

(1974) 06 CAL CK 0001
In the Calcutta High Court
Case No : Suit No. 370 of 1971

Auto Distributors Ltd.

APPELLANT

Vs

Guha Rice Company

RESPONDENT

Date of Decision : 19-06-1974

Acts Referred:

Companies Act, 1956 — Section 125, 19, 3, 394, 394(3)

Citation : 78 CWN 984

Hon'ble Judges : Sudhamay Basu, J

Bench : Single Bench

Advocate : Monotosh Mukherjee, for the Appellant; B. Das, for the Respondent

Judgement

Sudhamoy Basu, J.—This is a suit for a decree for Rs. 69114.43 for arrears of rent, interests and costs. The plaintiff's case is that the defendant was a tenant of the plaintiff in respect of a go-down and durwan's quarter at a monthly rent of Rs. 6350/- at No. p. 15, Transport Depot Road, Jingir Pool, Kidderpore. The defendant has failed and neglected to pay monthly rent from October, 1970 to July, 1971 in spite of demands. The plaintiff, it is stated, is also entitled to interests at the rate of eight and one third percent per annum. The defendant agreed to pay electricity charges. A sum of Rs. 69141.43 is said to be due and payable on account of the monthly rent interests and electricity charges, It may be noted that the suit was originally filed by Poddar Automobiles limited. It is alleged in paragraph 6A of the amended plaint that by an order of this Court of the 28th of February, 1972 the said Poddar Automobiles limited was amalgated with the plaintiff. The formalities mentioned in the said order having all been complied with in terms of Clauses 1 and 3 of the said order all properties, rights and powers of the said company stand transferred to the plaintiff including the right in this suit and the right to proceed with the suit. Besides the original written statement the company filed an additional written statement. Mr. B. Das, the learned Counsel appearing on behalf of the defendant said that the defendant would contest only on the maintainability of the plaint on the ground that the

present plaintiff is not entitled to proceed with the suit. It is not necessary therefore, to set out all the allegations in the written statement. It is, inter alia, contended in the additional written statement that the said order dated 28th February, 1972 was not made upon notice to the defendant or with their knowledge. The plaintiff is not entitled or competent to continue the present suit. No intimation was given of the amalgamation nor the defendant was asked to attorn to the tenancy in favour of the present plaintiff. It is further alleged that the suit filed by the original plaintiff was not maintainable nor the present plaintiff has any right title or interest to proceed with the suit.

2. On the basis of the aforesaid pleadings the following issues were raised:

1(a). Is the suit maintainable against the defendant ?

1(b). Has the substituted plaintiff any cause of action against the defendant ?

2. What relief or reliefs, if any, is the plaintiff entitled to ?

Two witnesses were examined in this case; (His Lordship then discussed the evidence and proceeded as follows :)

3. Mr. B. Das, the learned Counsel appearing on behalf of the defendant company argued that although the order for the amalgamation was made on the 28th of February, 1972 the same was filed only on the 9th of May, 1972. It was long after thirty days. According to Mr. Das it transgressed the provision of section 394 sub-section 3 of the Companies Act which was mandatory. From the deposition of Uma Kanta Chakraborty and some of the letters; DD. 19, DD. 22 and DD. 23 he contended that even after the amalgamation the defendant paid two cheques in the name of Poddar Automobile company and the same were accepted by the latter. There was no cross-examination of Uma Kanta Chakraborty in this respect and there was no suggestion either that the cheques were not encashed. This encashment of the cheque was inconsistent with the amalgamation having taken place. Mr. Das then referred to the scheme in terms of which the amalgamation was effected. Paragraph 4 of the scheme mentions some other suits but not the present one. He laid considerable emphasis on these two aspects of the matter.

Referring to the provisions of section 394(3) of the Companies Act Mr. Das pointed out that it not only provides that the order of amalgamation has to be filed within thirty days but there is also a penal provision attached to it. He submitted that the penal provision made the provision a mandatory one. In this connection he referred to the case of Jaganath v. Jaswant Singh reported in AIR 1954 Supreme Court 210. He also referred to Craies on Statute Law, 7th edition, page 62. Mr. Das contended that a statute would be mandatory when no option was left. Even if compliance with the order was a formality it was such an essential formality that it had to be regarded as imperative. Until the certified copy was filed dissolution could not come about. Even in the order there was a direction for compliance. From some of the records produced from the office of

the Registrar of Companies he pointed out that the order although made on 28.2.72 was filed on 6.5.72. The application for the copy was made on 21.4.72 and the certified copy was delivered on 12.4.72. Although the requisition was given on 2nd of March, 1972 there was delay in applying for copy and it could not be said that there was compliance in filing the order within thirty days.

4(i). The Court is, however, unable to accept the contentions of Mr. Das. Schedule B, Part II of the order, inter alia, contain the description of the property in which the defendant is a tenant. The go-down is distinctly mentioned and tallies with the description in paragraph 1 of the plaint which has not been denied in the written statement. Again the operative part of the order clearly states that all property, rights and powers of the transferor company specified in the first, second and third part of schedule B and all other property, rights and powers of the said transferor company be transferred without further act or deed to the transferee company with effect from the 31st of March, 1973. The said order itself reduces the scope for the submissions made by Mr. Das. It is true that in Clause 4 of the order the Court itself directed a certified copy of the order to be delivered to the Registrar of the Companies. The transferor company was to be dissolved after such delivery but there was no default clause attached thereto. It is nowhere said that in default of compliance the order will be a nullity or that the transfer will be bad or ineffective. Moreover Clause 3 of the order provided that all proceedings "now pending by or against the said transferor company be continued by or against the said transferee company". That was a general clause which seems to govern the present case.

(ii). Secondly, the Court finds substance in the contention of Dr. Mukherjee that this question is hit by the principles of *res judicata* inasmuch when amendment was made of the plaint and Auto Distributors Limited was substituted in place of the original plaintiff no objection was taken by the Defendant. No plea was taken that the same was not proper. The order of amendment itself refers to the scheme of amalgamation and proceeded on the basis of the order of amalgamation. At the time of making the order no objection was taken and even after the order was made the same was not challenged in appeal.

(iii). Again Clause 2 of the scheme made it clear that the transfer took place immediately from the date of sanction of the scheme by the Court. No further formality or deed was necessary. It is not made dependent on compliance within thirty days.

(iv). There is also substance in the submission of Dr. Mukherjee that even assuming that the provision of 894(3) of the Companies Act was mandatory it clearly indicated that paying the penalty was the only consequence of the default. No other consequences were provided for and the same could not be read into it. The property vested in the transferee by virtue of the order of the Court irrespective of the filing. The different provisions in the Companies Act provided for different consequences in case of non-compliance. Dr. Mukherjee referred to section 19 and 125, inter alia, to illustrate that different consequences were

contemplated for transgression of the provisions.

(v). Moreover to look into the Supreme Court case of Jagan Nath Vs. Jaswant Singh and Others, . It appears that it related to a different statute and did not deal with the Companies Act. It held in a negative form that the provision of a statute is not mandatory unless non-compliance with it is made penal. That observation was made in connection with the construction of section 82 of the Representative of the People Act (1951) The word "shall" was treated in a manner similar to the word used in order 38 Rule 1 C.P.C. and the Court observed that it is one of the rules of construction that the provision like this is not mandatory unless non-compliance with it is made penal. Mr. Das referred to Craies on Statute Law page 62, 7th Edition for elucidation of the term mandatory and imperative. A statute which creates duty is not "imperative" if it is not optional whether the duty be performed or not and the same term applies to Acts imposing a condition the satisfaction whereof is essential to the validity of the Act or document as to which it is imposed. It, however, appears that the learned author later on commented that "when the statute is passed for the purpose of enabling something to be done and prescribes the formalities which are to attend performance those prescribed formalities which are essential to the validity" of the thing when done are called imperative or absolute but those which are not essential and may be disregarded without invalidating the thing to be done, are called directory." Assuming that the prescribed formalities of filing the certified copy are imperative and mandatory it is not clear why the time for filing the certificate should be regarded as such when the section itself provides for penalty for its breach. Therefore, if the filing by itself is held to be mandatory the mode of filing it or the time prescribed for filing it does not seem to be necessarily mandatory. While the provision of penalty introduces an element of compulsion it simultaneously contemplates possibilities of breach and provides measures for regulating that contingency.

(vi). Court's attention was also drawn to the case of New Central Jute Mills Co. Ltd. v. River Steam Navigation Co. Ltd. & Ors. reported in AIR 1959 Calcutta 352 where title was perfected in consequence of the order of amalgamation. Court's attention was also drawn to an unreported decision relating to company petition 398 of 1971 connected with company application 327 of 1971 of this Court made by Sabyasachi Mukharji, J. in which case a property was not mentioned in the scheme. On subsequent application to incorporate that property on the ground of mistake the same was granted, inter alia, on the ground that there was unmistakable intention to incorporate that property. The case here is even stronger inasmuch as the property itself is mentioned in schedule B. Moreover the transferor company stands dissolved by virtue of the Court's order.

(vii). As to the acceptance of cheque it appears from the correspondence that the demand was made on behalf of Auto Distributors Limited but in spite of that the defendant choose to pay two cheques in the name of Poddar Automobiles Limited. In the circumstances there was nothing wrong in accepting the cheques

as its refusal would serve no purpose. Moreover the amounts of the two cheques related to a period which is not included in suit.

The court, therefore, rejects the validity of Mr. Das's contention and finds no reason why the plaintiff should not be entitled to the decree. As to the merit of the suit there has been no contest. The plaintiff has proved its case.

In the circumstances the Court decides the issues 1(a) and 1(b) in favour of the plaintiff. Let there be a decree in favour of the plaintiff against the defendant for Rs. 69114.43/-; interim interest @ 8 1/3% and further interterest at the rate of 6% per annum and costs. Certified for two counsel.