

# LAHORE HIGH COURT

Shukantla

Vs

Bank of Northern India Ltd

(Tek Chand, J.)

17.06.1941

## JUDGMENT

**Tek Chand, J.**

1. Two cases, Regular second Appeal No. 445 of 1939 and Letters Patent Appeal No. 166 of 1940, were separately referred to the Full Bench, but they have been heard together, as the question of law involved in them is the same. The referring Bench did not state, in so many words, the question on which the opinion of the Full Bench was invited, and, there-fore, at the commencement of the hearing before us, we formulated the question as follows:

Where in execution of a decree obtained by a company in liquidation, certain property has been attached as belonging to the judgment-debtor, and a third person has unsuccessfully objected to the attachment on the ground that the property belonged to him and not to the judgment-debtor, can such person bring a suit under Order 21, Rule 63, Civil Procedure Code, against the company for a declaration of his title without having first obtained, under Section 171, Companies Act, leave of the Court which had passed the winding up order?

2. In *Bhawanishankar v. Industrial Bank of India Ltd*<sup>1</sup>. a Division Bench of the Punjab Chief Court (Shadi Lal and Wilber. force, JJ., answered this question in the negative, holding that such a suit could not be commenced, or proceeded with, except by leave of the liquidation Court. This ruling had been followed uniformly in the Chief Court and in this Court, until its soundness was challenged in these cases, in view of certain observations of their Lordships of the Privy Council in *Phul Kumari v. Ghanshyam Misra*<sup>2</sup> defining the "object and nature" of a suit under Order 21, Rule 63, Civil Procedure Code It was, therefore, thought necessary to have the matter reconsidered by a Full Bench. Section 171, Companies Act, lays down that:

When a winding up order has been made, or a provisional liquidator has been appointed, no suit, or other legal proceedings, shall be proceeded with, or commenced, against the

company, except by leave of the Court and subject to such terms as the Court may impose.

<sup>1</sup>(19) 6 A.I.R. 1919 Lah 200

<sup>2</sup>(08) 35 Cal. 202

3. The terms of this section are clear and imperative. They create an absolute bar against the commencement, or continuance, of a suit or other legal proceeding against the company except with the leave of the Court. Neither the word 'suit' nor the expression 'legal proceeding' is, however, defined in the Companies Act, the Civil Procedure Code or the General Clauses Act. They have different meanings in different statutes according to the context, but there is no doubt as to their meaning in Section 171. As stated in Section 26, Civil Procedure Code, a 'suit' is a proceeding under the Code, which is instituted with the presentation of a plaint in a Court of original jurisdiction and it is in this sense that this word is used here. The expression 'legal proceeding' in this section is coupled with 'suit' and obviously means proceedings ejusdem generis, that is to say, original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint.

4. It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from an interlocutory or final order passed in the suit. The rule of interpretation to be followed in such cases is contained in the maxim *copulatio verbo-rum indicat acceptationem in eodem sensu* (the coupling of words shows that they are to be understood in the same sense). Reference may, in this connection be made to *Hood Barrs v. Cathcart*<sup>3</sup> affirmed on appeal by the House of Lords in *Hood Barrs v. Heribt*<sup>4</sup> in which a similar provision in the (English) Married Woman's Property Act, 56 and 57 vict., c. 63, Section 2, was so interpreted.

5. A case under Order 21, Rule 63, by an unsuccessful objector is initiated with a plaint. It is therefore a 'suit' and, prima facie, within the prohibition contained in Section 171, Companies Act. It is, however, contended that it is not a 'suit' strictly so called, but is a 'legal proceeding' of a peculiar kind. In support of this contention, reference is first made to a Full Bench ruling of the Chief Court in *Kishen Singh v. Industrial Bank of India*<sup>5</sup> where it was held that an appeal or petition for revision preferred by a defendant, against whom the action had been brought by a company in liquidation, did not require the leave of the Court. The learned Judges (Chavis, Shadi Lal and Wilberforce, JJ.) based their decision on the judgment of the House of Lords in the well-known case in *Humber & Co. v. John Griffiths Cycle Co*<sup>6</sup>. In that case it had been laid down that where a company was being wound up under the direction of the Court, an appeal to the House of Lords in which the company was the respondent brought in an action in which the company was originally the plaintiff, was not a 'proceeding against the company' within Section 87, Companies Act of 1862, (which corresponds to Section 177, English Companies Act of 1929 and Section 171, Indian Companies Act of 1913) and that no leave of the liquidation Court was necessary for the institution, or continuance, of the appeal. In coming to this conclusion Lord Davey, observed:

It was the respondents (company) who themselves proceeded with the action after the winding up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with there is no necessity for the defendants in the action to obtain leave for any

<sup>3</sup>(1894) 3 Ch 376

<sup>5</sup> A.I.R. 1918 Lah. 181

<sup>4</sup>(1897) A.C. 177

<sup>6</sup>(1901) 85 L.T. 141

defensive 'proceeding on their part. The liquidator was either party, or privy, to the proceedings in the Court of Appeal, and the respondents, having been successful in that appeal, cannot now object to the appellants defending themselves against the consequences of the judgment by the ordinary means of an appeal to this house.

6. Relying upon the words underlined (here italicised) in the passage cited above, Mr. Jagan Nath Aggarwal for the appellants contended that a suit under Order 21, Rule 63, is also, in essence, a 'defensive proceeding' taken on behalf of the objector, and arising out of the proceedings, which the company itself had started by attaching, in execution of their decree against the judgment-debtor, property which the objector claims to be his. The learned Counsel further referred to certain observations made by Lord Robertson in delivering the judgment of their Lordships of the Privy Council in *Phul Kumari v. Ghanshyam Misra ('08) 35 Cal. 202(Supra)*. The exact point before their Lordships in that case related to the proper court, fee payable on the plaint in a suit under Order 21, Rule 63, Civil Procedure Code, where the plaintiff, having unsuccessfully objected to the attachment of the property in proceedings in execution of the decree of defendant 1 against defendant 2 had brought a suit for declaration of her title and for an injunction. The Sub-ordinate Judge as well as the Calcutta High Court had held that court-fee was payable ad valorem on the amount of the decree in execution of which the property had been attached.

7. Their Lordships, in reversing this decision, held that the case was governed by Article 1(1) of Schedule II, Court-fees Act, which prescribes a fee of L 10 on the plaint "in suit to alter or set aside a summary decision or order of any of the Courts not established by Letters Patent or of a revenue Court." In coming to this conclusion, they examined the "object and nature" of a suit under Section 283 of the Code of 1882--(Order 21 Rule 63 of the present Code)--and remarked that it was "simply a form of appeal." They also stressed the "essential fact" that this was "a complaint for review of a summary decision," and, as such, governed by Article 1(1) of Schedule II, Court-fees Act.

8. This being the true "object and nature" of a suit under Order 21, Rule 63, as explained authoritatively by the Privy Council the appellants' learned Counsel urged that such a suit, though described as a "suit" in the Code, was really "a form of appeal" against the summary order passed in execution proceedings, which had been initiated by the company, and therefore it was a "defensive proceeding" within the meaning of the rule laid down by Lord Davey in *Humber & Co. v. John Griffiths Cycle Co. (1901) 85 L.T. 141(Supra)*, and, thus, outside the ambit of P. 171, Companies Act. The argument, though at first sight plausible, is wholly fallacious. An appeal or

revision petition from an order or decree passed in a suit stands on an entirely different footing from a regular suit under Order 21, Rule 63. There is no real analogy between the two. In the former case, the appeal or revision is a proceeding arising in the suit itself, though continued in a higher Court. In the latter case it is an independent action, distinct from the execution proceedings in which the attachment had been ordered and the objection disallowed. It is initiated by the presentation of a formal plaint, in a different Court of original jurisdiction on payment of a fixed court-fee, and has all the essentials of a 'suit.

9. It is no doubt true that in *Phul Kumari v. Ghanshyam Misra* ('08) 35 Cal. 202(*supra*) such a suit was described as a "form of appeal" or a "review of summary order," but these remarks were made in reference to the phraseology of Article 1(1) of Schedule II, Court-fees Act, which was held applicable to such a suit. They are no guide for interpreting a totally different section in the Companies Act. Similarly, Lord Davey's description in *Humber & Co. v. John Griffiths Cycle Co.* (1901) 85 L.T. 141(*Supra*) of an appeal arising out of an action brought by the company itself as a "defensive proceeding" cannot apply to a regular action to establish the objector's title in another Court of original jurisdiction.

10. Mr. Jagan Nath stressed the fact that the cause of action for a suit instituted under Order 21, Rule 63 is the summary order passed by the executing Court rejecting the objection, but that circumstance alone cannot make the suit a "defensive proceeding." If this were so, it would take out of the purview of Section 171, Companies Act, suits of diverse kinds and render its provisions largely nugatory.

To give a few instances : if a company has got a notice of ejectment issued by a revenue officer against a tenant of property owned by it and the tenant brings a suit in a revenue Court to contest the notice of ejectment or, denying the relationship of landlord and tenant, sues in a civil Court, can it be said that such a suit is in the nature of a "defensive proceeding" and therefore not governed by Section 171, Companies Act? Again, where some one had taken forcible possession of premises owned by a company in liquidation and within six months of the forcible dispossession the liquidator brought a suit under Section 9, Specific Relief Act, and obtained decree in execution of which possession has been restored to him, and subsequently, the opposite party wishes to bring a regular suit against the company to establish his title and recover possession, obviously, he cannot do so without leave of the Court. If the appellant's contention were sound, a suit to set aside a decree, which had been passed in favour of the company against him, on the ground that it had been obtained by fraud, or because the plaintiff was not properly represented in the former suit, might very well be called a "defensive proceeding;" but Mr. Jagan Nath frankly conceded that this would be extending the meaning of the expression too far.

11. The learned Counsel next referred to *Krishnappa Chetty v. Abdul Khader Sahib*<sup>6</sup> and *Mt. Bas Kuar v. Gaya Municipality*<sup>7</sup> in which it was held that for the purpose of the application of the rule

of lis pendens a suit brought under Order 21, Rule 63 is a mere continuance of the proceedings in the claim petition, and all alienations made during the continuance of the proceedings, originated by the claim petition till the disposal of the suit brought to set aside the order passed on the claim petition, are affected by the doctrine of lis pendens formulated in Section 52, Transfer of Property Act. Counsel for the respondent challenged the correctness of these decisions, but for

<sup>6</sup> A.I.R. 1915 Mad 495

<sup>7</sup> A.I.R. 1939 Pat. 138

the purposes of this case, it is not necessary to examine those cases more especially when they appear to have become obsolete by the addition of the explanation to Section 52 by the Amending Act, 10 of 1929.

12. There is however no doubt that the application of the doctrine of lis pendens to such cases was governed by wholly different considerations, which are of no assistance whatever in interpreting the plain wording of Section 171, Companies Act. In these cases, the decision was based on the extension of the well-established rule that, where a right of appeal is given, it is essential for the sufficient exercise of that right that purchasers should be regarded as acquiring their interest subject to the contingency of the diminution or loss by subsequent reversal of the judgment and therefore they must be held to be purchasers pendente lite if their purchase was made at any time after the decision of the suit (Hukam Chand's Law of Res Judicata, p. 700, para. 277). But this has nothing to do with the rule of construction on which the plain wording of Section 171, Companies Act, has to be interpreted.

13. After giving due weight to the arguments of learned Counsel, we have no doubt that *Bhawanishankar v. Industrial Bank of India Ltd*<sup>8</sup>. was correctly decided and that a suit under Order 21, Rule 68 against a company in liquidation cannot be commenced without the leave of the Court which had ordered: the winding up. We would accordingly, answer the question referred to the Full Bench in the negative. Before concluding, it may be mentioned that in the course of the argument, reference was made to the judgment of Braund, J. of the Allahabad High Court in *Rawat Raj Kumar Singh v. Benares Bank Ltd*<sup>9</sup>, in which the Full Bench decision of the Chief Court in *Kishen Singh v. Industrial Bank of India*<sup>10</sup> was adversely criticised and the view was expressed that an appeal or revision preferred by a defendant against an order or decree in a suit instituted by the company is a "legal proceeding" within Section 171 and therefore cannot be brought without the leave of the Court. As stated above, the expression "legal proceeding" in the section appears to us to mean original proceeding, analogous to a suit, and not proceeding arising in the suit, though carried on in the Court of appeal or revision. In our view *Kishen Singh v. Industrial Bank of India A.I.R. 1918 Lah. 181(Supra)* rightly interpreted the decision of the House of Lords in *Humber & Co. v. John Griffiths Cycle Co. (1901) 85 L.T. 14(supra)* and is also in accord with the judgment of the same high tribunal in *Hood Barrs v. Heribt*<sup>11</sup> cited above.

14. At the conclusion of the hearing, it was stated by counsel for the appellant in (*Shrimati Shakuntala Devi v. Peoples' Bank of Northern India Ltd. and Ram Narain*<sup>12</sup>) and admitted by counsel for the liquidator that the judgment-debtor, Ram Narain, has since paid to the liquidator

the entire amount of the decree obtained by the company against him, and therefore the attachment of the jewellery box in dispute (in respect of which Shrimati Shankuntala Devi had instituted the suit under Order 21, Rule 63), has become inoperative and that the jewellery, box would be returned to the depositor Ram Narain. Accordingly, all parties stated that it is not necessary to send this case back to the Division Bench and (as the whole case had been referred to us) they prayed that we might pass final orders

<sup>8</sup>1919 6 A.I.R. Lah

<sup>10</sup>A.I.R. 1918 Lah. 181

<sup>9</sup>AIR 1941 All 154: 1941 AWR (H.C.) 11

<sup>11</sup>(1897) 1897 A.C. 177

<sup>12</sup>R.S.A. No. 445 of 1939

on it.

15. We therefore dismiss R.S.A. No. 445 of 1939, but in the circumstances leave the parties to bear their own costs throughout. In the other case, *Nazir Ahmed v. Peoples Bank of Northern India*<sup>13</sup>, besides the question of law decided above, there are other points involved which can more appropriately be dealt with by the Division Bench. We therefore remit that case to the Division Bench for disposal of the other points.

<sup>13</sup>L.P.A. No. 166 of 1940