passed by the trial court which only was for the appointment of a receiver. Admittedly no money decree could be passed against the appellant company except for the money of the assessee company lying in deposit with them of the assessee company and it is for that purpose that the decree for appointment of receiver was made so that the amount be recovered and paid to the plaintiff-Union of India.

5. Having considered the question and heard learned counsel for the appellant, we see no error in the judgment passed by the learned High Court of Gujarat. The appeal is therefor dismissed with costs.

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