Arati Dutta

Vs

M/S. Eastern Tea Estate (P) Ltd.

Civil Appeal Nos. 1510 and 1511 of 1987

(Sabyasachi Mukharji, G. L. Oza JJ)

13.11.1987

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. These appeals by special leave relate to the affairs of M/s. Eastern Tea Estate (P) Ltd. It was of two branches namely, the Dutta's and the Choudhury's. Due to death and lack of cordiality between the erstwhile partners the two branches first drifted and then parted company as is unfortunately the fate of so many Indian concerns and there were disputes and litigations in court.

2. The Civil Appeal No. 1510 of 1987 arises from a judgment and decision of the Division Bench of the High Court of Gauhati dated June 4, 1987. It appears that a petition was filed originally by the appellant under Sections 397 and 398 read with Section 403 of the Companies Act, 1956 (hereinbefore called 'the Act'). The company petition came to be disposed of on February 4, 1977 in accordance with the compromise arrived at between the parties. The said compromise comprised of inter alia, two relevant paragraphs, for the present purpose, which read as follows :

> (1) Mrs. Arati Dutta will take over Chandana T.E. and Choudhury group will take over Martycherra T.E. on January 25, 1976.
>
> (2) The bank liability of the company in respect of Martycherra T.E. amounting to Rs. 2,20,000 (approx.) shall be shared equally of which Rs. 1,10,000 shall be paid by Mrs. Arati Dutta on January 25, 1976 at Silchar in presence of Shri B. K. Das, Advocate and Shri S. K. Sen, Advocate.
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> (3) The entire liability of the company would be equally shared and for that purpose an independent auditor shall be appointed by Shri S. K. Sen, Advocate who shall undertake to start the accounting from the first week of February 1976.
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> (4) The shares owned by Mrs. Arati Dutta and her sons and daughters will be sold to company on January 25, 1976 and necessary permission shall be taken from Hon'ble High Court in this regard.
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> (5) The staff salary and gratuity of the employees of the Head Officer of the Hon'ble High Court is obtained shall be considered as the liability of the company and will be borne by the two parties equally.
>
> (6) Mrs. Arati Dutta shall have to pay another sum of Rs. 12,500 to the company in

addition to her payment of 5 per cent liability of the company.

3. Thereafter there were differences between the parties and it could not be adjusted as the parties could not agree as to audit. On November 9, 1982 the parties agreed that no auditor need be appointed in the matter of determination of liability and the matter of determination of liability as per the 1973 balance sheet should be left entirely to the court. In accordance with the compromise the parties were asked to submit their balance sheets regarding the payments made by them which related to liabilities in the balance sheet as on December 31, 1973. The parties filed their balance sheets and the learned Single Judge of the High Court computed the liabilities of the parties on that basis. Aggrieved, however, by the said decision, the appellant preferred an appeal before the Division Bench of the said High Court. The first question that was raised before the Division Bench was whether the appeal lay to the Divisional Bench under Section 483 of the Act which dealt with appeals from orders. The said section was as follows :

> 483. Appeals from orders. - Appeals from any order made, or decision given, in the matter of the winding up of a company by the court shall lie to the same court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the court in cases within its ordinary jurisdiction.

4. It was submitted by learned counsel that though the first application by the appellant was under Sections 397 and 398 read with Section 403 of the Act the same could be taken in the matter of winding up of a company to which the reference has been made in Section 483. On the other hand, it was submitted that no appeal lay. It appears to us that though this present application was relating to Sections 397 and 398 and as it arises in respect of the orders passed under Sections 397 and 398 of the Act, the provisions of Section 483 would be attracted and an appeal would lie to the Division Bench. This conclusion seems to follow from an analysis of the sections as interpreted by the various decisions of this Court as well as one judgment of the Delhi High Court to which we will refer. However, it is sufficient for the present purpose for us to refer to the observations of this Court in Shanta Genevienve Pommerat v. Sakal Papers Pvt. Ltd. (AIR 1983 SC 269 : (1983) 1 SCC 295 : 1983 SCC (Tax) 69) where this Court observed that an appeal under Sections 397 and 398 read with Sections 403 of the Companies Act would lie to the same court to which, in the same manner in which, and subject to the same conditions under which the appeals lie from any order or decision of the court in cases within its ordinary jurisdiction. This Court made the following observations at page 269 of the report : [SCC p. 297 : SCC (Tax) p. 71, paras 5 and 6]

Now an order under Sections 397, 398 and 403 of the Companies Act, on the fact of it, cannot be said to be an order made or decision given, in the matter of the winding up of a company. Relief, undoubtedly under Section 397 and/or 398 is in fact an alternative to winding up. No doubt order under Section 397 or 398 could be an order made or decision given by the High Court having jurisdiction under the Companies Act and therefore, an appeal will lie to the Division Bench of the same High Court. This is not disputed.

Chapter XLII of the Bombay High Court Rules provides for appeals to appellate court. The Rules make provision for certain type of appeals to be placed in the first instance, for admission before a Bench of the High Court to be appointed by the Chief Justice. It is not in dispute that the appeal preferred by the present appellants was not one such appeal which can be placed for admission under Rule 966-A and it follows from this rule that the appeals other than those mentioned in that rule are not to be placed for admission. This point is no more res integra in view of the decision of

this Court in Golcha Investment (P) Ltd. v. Shanti Chandra Bafna (AIR 1970 SC 1350 : (1970) 3 SCC 65 : 40 Com Cas 1128) wherein after considering the provision contained in Rule 996-A, it was held that appeals, other than those set out in the rule are not to be placed for admission and they were entitled to be admitted as a matter of course. This Court accordingly quashed the order dismissing the appeal in limine observing that the appellate court erred in summarily dismissing the appeal because it was bound to entertain the same and dispose it of on merits. This observation will mutatis mutandis apply to the present appeal.

5. Reference may also be made to the decisions of this Court in Shankarlal Aggarwala v. Shankarlal Poddar (AIR 1965 SC 507 : 35 Com Cas 1); M/s. Golcha Investments (P) Ltd. v. Shanti Chandra Bafna (AIR 1970 SC 1350 : (1970) 3 SCC 65 : 40 Com Cas 1128) and M/s. Tarapore & Co. v. Cochin Shipyard Ltd. (AIR 1984 SC 1072 : (1984) 2 SCC 680). The Delhi High Court in Gokulchand D. Morarka v. Company Law Board ((1974) 44 Com Cas 173) correctly in our opinion explained the position. There the High Court found that pending the petition for winding up of the company filed by two of its creditors for failure to pay a debt in spite of statutory notice, the Company Law Board had filed a petition under Sections 397 and 398 of the Companies Act and in an application applied for interim reliefs of removal of the sole director and constitution of a Board to manage the company. The Company Judge passed ex parte orders restraining the company from disposing of its assets and restraining debenture trustees from enforcing their rights. Thereupon, an application was filed under Section 442 for stay of the petition and that petition under Sections 397 and 398 was filed by 125 shareholders and a bank has also filed another winding up petition claiming a large money. Pending the winding up petitions the Company Judge heard two applications together and passed a common order for removal of the sole director and constitution of a Board of Directors with a retired judge as the Chairman. Appeals were taken to a Division Bench against another order of the Company Judge. It was held overruling the preliminary objections that the order passed by the Company Judge was appealable under Section 483 of the Companies Act, 1956 because firstly, any order passed under Section 397 or Section 398 was one which was passed lieu of winding up and hence, it was "in the matter of winding up" and, secondly, the order passed in C.A. No. 323 of 1971 expressly fell within the scope of Section 442 as the order had been passed after at least two applications had been filed for the winding up of the company.

6. The court further held that there was nothing in Section 483 of the Companies Act, 1956, which took away or curtailed the right of appeal provided by Section 5(1) of the Delhi High Court Act, 1966, and Clause 10 of the Letters Patent (Punjab) as applicable to the Delhi High Court; and that the jurisdiction conferred on the Company Judge of the High Court under Section 10 of the Companies Act was none other than its ordinary civil jurisdiction and appeal lay also under Clause 10 of the Letters Patent to a Division Bench from the order of the Company Judge.

7. In this case in the High Court of Gauhati, however, unlike the Bombay High Court or the Calcutta High Court or the Delhi High Court, no Letters Patent was applicable to the Gauhati High Court. It was therefore held that there was no provision for an appeal to the judgment of the learned Single Judge of the High Court. In our opinion the decision in Shankarlal Aggarwala v. Shankarlal Poddar (AIR 1965 SC 507 : 35 Com Cas 1) of this Court indicated the true position where this Court held that Section 202 of the Companies Act, 1913 was in pari materia with the present section. This Court preferred the view of Chief Justice Chagla of the Bombay High Court reported in Bachharaj Factories Ltd. v. Hirjee Mills Ltd. (AIR 1955 Bom 355) to the view expressed by the Calcutta High Court in Madan Gopal Daga v. Sachindra Nath Sen (AIR 1928 Cal 295) wherein it was held that an order or the decision made or given in the matter of winding up of a company to be appealable had to satisfy the requirements of Clause 15 of the Letters Patent. This interpretation was not accepted

by other High Courts and the Bombay High Court held differently. The view of the Bombay High Court was preferred by this Court in the aforesaid decision and it was observed as follows :

> We thus agree with Chagla, C.J. that the second part of the section which refers to "the manner" and "the conditions subject to which appeals may be had" merely regulates the procedure to be followed in the presentation of the appeal and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of that section.

8. In our opinion this position is clear from the observation of this Court in Shankarlal Aggarwala v. Shankarlal Poddar (AIR 1965 SC 507 : 35 Com Cas 1) that the appeal lies to the same High Court irrespective of the powers under the Letters Patent. Sections 397 and 398 read with Section 483 indicate that the appeal would lie in the same manner to the same court and naturally and logically an appeal from the decision of the Single Judge would lie to the Division Bench. This in our opinion follows logically from the ratio of decision of this Court in Shankarlal Aggarwala v. Shankarlal Poddar (AIR 1965 SC 507 : 35 Com Cas 1) as well as other decisions referred hereinbefore. It is true that there is perhaps no procedure to file an appeal from the decision of the learned Single Judge of the Gauhati High Court. If that is so rules should be framed by the High Court in its jurisdiction of rule-making power for filing and disposal of such appeals. But absence of the procedural rules do not take away a litigant's right to file such appeals when the statute confers such a right specifically and the jurisdiction of the High Court to dispose of such an appeal if so filed.

9. We, therefore, propose to deal with the decision of the High Court. Here, we are further helped by the fact that there is an appeal from the decision of the learned Single Judge being Appeal No. 1511/87. In either view of the matter the view taken by the High Court is before us. As noted, the learned Single Judge was asked by parties by agreement to compute the liabilities in view of the failure of the parties to agree to another auditor. We have heard Dr. Ghosh, learned counsel for the appellant and we have also heard Shri A. K. Sen, learned counsel for the respondent. Shri Sen's contention was that the current liabilities came to a sum of Rs. 6,65,841.63. He further submitted that the parties having agreed to divide the liabilities equally, the liability to the share of the appellant came to a sum of about Rs. 3.32 lacs. As the appellant had paid a sum of Rs. 1.36 lacs the contention of the appellant was that the appellant has to pay a further sum of Rs. 2 lacs. In the alternative, it was urged by the appellant that what could be demanded from the appellant was the liabilities which were outstanding and not paid off by the time the settlement had been arrived at between the parties in January 1976. But having regard to all the events and terms of settlement we are in agreement with the Division Bench of the High Court that so far as the bank liability of Martycherra T.E. was concerned, the same had to be taken at the figure of Rs. 2,20,000 as stated in clause (2) of the agreement and not at Rs. 6,28,000 and odd as given in the balance sheet of December 31, 1973. The Division Bench computed the liability which came to a total of Rs. 16,34,675.46 which was computed after deducting a sum of Rs. 2,20,000 which was governed by clause (1) and it comprised of bank liability. The Division Bench took into consideration that the appellant had paid a sum of Rs. 1,36,038.06 after the compromise. She had not paid anything more than this. Therefore it follows that only a sum of Rs. 6,81,299.67 was payable by the appellant to the respondent. The Division Bench, in our opinion, correctly modified the determination on that figure and that is the sum which should be the liability of the appellant. Dr. Ghosh, learned counsel for the appellant tried to submit before us that a sum of Rs. 1,36,038.06 should be given credit in computing the liability of the appellant and according to him the Division Bench fell into an error in nod deducting this liability of his client. We are unable to agree with this view. In the aforesaid view

of the matter we uphold the direction of the Division Bench insofar as they computed the liability and direct that the appellant would pay that sum to the respondent in settlement of the dues referred hereinbefore.

10. A sum of Rs. 1,36,038.06 was directed to be paid at the time of the admission of the appeal by the Division Bench of the High Court. If that money has been paid or realised by the respondent the appellant would pay the balance amount of Rs. 6,81,299.67 and if the money is paid the respondent will by virtue of this order be entitled to withdraw the same and give credit to the appellant for the same. The balance sum will be paid by March 15, 1988. In default of payment by that date the amount will carry 18 per cent interest.

11. The appeal is disposed of accordingly by so holding. In view of the aforesaid position, decision in C.A. No. 1511/87 which is from the decision of the learned Single Judge no longer survives and disposed of accordingly.

12. SLP(C) No. 8152 of 1987 which is a cross-petition filed against the decision of the Division Bench of the Gauhati High Court no longer survives and is disposed of accordingly.

13. Parties will pay and bear their own costs.

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