

ALLAHABAD HIGH COURT

Official Liquidators

Vs

Jugal Kishore

(Harries, J.)

15.09.1938

ORDER

Harries, J.

1. This is an application by the Official Liquidators praying that the name of Mr. Jugal Kishore, opposite party No. 1, be removed from the array of opposite parties and that the names of his two sons and widow be brought on the record in his stead. On 31st July 1935 the liquidators presented an application under Section 235, Companies Act, in this Court against certain directors of the Mofussil Bank Ltd. including Mr. Jugal Kishore. In this application certain acts of misfeasance were alleged and certain definite allegations were made against Mr. Jugal Kishore. On 29th March 1938 during the pendency of the proceedings, Mr. Jugal Kishore died and on 5th May 1938 the present application was filed. It is to be observed that the widow of Mr. Jugal Kishore, Mt. Dularna Bibi, is already in the array of opposite parties and the prayer in so far as it concerns her is that a note be made that she is also the legal representative of Mr. Jugal Kishore. As to the two sons, Nawal Kishore and Kamal Kishore, it is prayed that their names should be brought upon the record as opposite parties as two of the personal representatives of the late Mr. Jugal Kishore. The opposite parties have objected and contend that in proceedings under Section 235, Companies Act, no such substitution can be effected. Section 235(1), Companies Act, under which the misfeasance proceedings were instituted is in these terms: Where in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company or any past or present director, manager or liquidator or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator or of any creditor or contributory (made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust as the case may be whichever is longer) examine into the conduct of the promoter, director, manager, liquidator or officer and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just or to contribute such

sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) This Section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

2. It has been contended on behalf of the Official Liquidators that this right to bring summary proceedings under this Section survives as against the personal representatives or heirs of a deceased director. It is to be observed that the opposite parties are not in the true sense of the words executors or administrators. They are the heirs of the deceased man and it is in that capacity that they are said to represent his estate. On behalf of the opposite parties, it has been contended that the terms of this Section made it clear that no right to institute or continue the proceedings against a personal representative was contemplated, by the Legislature. Section 235, Indian Companies Act, is in the same terms as Section 276, English Companies Act, 1929, and Section 215 of the earlier English Companies Act, 1908. Those two Sections were reproductions of Section 165 of the earlier English-Companies Act, 1862.

3. Section 165 of the English Act of 1862 has been the subject of judicial construction in: the English Courts and it has always been the view in England that there is no right to institute or continue summary proceedings for misfeasance against the personal representatives of a deceased director. The matter was first considered in *In re East of England Bank; Ex Parte Flton's Eecutors* (1865) 1 Eq. 219 in which Kindersley V.C. held that Section 165, Companies Act, 1862, which conferred powers on the Court to compel payment by directors and officers of companies in respect of misfeasance or breach of trust relating to the affairs of the company, did not apply as against the executors of a deceased director. The learned Vice-Chancellor pointed out that in that Section the Court was authorized to compel payment of any moneys which upon investigation should be found to be payable by any person to whom the Section was intended to apply. He was of opinion that with regard to executors or administrators who are on the list of contributories as representing, the estate of a deceased shareholder, the Court in the winding up could not compel them to pay anything which was payable by the estate of the deceased. The Court winding up the company had no power to administer the estate of the deceased and all that it could do was to make an order directing payment to be made out of the deceased's estate and so in effect declare, the Official Liquidator to be a creditor of the deceased, he was of opinion that the-use of the phrase 'compel him to pay' led irresistibly to the conclusion that the Section was not intended to apply to the case of executors or administrators of a deceased person, because it was clear that they could not be compelled to pay in the winding up.

4. This case was expressly approved by Selwyn L.J. in *In re United English and Scottish Assurance Co.; Ex parte Hawkings* (1868) 3 Ch. A. 787 at p. 791 and the same principle was applied in *In re British Guardian Life Assurance* 19 L.T. 232. In this latter case Hall V.G. held that the executors of a deceased director not being officials of a company cannot be proceeded against by summons taken out under the provisions of Section 165, Companies Act, 1862. Hall

V.C. agreed with reasoning of Kindersley V.C. in the earlier case. He observed: Looking at the language of the Section in reference to making an offender who is criminally responsible liable, it appears to me that there is a total absence of the power to investigate the conduct of a dead man under it, therefore I am of opinion that the words are in favor of the construction put upon them by Kindersley V.C.

5. The view expressed in these cases has been followed and is also the view of the leading text-book writers in England upon Company Law. Further it has been held in *S.B. Billimoria, Official Liquidator v. Cecilla Mary DeSouza* (1929) 13 A.I.R. Lah. 624 that Section 235, Indian Companies Act, 1913, must be construed in the same manner. Mr. P.L. Banerji who appeared on behalf of the Official Liquidators has however argued that by reason of Section 306, Succession Act, the right to continue misfeasance proceedings survives against the personal representatives of a deceased director. Section 306, Succession Act, is in these terms: All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the I.P.C. or other personal injuries not causing the death of the party; and except also cases where after the death of the party the relief sought could not be enjoyed or granting it would be nugatory.

6. It is to be observed that this Section applies not only to actions or suits but also to special proceedings, and it is urged that summary proceeding under Section 235, Indian Companies Act, is clearly a special proceeding. On behalf of the opposite parties it has been contended that the phrase 'special proceeding' can only have reference to a proceeding in the nature of a suit and such appears to have been the view expressed by a single Judge in Lahore. I find it difficult to accept such a view. The phrase 'special proceeding' is an extremely wide one and there is nothing in the Section to suggest that it must be a proceeding analogous to a suit, but even if such a construction has to be given to the phrase 'special proceeding' I would be prepared to hold that misfeasance proceedings are proceedings in the nature of a suit. In my view, the term 'special proceeding' is certainly wide enough to cover a summary proceeding under Section 235, Indian Companies Act.

7. In my judgment however the present applicants can obtain no assistance whatsoever from the provisions of Section 306, Succession Act. In terms that Section only gives the right to continue proceedings against an executor or administrator of the deceased defendant or opposite party. The Section does not give a right to continue proceedings against heirs as representing an estate. Section 306, Succession Act, is the second Section in Chapter 6 which is headed "of the powers of an executor or administrator." The terms "executors or administrators" are defined in Section 2 of the Act. By Section 2(a), Succession Act, administrator means a person appointed by competent authority to administer the estate of a deceased person when there is no executor and in Section 2(c) an executor is defined as meaning a person to whom the execution of the last will of a deceased person is by the testator's appointment confided.

8. Where terms are defined in an Act of the Legislature, such terms must be given the meanings contained in the definitions wherever the terms are used in a statute, unless it is clear that they must be given some different meaning. There is nothing to suggest that the terms "executors or administrators" are used in Section 306, Succession Act, in any different sense from the sense in which the terms are used in other portions of the Act. It appears to me that the words "executor or administrator" in this. Section mean persons who are appointed by the Court to administer the estate of the deceased person in the absence of a will or persons nominated by the testator in his will to administer his estate. In nay view it is impossible to say that the words "executors or administrators" in Section 306 are sufficiently wide to include or embrace heirs representing the estate. I am conscious of the fact that the view which am taking is contrary to the view expressed in a number of decided cases. In *Peoples Bank of Norther India Ltd v. Desraj*¹ Coldstream and Jai Lal JJ. were of opinion that Section 306, Succession Act, was -wide enough to include heirs as representing the estate. They observed:It is true that the Section governs the liability of the executors and administrators, but there is no reason to hold that the liability of the heirs, who have not taken out probate or letters of administration stands on a different footing.

9. In *Peoples Bank of Norther India Ltd. V. Har Gopal*² Coldstream and Jai Lal JJ. again expressed the same view. The learned Judges who decided the Lahore cases were of opinion that the matter was governed by a Full Bench decision of the Calcutta High Court in *Krishna Behari Sen v. Corporation of Calcutta*³ but in my judgment the view taken by the Lahore Court does not receive any real support from this case. In the Calcutta Full Bench case Maclean C.J. observed:But the present action has not been revived at the instance of the administrators of the original plaintiff, and it may be said therefore that the case does not fall within the Section. The present appellants however are willing to take out letters of administration, and I think we should be taking too narrow a view of the situation, if we were to shut them out altogether from further continuing the action.

10. In short, the view of the Pull Bench of the Calcutta High Court was that the present Section 306, Succession Act, applied in terms only to executors and administrators and that before the proceeding could continue, the heirs of a deceased plaintiff would have to take out letters of administration. With great respect to the view expressed by the learned Judges of the Lahore High Court, I am unable to accept the contention that Section 306, Succession Act, applies not only to executors and administrators but also to heirs representing the estate. I am therefore bound to hold that the Official Liquidators have no right under Section 306, Succession Act, to continue these proceedings.

11. Even if Section 306, Succession Act, applied to heirs rex resenting the estate I would still be inclined to hold that the names of the present opposite parties could not be brought upon the record. If upon the true construction of Section 235, Companies Act, it is clear that summary proceedings were intended to be brought against the director in his lifetime and not against his

legal representatives or heirs, then the right would not in my view continue against his legal representatives or heirs by reason of Section 306, Succession Act. This latter Section can, in my view, only apply where the law is silent as to whether a right to sue or continue proceedings survives against the legal representatives or heirs of a deceased man. If the law which gives a plaintiff a right to institute proceedings is silent as to whether such right continues against the legal representatives or heirs, then Section 306, Succession Act, would apply. However, when the law which gives a person a right to institute proceedings gives him a right to institute and continue those proceedings against a man only in his lifetime, then if the defendant dies the right dies with him and the suit or proceedings cannot be continued against his executors.

12. At first sight it might appear that this is a somewhat harsh view, but in proper cases there is nothing to prevent the Official Liquidators instituting regular suits against the legal representatives or heirs of a deceased director. The Legal Representatives Suits Act (Act 12 of 1855) deals with cases where actions can be maintained against executors, administrators or heirs or representatives of any deceased person and also with cases where actions commenced against a person may be continued against his executors, administrators or representatives. It is to be observed that in this Act heirs and other representatives are mentioned separately and are not regarded as being included in the terms "executors or administrators."

13. Holding as I do that Section 306, Succession Act, cannot assist the present applicants, they are bound to contend that I should not follow the English construction of Section 235. It has been urged that to apply the English construction to Section 235 is to adopt the old principle of action personalis moritur cum persona which has been from time to time described by English Judges as a barbarous principle. In my view I should not be applying this principle at all in construing Section 235, Companies Act, in the manner in which it has been construed in England. In my judgment the phraseology of Section 235, Companies Act, makes it tolerably clear that the proceedings contemplated in that Section were intended to apply only to the director and not to his representatives. It may be a harsh Section, but I have to give effect to it as it stands. I see no reason whatsoever for not following the construction placed upon a similar Section in England and therefore I hold that the proceedings brought by the Official Liquidators against Jugal Kishore in his lifetime cannot now be continued against his two sons and wife as heirs representing the deceased man's estate. Consequently this application fails and is dismissed with costs.

Cases Referred.

1(1935) 22 A.I.R. Lah. 705

2(1936) 23 A.I.R. Lah. 271

3(1904) 31 Cal. 993