SUPREME COURT OF INDIA

State of J&K

Vs.

Uco Bank & Ors.

C.A.No. 4414-15 of 1997

(Ruma Pal and S.H. Kapadia, JJ.)

22.04.2004

ORDER

Ruma Pal, J.

1. The appellant had granted a lease to Respondent 2 Hindustan Forest Company (P) Ltd. (hereinafter referred to as "the Company") for felling trees ^ in 1961. In terms of the agreement executed between the appellant and the Company, the Company was liable to pay royalty on the timber so felled to the appellant. This lease was initially valid up to 1968 and was then extended

up to 1971.

2. In 1972 the Company passed a resolution that it should be wound up voluntarily under Section 484 of the Companies Act, 1956. The final order e for winding up was passed by the High Court of Punjab and Haryana on 7-2-1975.

3. In June 1975 a suit was filed by the Bank against the Company and the appellant for various reliefs including a decree for payment of money by the appellant to the Bank. The case of the Bank in the suit was that the Company was its constituent. From time to time the Bank had advanced loans to the f Company. The Company's financial affairs deteriorated sometime in 1969. The Company approached the respondent Bank for further financial assistance. The Bank was not willing to advance any money unless the repayment of the amount sought to be advanced was guaranteed by the State. The conditions for advancing any loan to the Company were set out in a letter dated 19-6-1969 addressed by the Managing Director of Jammu and g Kashmir State Financial Corporation to the Manager of the respondent Bank which records the terms of this proposal.

4. The proposals were to the effect that the respondent Bank would advance an amount of Rs 6 lakhs to the Company and these funds would be placed at the disposal of the Forest Department. The Forest Department would supervise the operation of the felling of trees for

the remaining period h of the lease and would sell the timber. Out of the sale proceeds the appellant would be entitled to recover its royalty up to 50% of the sale proceeds and the balance would be used for paying the various creditors of the Company. It a was the respondent Bank's further case that the Conservator of Forests raised certain disputes as regards the rate of the royalty, namely, that the full royalty would be recovered from the sale proceeds. Pursuant to this "agreement, assurances and guarantees" alleged to have been given by the appellant, the respondent Bank sanctioned an amount of Rs 6 lakhs in favour of the Company. According to the Bank, the money was placed at the disposal of b the Conservator of Forests. This arrangement continued for a period of two years. It was admitted that there was no formal agreement as required under Section 122 of the Constitution of Jammu and Kashmir (hereinafter referred to as "the Constitution"). The respondent Bank's case was that it was entitled to a return of Rs 6 lakhs advanced by it pursuant to the alleged arrangement. A decree was accordingly prayed for against the appellant (Defendant 1) and c the Company and persons who the Bank claimed had guaranteed the repayment of the Company's dues (being Defendants 2 to 5 in the suit).

5. A written statement was filed by the respondent Bank in which the arrangement was denied and it was also pleaded that the alleged agreement would, in any event, be contrary to Section 122 of the Constitution.

6. The suit was transferred to the High Court of Punjab and Haryana d where the winding-up proceedings were pending. Leave was granted to the respondent Bank under Section 446(1) of the Companies Act, 1956 on 1-8-1980. The suit was renumbered as CP No. 48 of 1981.

7. The learned Single Judge framed several issues on the pleadings. Of these we are concerned with Issues (1), (6), (7) and (8) which read as under:

> "(?) Whether suit is not maintainable as no leave has been obtained under Section 446 of the Companies Act? OPR
> * * *
> (6) Whether the suit is barred by time? OPR
> (7) Whether Defendants 2 to 5 are not liable for the suit amount because the management of forest lease was handed over to Defendants 1 f and 6 at the instance of the petitioner Bank? OPR
> (§) Whether the petitioner is entitled to any decree against Respondent 1? OPR"

8. As far as Issue (1) is concerned, the trial court held that since no leave had been obtained under Section 446 of the Companies Act when the suit was instituted, the suit would be deemed to have been instituted on 1-8-1980 when such leave was applied for and granted.

9. As far as the sixth issue is concerned, consequent upon the conclusion arrived at in answer to Issue (1) the Court was of the view that the suit was barred by time as against all the defendants.

10. Issues (7) and (8) were dealt with together. The learned Single Judge ft came to the conclusion that the arrangement pleaded by the respondent Bank could be taken to have been established because there was no cross- examination on the evidence given in this regard by the Bank's witnesses. It was also noted that the appellant had not produced any witnesses in support of its case that there was no such arrangement, as pleaded by the respondent Bank. In addition, the trial Judge noted the contents of the letter dated 19-6-1969 which was addressed by the Managing Director of Jammu and Kashmir State Financial Corporation to the respondent Bank and said that the letter unequivocally established that the proposal had been finalised and that the additional loan which had been sanctioned in terms thereof by the respondent Bank in favour of the Company, this was in fact placed at the disposal of the Forest Department and the officials of the Forest Department maintained complete control over the disbursement of the loan.

11. These were the only reasons given for holding that the Company and the other guarantors/shareholders of the dues of the Company to the respondent Bank were not liable for payment of any amount as claimed by the respondent Bank. The liability, according to the learned trial Judge was that of the appellant State alone. However, in view of the finding on the question of limitation, the suit was dismissed against all the defendants.

12. Appeals were preferred by the respondent Bank from this decision of the Single Judge before the Division Bench. The appellant herein also preferred separate appeals challenging the findings of the trial court on Issues

> (7) and (8). The appellant again specifically raised the issue that there was no agreement in fact or in law which could be pleaded by the respondent Bank and which could be enforced against the appellant.

13. On the issue of leave under Section 446 and limitation, the Division Bench distinguished the decision of this Court in Bansidhar Shankarlal v. Mohd. Ibrahim and came to the conclusion that the suit could not be said to have been filed only after the leave was obtained. It held that leave under Section 446(1) could be obtained subsequent to the filing of the suit and irrespective of the date on which such leave is granted, for the purpose of limitation the date of the original filing of the suit was the relevant date.

14. As far as the merits of the matter were concerned, the Division Bench did not consider the issue of the respondent Bank's claim against the Company or any of its shareholders/guarantors at all. It concentrated on the claim of the Bank against the appellant State alone. This has not been challenged by the respondent Bank before us. Thus as far as the Company and the other guarantors are concerned, the respondent Bank's claim against them must be taken to have been rejected. As far as the respondent Bank's claim against the appellant was concerned, after noting the pleadings and quoting from the judgment of the trial court, the Division Bench, without any independent discussion of the evidence, agreed with the findings of the learned Single Judge on Issues (7) and (8). It said that the Company

Judge had taken into account all the relevant evidence that had come on record. It found merit in the conclusion of the Company Judge on the basis that the State had led no evidence in defence of its averment that no such agreement had been arrived at. Accordingly, the appeal preferred by the respondent Bank was decreed against the appellant for the principal amount advanced by a the Bank together with 6% interest and costs.

15. The decision of the Division Bench has been impugned before us in these appeals. Unfortunately, we have been deprived of any assistance from thelearned counsel appearing on behalf of the appellant. Nevertheless, we are of the opinion that in view of the glaring errors in the impugned judgment, these appeals must be allowed. d 16. Section 446(1) of the Companies Act reads as follows:

> "446. (1) When a winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose." c 17.

According to the apparent language of the section, a suit cannot be instituted once a winding-up order is passed except by leave of the Court. This sub-section has been construed by this Court in the decision of Bansidhar1. In that case leave had been obtained at the time of filing of the suit and the question was whether fresh leave ought to be obtained before proceeding under Section 446(1) before institution of execution proceedings. d This Court considered the contrary views expressed by the different High Courts on the effect and purport of Section 446(1) and came to the conclusion that the view expressed by the Calcutta High Court was correct, namely, that the failure to obtain leave prior to institution of suit would not debar the Court from granting such leave subsequently and that the only consequence of this would be that the proceedings would be regarded as e having been instituted on the date on which the leave was obtained from the High Court. In view of this categorical pronouncement of the law, the grounds on which the Division Bench has sought to distinguish the aforesaid principle are not only specious but contrary to the provisions of Section 446(1) and the decision of this Court in Bansidhar case1.

18. On the merits also we are unable to sustain the decision of the courts ^ below as far as Section 122 of the Constitution is concerned. Section 122, which is in terms materially identical with provisions of Article 299 of the Constitution, provides:

> "122. (1) All contracts made in the exercise of the executive power of the State shall be expressed to be made by the Governor and all such contracts and all assurances of property made in the exercise of that power 9 shall be executed on behalf of the Governor by such persons and in such manner as he may direct or authorise."

19. The Division Bench negatived the arguments of the appellant on the basis of Section 122 (incorrectly referred to as Article 299) by holding that the arrangement pleaded by the

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respondent Bank was not a fresh agreement but a continuation of the original agreement between the appellant and the Company relating to the lease of forest land. That was not the case with which the respondent Bank had come to the Court. The Bank had pleaded a form of promissory estoppel in the plaint. Neither the Single Judge nor the Division Bench considered this plea nor whether such a plea was maintainable in law or established in fact. The opinion of the Division Bench a that this "agreement, assurances, guarantees" as claimed by the respondent Bank which was alleged to have been entered into between the respondent Bank, Respondent 2 and the appellant State was a continuation of agreement which was between the appellant State and the respondent Bank alone is in any event unsustainable. The second ground for holding that Section 122 did not apply is equally untenable but more confusing. Reliance has been placed b by the Division Bench on the nature of the original contract between the appellant and the respondent Company. It was held that it was a sale of goods which had been effected between the appellant State and the Company subject to certain conditions of payment of royalty, etc. From this major premise, by a leap of faith and not of logic, the Division Bench came to the wholly fallacious conclusion that the provisions of Section 122 did not apply, c For the purpose of these appeals it is sufficient if we rest our decision on these two grounds to set aside the impugned judgment. These appeals are accordingly allowed and the decree of the respondent Bank against the appellant is quashed.

20. There shall be no order as to costs.