SUPREME COURT OF INDIA

Government of Orissa

Vs.

Messrs Ashok Transport Agency

C.A.No.3209 of 2002

(R. C. Lahoti CJI. and G. P. Mathur JJ.)

05.11.2004

JUDGMENT

P. K. Balasubramanyan, J.

1. M/s Ashok Transport Agency, Respondent No.1 herein [hereinafter referred to as the 'plaintiff'], filed a suit against M/s O.M.C. Alloys Limited, a Government Company, [hereinafter referred to as the 'defendant'], for recovery of a sum of Rs.3, 90, 210/- with interest thereon. The suit was filed on 1.8.1986. The defendant filed a written statement on 14.10.1987. On 29.08.1990, the suit was dismissed for default. On 20.09.1990, the plaintiff filed an application under Order IX Rule 9 of the Code of Civil Procedure for restoration of the suit. On 03.08.1991, the defendant filed a memo substantially submitting that it was not opposing the restoration of the suit. The application for restoration was heard and posted for orders to 17.8.1991. On that date, orders were not pronounced and the pronouncement of orders was adjourned to 02.09.1991.

2. On 30.08.1991, the Ministry of Law, Justice and Company Affairs, Government of India, issued a Notification S.O. 562 (E) in exercise of the powers conferred under sub-Sections (1) and (2) of Section 396 of the *Companies Act, 1956*, called the OMC Alloys Limited and the Orissa Mining Corporation Limited (Amalgamation) Order, 1991. It provided for the amalgamation of the defendant with the Orissa Mining Corporation Limited [hereinafter referred to as the 'Corporation'], a Government of Orissa company incorporated under the Companies Act. In addition to providing for the amalgamation of the two companies and for transfer of all rights and properties of the defendant and the vesting of the same in the Corporation in accordance with law, by clause 12, it provided for the dissolution of the Company. Clause 12 reads:

> "12. Dissolution of the M/s OMC Alloys Limited, Subject to the other provisions of this order, as from the appointed day, M/s OMC Alloys Limited shall be dissolved and no person shall make, assert or take any claims demand or proceedings against the dissolved company or against a director or an officer thereof in his capacity as

such director or officer, except in so far as may be necessary for enforcing the provisions of this order."

3. Clause 7 thereof made provision for saving of legal proceedings. It reads:-

"7. Saving of legal proceeding.- If on the appointed day, any suit, prosecution, appeal or other legal proceedings or whatever nature by or against the dissolved company be pending, the same shall not abate or be discontinued, or be any way prejudicially affected by reason of the transfer to the resulting company of the undertaking of dissolved company or of anything contained in his order. But the suit, prosecution, appeal or other legal proceeding may be continued, prosecuted and enforced or against the resulting company in the same manner and to the same extent as it would or may be continued, prosecuted and enforced by or against the dissolved company, if this order had not been made."

4. By definition, the resulting Company is the Corporation.

5. Thus, by virtue of the above Order issued under Section 396 of the Companies Act, the rights and obligations of the defendant were taken over by the Corporation with a liberty given to claimants like the plaintiff to continue the prosecution of their suits against the Corporation.

6. It is seen that the defendant, who was represented by counsel and who had filed a written statement in the suit, did not bring to the notice of the Court that the defendant had got amalgamated with the Corporation, that it stood dissolved and that it was necessary to implead the Corporation before proceeding further with the suit. The plaintiff also did not take any steps to implead the Corporation as a defendant in the suit either due to ignorance or due to want of care.

7. On 02.09.1991, with only the defendant on the party array, the application for restoration of the suit was allowed, the suit was restored and adjourned to 31.10.1991. Meanwhile, on 24.09.1991, the Government of Orissa promulgated ordinance No.8 of 1991 in exercise of powers conferred under Article 213(1) of the Constitution of India and issued a Notification dated 24.09.1991 whereby the Charge Chrome Division originally known as OMC Alloys Limited of the Corporation stood transferred and vested in the Government of Orissa. On 27.09.1991, the Government of Orissa sold what had vested in it, to Tata Iron and Steel Company (TISCO). It is seen that the defendant did not take further part or interest in the litigation and this resulted in Money Suit No. 491 of 1986 being decreed ex parte on 12.11.1991. The defendant did not accede to the demand of the plaintiff for satisfying the decree. The plaintiff came to know of the Government Notification and the subsequent developments and issued a notice to the Secretary, Department of Steel and Mines demanding payment of the decretal dues. The decree having not been satisfied, the plaintiff filed an Execution Petition on 24.10.1994 impleading the defendant as judgment debtor No.1, the Corporation as judgment debtor No.2 and the State Government of Orissa as judgment debtor No.3. In other words the plaintiff, the decree holder, sought to execute the

decree not only against the defendant-judgment debtor, but also against the statutory transferees. The Corporation filed an objection objecting to the executability of the decree as against it. The Government of Orissa also filed an objection objecting to the executability of the decree as against it. Both took the stand that not being parties to the decree, they were not bound by it. Thus, the question arose in execution whether the decree obtained by the plaintiff against the defendant was capable of being enforced against the Corporation and the State of Orissa. The Executing Court held that the decree was executable as against the Corporation and the State of Orissa since they were successors-in-interest of the judgment debtor and hence bound by the decree. Their objection was thus overruled. The Corporation and the Government of Orissa challenged the order of the Executing Court before the High Court of Orissa in Revisions under Section 115 of the Code of Civil Procedure. The High Court of Orissa after considering the relevant aspects and relying on the decision of this Court in State of Orissa vs. Klockner & Co., held that the Executing Court was right, since the Corporation and the State Government were only successors-in-interest of the defendant-judgment debtor and it was not open to them to challenge the decree as a nullity or as one unenforceable against them. Thus the revisions were dismissed. The dismissal of its revision, Civil Revision No. 117 of 1998, is challenged in this appeal by the Government of Orissa.

8. This appeal was heard by two learned Judges of this Court. One learned Judge came to the conclusion that the decree could not be enforced against the appellant and the appellant was entitled in execution to successfully raise the objection of non-executability of the decree as against it. The other learned Judge took the view that the decree was enforceable against the Corporation and also the Government of Orissa, though they were not impleaded in the suit, since they were successors-in-interest of the judgment debtor. It is seen that the essential difference in approach between the two learned Judges was as to whether it was for the plaintiff to have taken steps to bring on record the Corporation and the State of Orissa as parties to the suit before proceeding with it and obtaining a decree, or whether it was for the successors-in-interest of the defendant, if they wanted it, to seek to come on record by themselves so as to defend that suit. Anyway, the two learned Judges thus differed. In view of this, their Lordships referred the appeal to a larger bench for decision by order dated 30.04.2004. That is how, this appeal has come up before a bench of three Judges.

9. Normally, in a case covered by Order XXII Rule 10 of the Code of Civil Procedure where rights are derived by an assignee or a successor-in-interest pending a litigation, it is for that assignee or transferee to come on record if it so chooses and to defend the suit. It is equally open to the assignee to trust its assignor to defend the suit properly, but with the consequence that any decree against the assignor will be binding on it and would be enforceable against it. Equally, in terms of Section 146 of the Code of Civil Procedure, a proceeding could be taken against any person claming under the defendant or the judgment debtor. Similarly, a person claiming under the defendant or the judgment debtor could seek to challenge the decree or order that may be passed against the defendant, by way of appeal or otherwise, in the appropriate manner. But, it would not be open to it to challenge the decree as void or unenforceable in execution in the absence of any specific provision in that regard in the statute or order bringing about such a transfer or assignment. Going by these general principles, it is possible to argue that it was for the Corporation, and subsequently for the

State of Orissa, to get themselves impleaded in the suit and to prosecute a defence, not inconsistent with the defence already set up by the defendant in its written statement. Neither the Corporation nor the Government of Orissa took that step. In such a situation, normally, one would be inclined to the view that it is not open to the Corporation or to the Government of Orissa to challenge the executability of the decree as against them. It is in this context that the impact of Amalgamation Order has to be considered.

10. There is no dispute that the companies concerned were Government companies and that under Section 396 of the Act, the Central Government had the power to provide for amalgamation of the companies in national interest. It was in exercise of that power, that Notification S.O. 562(E) dated 30.08.1991 providing for amalgamation of the defendant and the Corporation was issued. The said Order, in addition to providing for amalgamation of the two companies, also made two important provisions in Clauses 7 and 12. By virtue of Clause 12, a dissolution of the defendant was brought about and it was provided that no person shall make, assert or take any claims demand or proceedings against the dissolved company, but claimants like the plaintiff and other creditors were not deprived of their right to proceed with the enforcement of their claims against the dissolved company in terms of the Order. Clause 7, which we have quoted above, provided that any suit, prosecution, appeal or other legal proceeding by or against the dissolved company pending on the appointed day, shall not abate or be discontinued or be any way prejudicially affected by reason of the transfer to the resulting company, the Corporation, of the undertaking of the dissolved company or of anything contained in the Amalgamation Order. But it was specifically provided that the suit, prosecution, appeal or other legal proceeding may be continued, prosecuted and enforced against the resulting company, namely, the Corporation, in the same manner and to the same extent as it would or may be continued, prosecuted and enforced by or against the dissolved company, if the order of amalgamation had not been made. In other words, a claimant like the present plaintiff, was given the right to proceed with the suit as against the Corporation in terms of Clause 7. On the wording of clause 7, an obligation was cast on the plaintiff to implead the Corporation as a defendant in the suit and to proceed with the same. It may be noted that at the relevant time, the suit stood dismissed for default and the same had not been restored though the application for restoration of the suit was pending. The suit was got restored after the amalgamation took place and the consequences as set out therein followed. On the terms of the Amalgamation Order, the plaintiff did have the right to proceed with the application for restoration and the suit as against the Corporation by taking appropriate steps in that behalf. We must also notice that it was the plain duty of the defendant and its counsel, to bring to the notice of the Court the fact of promulgation of the Amalgamation Order so as to enable the Court to pass appropriate orders regarding the continuance of the proceeding before it. All the same, that can only be a reason for the plaintiff not having taken the requisite steps at the relevant time. In the face of the Amalgamation Order, we are of the view that it was necessary for the plaintiff to have brought on record the Corporation and the State Government before proceeding with its suit and the search for a decree in its favour. The terms of the Amalgamation Order has not been properly appreciated by the Executing Court and the High Court when they allowed the plaintiff to proceed with the execution as against the Corporation and as against the Government of Orissa.

11. Thus, we are inclined to the view that the Corporation and the State of Orissa should have been impleaded in the suit prior to the decree on the terms of the Amalgamation Order. Learned counsel for the appellant submitted that the appellant only wanted an opportunity to defend the suit consistent with the stand adopted in the written statement filed by the defendant subject to any additional pleas that may be available to be raised by the appellant. We think that in this case, the proper order to be passed, in the interests of justice is to accede to the plea of the appellant to give it a chance to defend the suit especially in view of the relevant clauses of Amalgamation Order, 1991, by setting aside the orders impugned in this appeal and also by setting aside the ex parte decree and reviving the suit and by directing the trial court to try and dispose of the same afresh and in accordance with law, after bringing on record the Corporation, the Government of Orissa and TISCO, since the State had subsequently sold the assets to TISCO, and after giving the newly added defendants an opportunity to file their written statements, not inconsistent with the one already filed by the defendant. After giving of such an opportunity to the newly added defendants, it will be for that Court to proceed with the trial and disposal of the suit in accordance with law.

12. We therefore allow this appeal. We set aside the orders of the Executing Court and the High Court on the objections raised by the appellant. We close the Execution Petition. In the interests of justice, we set aside the ex parte decree in Money Suit No. 491 of 1986 on the file of the Civil Judge, Senior Division, Bhubaneswar and remand that suit to the Court of the subordinate Judge of Bhubaneswar for a fresh trial and disposal as indicated above. The parties would appear before that Court on 14.12.2004 to take further orders regarding the posting of the suit. Learned Senior Counsel for the appellant has submitted before us that appearance would be entered on behalf of the Corporation and the Government of Orissa. The trial court will direct the plaintiff to take out summons to TISCO and also to the Corporation and the Government of Orissa if they do not appear before it on 14.12.2004. Since defendant No.1 was already on the party array and had appeared in the suit, no fresh notice to it will be necessary. We have been assured on behalf of the Government of Orissa that it will appear in the trial court on the date fixed. After the appearance of the Corporation and the Government of Orissa or after service of summons on them and TISCO, the trial court will proceed with the suit and dispose of the suit in accordance with law and in the light of the directions as above.

13. The parties are directed to suffer their respective costs.