

(1964) 06 KL CK 0023
In the High Court Of Kerala
Case No : Appeal Suit No. 747 of 1960

A.P.K. Kaliappa Nadar

APPELLANT

Vs

Kathayee Cotton Mills Ltd., Alwaye and Others

RESPONDENT

Date of Decision : 15-06-1964

Acts Referred:

Companies Act, 1913 — Section 179

Citation : AIR 1965 Ker 14

Hon'ble Judges : T.K. Joseph, J; T.C. Raghavan, J

Bench : Division Bench

Advocate : C.K. Viswanatha Iyer, for the Appellant; N.K. Sreedharan, for Respondent No. 7, R. Gopalaswamy Iyengar and P.K. Kesavan Nair for Respondent No. 9 and T.N. Subramonia Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Joseph, J.—The suit which has given rise to this appeal was for the following reliefs: (i) a declaration that the decrees and execution proceedings in O. S. No. 82 of 1950 of the District Court of Parur and O. S. No. 3 of 1122 of the same Court (O. S. No. 2 of 1122 of the High Court of Travancore) were obtained fraudulently and collusively with the object of defeating creditors of the Alwaye Textiles Ltd. and that the same were not valid or binding on the company, (ii) that the decree and execution proceedings in O. S. No. 278 of 1950 be set aside and that the first plaintiff be permitted to recover possession of the properties in the schedule appended to the plaint; and (iii) for an injunction restraining defendants 1, 4 and 5 from alienating or encumbering the properties in schedule A and the moveables therein. Originally there were three plaintiffs. The first plaintiff was the official liquidator of the Alwaye Textiles Limited. The second plaintiff was a creditor of the company, and the third plaintiff a share-holder. The second plaintiff was removed from the array of parties on his application. During the pendency of the suit the first plaintiff ceased to be the official liquidator and the additional fourth plaintiff was appointed in his place. He got impleaded as per

an order dated 31-8-1959. The suit was dismissed by the trial Court on 23-3-1960, and this appeal has been preferred by Kaliappa Nadar, the third plaintiff in the suit.

2. At the hearing of the appeal, counsel for the 9th respondent raised a preliminary objection that the appeal was incompetent. The argument was that the suit was filed by and in the name of the company for reliefs in respect of the property of the company and that the company not having filed an appeal from the decree, the appeal filed by a share-holder was not competent. Counsel pointed out that the official liquidator (who is the seventh respondent in the appeal) did not choose to file an appeal on behalf of the company and that the appellant, a share-holder, has no interest in the assets of the company entitling him to maintain the appeal.

The objection was met by the appellant who contended that as a party to the suit (third plaintiff) and a share-holder of the company he was entitled to prefer the appeal. We asked counsel whether the appeal was preferred by the appellant in his individual capacity or on behalf of the company and counsel stated that the appeal was only on behalf of the company. This information was elicited as the decree makes the third plaintiff liable for costs and as he is entitled to appeal against the same. We may add that no court-fee was paid in the appeal on the costs decreed, as required by the rules.

3. The first point to be considered is whether there is an appeal by and in the name of the company. The Alwaye Textiles Limited is a corporation entitled to sue and be sued in its name. In fact the company was the first plaintiff in the suit, the description of the first plaintiff being "the Alwaye Textiles by R. Padmanabha Pillai, Official liquidator." The Alwaye Textiles Limited does not however figure as a party to the appeal. A company in liquidation retains its corporate powers including the powers to sue and such powers are exercised by the liquidator who has to sue in the name of the company when the suit is, as in this case, for recovery of the property of the company. It has been held in *City Bank of Lahore Ltd. v. Shiv Sharma* AIR 1951 Punj 144 that even a claim petition on behalf of a company in liquidation has to be made by the liquidator in the name of the company. Even if the liquidator sues in his own name for such relief it is competent for the Court to grant leave to amend the description in the cause title.

4. This takes us to the question whether the appellant in his own right as share-holder can sue or appeal for obtaining relief in respect of the assets of the Company. The Supreme Court has pointed out in *Bacha F. Guzdar Bombay v. Commr. of Income Tax, Bombay*, (S) AIR- 1955 SC 74

"That a share-holder acquires a right to participate in the profits of a company may be readily conceded but it is not possible to accept the contention that the share-holder acquires any interest in the assets of the company..... A share-holder has got no interest in the property of the company though he has

undoubtedly a right to participate in the profits if and when the company decides to divide them..... There is nothing in the Indian Law to warrant the assumption that a share-holder who buys shares buys any interest in the property of the company which is a juristic person entirely distinct from the share-holders".

To the same effect is the earlier decision of the Supreme Court in Charanjit Lal Chowdhury v. Union of India AIR 195r SC 41. In View of the authoritative pronouncements referred to above it is unnecessary to refer to the decisions of the High Courts. However, we may mention that the same view has been laid down in N.V. Vaidyanatha Ayyar and Another Vs. Indian Bank Ltd., Tiruchirapalli and Others, .

5. Section 178 of the Indian Companies Act, 1913 (reference is made to the old Act as the winding up proceedings were under that Act) provides :

"The official liquidator, whether appointed provisionally or not, shall take into custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled."

By Sub-section (2) all the property and effects of the company has to be deemed to be in the custody of the Court as from the date of the order for the winding up of the company. The powers of the official liquidator are enumerated in Section 179, and one of the powers which the liquidator can exercise with the sanction of the Court is a power to institute or continue any suit or prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company. Once a liquidator is appointed even the directors cease to have the power to sue on behalf of the company. It has been held in Shree Taj Protap Textiles Mills Vs. Granaries Ltd. and Others, that the directors cannot file a suit against a debtor even if the provisional liquidator wilfully refuses to institute a suit for that purpose. The remedy of the directors, should the liquidator cause a loss by refusing to file a suit, should be against the liquidator himself and wilful refusal might be a proper ground for his removal.

6. It follows from what has been stated above that a share-holder is not entitled to maintain an action when a liquidator is functioning. He may possibly move the Court to give directions to the liquidator to sue. We may add that the winding up Court has not given leave to this appellant to appeal on behalf of the company.

7. It was urged on behalf of the appellant that he being a party to the suit, namely, the third plaintiff, he is entitled under the Code of Civil Procedure, to file an appeal. This question was considered by this Court in Executive Officer, Sri Padmanabhaswamy Temple Vs. Raghavan Pillai and Another, and S. Govinda Menon Vs. K. Madhavan Nair and Others, and it was held that Courts in India have been following the practice of the Chancery Court which is summarised in Halsbury"s Laws of England as follows:

"Any of the parties to an action or matter and any person served with notice of the judgment or order may appeal (by leave where leave is necessary). A person

who is not a party and who has not been served with such notice cannot appeal without leave, but a person who might properly have been a party may obtain leave to appeal, (vol. 30 p. 461)".

Based on these decisions it is argued that the appellant is entitled to prefer the appeal. We may in this connection refer to a few facts preceding the institution of the suit. On 7-10-1955 plaintiffs 2 and 3 filed an application before the official liquidator. Ex. P. 169 is that application. After referring to the decrees sought to be declared invalid, it is stated :

"All the above are collusive decrees and collusive executions and there are good grounds for setting aside the proceedings. In such circumstances you should file suit to declare those proceedings invalid and have them cancelled.

We are willing to contribute equally between us all the amounts necessary for filing and conducting the suit and we are willing to join with you as co-plaintiffs.

Hence we request you to obtain necessary sanctions from Court and file the suit without delay."

On receipt of this application the liquidator submitted a report (Ex. P.21) to the winding up Court. After stating the receipt of the application and its contents, he prayed :

"It is therefore prayed that permission be granted to file a suit by the liquidator as well as Sri Mathew creditor and Sri Kaliappa Nadar share-holder for getting a declaration that the decrees are invalid".

(translation)

The Court passed an order "sanctioned" on 17-10-1955. It was on the strength of this that the suit was filed. Exs. P.169 and P.21 show that sanction was really accorded to the liquidator to sue on behalf of the company, the other two plaintiffs being allowed to be on the party array to indemnify the liquidator for any loss. This is seen from the plaint also because it is only the official liquidator who is described as suing on behalf of the company. It is stated in paragraph 1 of the plaint that the assets of the company are with the official liquidator as per the order in Company Petition No. 1 of 1953 and that he is suing on behalf of the company with the sanction of the Court. Paragraph 2 states that the second plaintiff is a creditor of the company to whom amounts are due on account of rent of a building taken by the company for which he has obtained a decree and the third plaintiff is described as a share-holder of the company. It is not stated in the plaint that plaintiffs 2 and 3 are suing on behalf of the company; on the other hand their presence is attributed to their status as creditor and shareholder respectively. After the suit was dismissed by the trial Court the third plaintiff did not ask for or obtain leave of the winding up Court to file an appeal on behalf of the company. Such being the case the right of the third plaintiff to file an appeal from the decree to which he is a party does not extend to a right to file the appeal on behalf of the company.

8. Counsel for the appellant referred to certain decisions to show that no leave is required for filing the appeal on behalf of the company. *Jaswantrai Manilal Akhaney Vs. The State of Bombay*, has no application to this case. What was held in that case is that for a prosecution for breach of trust even by a director of a company, previous sanction of any authority was not contemplated by law unless it is a prosecution in the name and on behalf of the company by the official liquidator who is to incur expenses out of the funds of the company. It is further held that Section 179 of the Companies Act does not control the general law of the land. *Sailendra Nath Sinha and Another Vs. Jasoda Dulal Adhikari and Another*, was also a case of a criminal prosecution. It was held that there was nothing in Section 179 to indicate that if the liquidator takes action without direction of the Court the action would be illegal or invalid or that it would invalidate the prosecution. These decisions have no bearing on the question whether a shareholder can sue in the name of the company without the sanction of the Court after the appointment of a liquidator.

9. Thus, our conclusions are that the reliefs sought for in appeal are those which the company alone is entitled to ask, that there is no appeal by or on behalf of the company and that the appeal is therefore incompetent. Their preliminary objection is accordingly upheld. The appeal therefore fails and is dismissed. As the appeal fails on a preliminary point we direct the appellant to pay one half of the costs of the contesting respondents, one set only, and to bear his costs. The Memorandum of cross-objections which relates only to findings is dismissed in the circumstances.